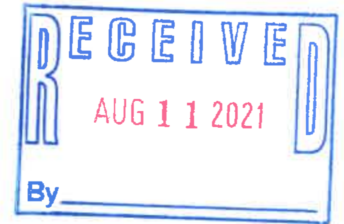
DUNCAN J. MACCALLUM
ATTORNEY AT LAW

536 STATE STREET
PORTSMOUTH, NEW HAMPSHIRE 03801-4327
(603) 431-1230
TELECOPIER: (603) 431-1308

ALSO ADMITTED IN NY, PA, OHIO & MA



August 11, 2021

Juliet Walker, Planning Director
City of Portsmouth
One Junkins Avenue
Portsmouth, New Hampshire 03801

Re: 105 Bartlett Street Project
Appeal of Planning Board's Decision

Dear Ms. Walker:

Enclosed for filing are the original and eleven copies of the Appellants' Objection to Applicants' Motion for Rehearing.

Very truly yours

Duncan J. MacCallum

DJM/eap
Enclosures
cc. Michael D. Ramsdell, Esquire
Robert A. Previti, Esquire

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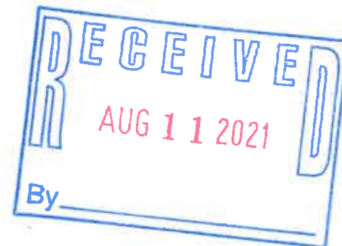


THE STATE OF NEW HAMPSHIRE

ZONING BOARD OF ADJUSTMENT
OF THE CITY OF PORTSMOUTH

In re Application of Clipper Traders, LLC, Portsmouth Lumber and Hardware, LLC, and Iron Horse Properties, LLC, regarding the property located at 105 Bartlett Street, and known familiarly as

The North Mill Pond Project

APPELLANTS' OBJECTION TO
APPLICANTS' MOTION FOR REHEARING

The appellants hereby object to the Intervenor's Motion for Rehearing Pursuant to RSA 677:2, filed by the developers of the above-referenced project, for the reasons set forth hereinafter.

The developer-applicants seek a rehearing on the appellants' appeal on essentially two grounds: (a) The Zoning Board of Adjustment allegedly lacked jurisdiction to hear the appeal, and thus the ZBA erred by entertaining it at the July 20, 2021 hearing and also by refusing to consider the developers' argument that jurisdiction was lacking. The appeal was from the Planning Board's grant of a conditional use permit, which the developers claim is "an innovative land use control adopted pursuant to RSA 674:21" and therefore the ZBA lacks jurisdiction to hear such appeals. (b) One of the ZBA members who participated in the decision, David MacDonald, allegedly had a preexisting bias against

the project and therefore should have been disqualified from hearing the appeal.

Neither argument has any merit.

"Adopted Pursuant to RSA 674:21"

In their motion, the developers repeatedly assert that the zoning ordinance's provision for the issuance of wetlands conditional use permits was an "innovative land use control" which was "adopted pursuant to RSA 674:21." However, The developers have produced no evidence to support their argument. The developers admit that there is no reference to RSA 674:21 either in section 10.1010 of the zoning ordinance or anywhere else in that ordinance. Apparently, it is the developers' position that any conditional use permit is automatically an innovative land use control which was adopted pursuant to RSA 674:21, regardless of whether or not that was the City Council's intention in adopting and implementing it. However, this Board has no business simply assuming that the developers' contention is the truth, without any evidence of same.

It is fundamental that as the parties bringing the motion for rehearing, the developers are the ones who bear the burden of showing why it should be granted. Gallo v. Traina, 166 N.H. 737, 740, 103 A.3d 1183, 1186 (2014). The developers have offered no evidence that the zoning ordinance's provision for the issuance of wetlands conditional use permits was implemented pursuant to RSA 674:21 or indeed that it had anything to do with that stat-

ute. For aught that the developers have shown, the Planning Department and the City Council may simply have borrowed the terminology from other sections of the ordinance, for lack of better, and imposed their own set of homespun, custom-designed criteria for the permit's issuance. Absent some proof that sections 10.1017.40 and 10.1017.50 of the ordinance were actually enacted with RSA 674:21 in mind, the developers' motion for rehearing must be denied.

Finally, if this Board entertains the developers' argument that the Board lacks jurisdiction over the appeal because wetlands conditional use permits fall within the exclusive jurisdiction of the Planning Board, then it must also consider the citizen opponents' position that the wetlands conditional use permit is not an "innovative land use control" in the first place but, as drafted, amounts to a simple special exception. (See the appellants' original appeal document, at pp. 10-12.) That issue was not the topic of any discussion at the July 20, 2021 hearing, and the developers did not adequately address it in their memorandum in opposition to the appellants' appeal. The developers merely asked this Board to accept, without more, the proposition that a wetlands conditional use permit is automatically an innovative land use control which falls within the purview of RSA 674:21. That remains to be seen.

In anticipation of the July 20, 2021 hearing, City Attorney Robert P. Sullivan issued a very sensible memorandum in which he

observed that these thorny legal issues were beyond the expertise of the members of this Board, the majority of whom are not lawyers and who in any event are unpaid volunteers, and he advised that the Board confine itself to the issue as to which it has true expertise: whether the Planning Board's decision was based on an erroneous construction, misinterpretation, or misapplication of the zoning ordinance. This Board prudently adopted Attorney Sullivan's advice then, and it should do likewise now.

Alleged Bias of ZBA Member David MacDonald

The developers' argument that ZBA member David MacDonald "suffered from an undisclosed bias that rendered him incapable of participating in the ZBA's quasi-judicial appeal hearing" because he expressed his views concerning runaway development and overcrowding of the population in Portsmouth is utterly devoid of merit. The so-called "bias" of which the developers complain is not the kind of bias which serves as ground for recusing or disqualifying a board member. As the parties alleging bias, of course, the burden is on the developers to adduce evidence of same. "Administrative officials who serve in an adjudicatory capacity are presumed to be of conscience and capable of reaching a just and fair result. The burden is upon the party alleging bias to present sufficient evidence to rebut this presumption." Webster v. Town of Candia, 146 N.H. 430, 441-42, 778 A.2d 402 (2001).

For whatever it's worth, it may be noted parenthetically that even if board member McDonald had recused himself, it would not have changed the outcome. The vote in favor of granting the appellants' appeal was 5-2. If Mr. McDonald had recused himself, the vote would have been 4-2, and the appeal would still have been granted and the Planning Board's decision overturned. (No alternate would have taken Mr. MacDonald's place, as the supply of alternates had already been exhausted, Chairman Rheaume and ZBA member Mulligan having already recused themselves previously and the only two alternates were already seated. The vote would have stood at 4-2 in favor of granting the appeal and thereby overturning the Planning Board's decision.)

The fact that "[o]ur State Constitution demands that" land use board members, like judges, "be 'as impartial as the lot of humanity will admit,'" <u>Winslow v. Town of Holderness Planning Bd.</u>, 125 N.H. 266, 267, 480 A.2d 114, 117 (1984), does not mean that ZBA members are required to be blind. When entertaining appeals, variance applications, and other petitions, ZBA members are not expected to be empty vessels and stuffed shirts, who are oblivious to their surroundings and to the goings-on in their communities and who are without any opinions concerning local affairs. Apparently, the developers in this case would prefer a panel of members composed of mindless, empty-headed dullards who have no opinions about anything and who are willing to entertain development proposals in a vacuum, without any context and with-

out any view to their settings. Such a scenario would mean that the membership of our land use boards would be drawn from the least intelligent and least qualified members of the community.

ZBA members and other land use board members are not required to be so oblivious. On the contrary, when entertaining an application or appeal they are entitled to take into consideration the setting of the proposed project and the impact that it will have on its surroundings, based on their familiarity with and knowledge of that setting and those surroundings. Dietz v. Town of Tuftonboro, 171 N.H. 614, 624-25, 201 A.3d 65, 74-75 (2019); Nestor v. Town of Meredith ZBA, 138 N.H. 632, 636, 644 A.2d 548, 551 (1994).

> In arriving at a decision, land use board members can consider their own knowledge concerning such factors as traffic conditions, surrounding uses, etc., resulting from their familiarity with the area involved. Board members may base their conclusion upon their own knowledge, experience and observations in addition to expert testimony.

15 Peter J. Loughlin, New Hampshire Practice: Land Use Planning & Zoning § 28.10 (4th ed. 2010) (footnotes omitted).

The fact that ZBA member David MacDonald may have had preexisting views concerning overcrowding of population and overdevelopment in the downtown area is not ground for disqualification. Attorney Peter J. Loughlin, a former Portsmouth city attorney who is the author of the definitive modern treatise on

New Hampshire land use law, cogently summarizes the law on this issue:

> Officials serving in an adjudicatory capacity are presumed to be of conscience and capable of reaching a just and fair result. . . . The fact the board members possess preconceived views on legal or policy issues affecting an application does not disqualify them. For example, if a ZBA member has been elected or appointed as a result of that individual's pro or anti-growth leanings, that board member is not disqualified from hearing an application for a 50 lot subdivision if the member can review that application for conformity with the town's regulations without bias.

15 Peter J. Loughlin, New Hampshire Practice: Land Use Planning & Zoning § 20.08, at 316-17 (4th ed. 2010) (footnotes omitted).

Thus, the developers' contention that Mr. MacDonald's views on overpopulation and overdevelopment disqualified him from hearing the citizen opponents' appeal is groundless. A virtually identical issue was raised and addressed by the Superior Court of Rockingham County in a fairly recent case which similarly arose in Portsmouth and involved a housing project, Brighton v. City of Portsmouth, Nos. 218-2018-CV-924 & 218-2018-CV-1085 (April 30, 2019). (A copy of the court's lengthy decision is appended hereto as Attachment A. The pertinent portions appear at pp. 14-18 and 24-33.) In that case, the shoe was on the other foot: It was the abutters and other citizen opponents, not the developers, who were complaining of bias on the part of some of the land use board members. The plaintiffs charged that Planning Board Chair-

man Dexter Legg, member Elizabeth Moreau, and then-Deputy City Manager Nancy Colbert Puff, who was an *ex officio* member of that board, were all biased because (among other reasons) they were all members of and/or worked closely with the Portsmouth Housing Huddle and the Workforce Housing Coalition, two organizations whose *raison d'etre* was to advocate for affordable housing. In Legg's case, the citizen opponents also charged that he was biased because he had made public statements in favor of the project before the vote was taken to formally approve it.

However, the Rockingham Superior Court (in the person of Judge Andrew R. Schulman) rejected the citizens' arguments and ruled that the fact that these three board members may also have been members of and/or had strong ties to advocacy groups supporting low income housing was not sufficient ground for disqualification. (See Opinion at pp. 24-33.)

> The question is not whether the challenged Planning Board members have strong opinions about housing in downtown Portsmouth--they would likely be inappropriate candidates for membership if they didn't--but rather whether such opinions interfered with their ability to judge the merits of PHA's application impartially.

(Opinion at p. 28.)

In Chairman Legg's case, the court noted that whatever public statements he had made in favor of the project were made *in the course of the land use board proceedings themselves*, as opposed to extra-judicial public statements made, say, in a

letter to the editor or in a prior campaign speech made while running for public office. That circumstance sharply distinguishes this case from Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480 A.2d 114 (1984), upon which the developers in the present matter principally rely. In Winslow, the subject planning board member's public statements in favor of the developer's project had been made earlier, before he became a planning board member, demonstrating that he had prejudged the project. To the contrary, both Mr. Legg's and Mr. MacDonald's public statements were made in the course of the land use board hearings themselves, and after a public hearing had been conducted and after the evidence had been presented, and therefore they did not provide a basis for disqualifying them from sitting on their respective boards and entertaining the applications that were presented therein. Such was the express finding of Judge Schulman in the Brighton case.

> It is also important to note that there is no suggestion that any of the three challenged members made any public statements relating to PHA's application outside of the record. To be sure, ex officio member Colbert-Puff may have been part of the formal planning process, but that is the whole purpose of seating ex officio members on the Planning Board. There is no suggestion that Colbert-Puff ever spoke about PHA's application outside of her role in this case.

(Opinion at p. 16 (footnotes omitted).) Under Winslow, it is only when a land use board member has previously taken a public stand on a proposed project, before there has been any hearing

thereon, that he can be deemed to have prejudged the project and must be disqualified.

Other highlights of Judge Schulman's decision include the following:

> By way of analogy, we expect that jurors will have strong, negative opinions about serious crimes, such as murder, rape and robbery. Yet they may nonetheless sit on such cases if they can set those opinions aside, apply the law provided by the court, and impartially decide the facts of a case. See, e.g., State v. Afshar, 171 N.H. 381, 386 (2018) ("A juror is considered impartial if the juror can lay aside his or her impression or opinion and render a verdict based on the evidence presented in court."); . . . Wainwright v. Witt, 469 U.S. 412, 421 (1985) (noting the "difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial"); . . . .

(Opinion at pp. 28-29.)

> Before detailing plaintiffs' concerns about bias, it must be emphasized that nobody has suggested that any of the challenged members, or their families, stood to gain or lose anything as a result of the outcome of the PHA's application. There was no suggestion that any of the challenged members, or their family members, were abutters. There was no suggestion that they or their families might serve as vendors, consultants or contractors for PHA's project.

(Opinion at p. 16.)

The New Hampshire Supreme Court affirmed Judge Schulman's ruling in a summary decision.

The developers have produced absolutely no evidence (and apparently do not even contend) that Mr. MacDonald had a pecuniary interest in the project or in the outcome of the ZBA's decision or any other direct personal interest which differed from that of the community at large. Nor have they produced any evidence that he ever publicly expressed any public opinions concerning the project outside of the ZBA's regular proceedings, or prior thereto. His only interest in the project was the same as that of every other right-thinking Portsmouth resident: preventing a massive, obtrusive, out-of-place building from creating overpopulation and from eroding the charm and character of downtown Portsmouth, and preventing a frontal assault on the wetlands buffer and the ecosystem. Under the teachings of Winslow and the other above-cited authorities, the comments that he made during this Board's deliberations on the citizen opponents' appeal in this case do not constitute the kind of "bias" which may be made the basis for disqualification or recusal. The developers' motion for rehearing is meritless.

Conclusion

For all of the foregoing reasons, the developers' Motion for Rehearing must be denied.

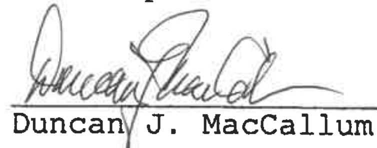
Duncan J. MacCallum
NHBA #1576
536 State Street
Portsmouth, New Hampshire 03801
(603) 431-1230
madbarrister@aol.com
Attorney for Appellants

<u>CERTIFICATE OF SERVICE</u>

The undersigned, Duncan J. MacCallum, Attorney for Appellants in the within proceeding, hereby certifies that on this 8th day of August, 2021, true and correct copies of the foregoing Appellants' Objection to Applicants' Motion for Rehearing were was served upon the applicants by forwarding same by first class mail, postage prepaid, to each of the following counsel of record:

Michael D. Ramsdell, Esquire
Sheehan Phinney Bass & Green, P.A.
1000 Elm Street, 17th Floor
Manchester, New Hampshire 03101

Robert A. Previti, Esquire
Stebbins, Lazos & Van Der Beken, LLC
889 Elm Street, 6th Floor
Manchester, New Hampshire 03101



Duncan J. MacCallum

ATTACHMENT A

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss.

MARK BRIGHTON, et al.

v.

CITY OF PORTSMOUTH

218-2018-CV-00924
218-2018-CV-1085

FINAL ORDER

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I. INTRODUCTION

These matters are statutory appeals from decisions of the City of Portsmouth Planning Board. See RSA 675:15. In 218-2018-CV-00924 the plaintiffs challenge (a) the issuance of a conditional use permit for a four story, 64 unit apartment building in downtown Portsmouth and (b) the planning board's decision to accept jurisdiction over the site plan for that project. In 218-2018-CV-1085 the same plaintiffs challenge final site plan approval for the project.

The developer and successful applicant is the City of Portsmouth Housing Authority ("PHA"). Its proposed apartment building will be used for workforce housing within the meaning of the federal statutes under which the project qualified for low income housing tax credits. The building will provide affordable housing to city residents of moderate means.

Plaintiffs argue that the planning board decisions should be vacated and reversed. They claim that (a) the planning board decisions were tainted by the participation of allegedly ineligible ex officio members and biased regular members; (b) the planning board's decisions were unreasonable and unsupported by the evidence because PHA's site plan lacks sufficient off-street parking spaces; (c) that the planning board's final site plan approval was unreasonable because the project will replace a small grassy area behind an abutting PHA building with a driveway that plaintiffs fear will be a safety hazard to the building's elderly and disabled tenants; and (d) the planning board's decisions must be reversed or vacated because the proposed workforce housing building would not qualify as "workforce housing" under the state statutory definition in RSA 674:58.

The City not only disagrees with the merits of the plaintiff's arguments, it also argues that (a) the two lead plaintiffs, Mark Brighton and Arthur Clough, lack standing, and (b) the planning board's interlocutory decision to accept jurisdiction over the site plan cannot be appealed.

The Court held an oral argument in this matter January 4, 2019. Thereafter, the plaintiffs filed additional pleadings and documents in connection with their request to expand the record. On March 22, 2019 this court issued an interim order requesting a copy of the City's zoning ordinance. The City provided the requested ordinance shortly thereafter.

The court now rules as follows:

1. Petitioners Mark Brighton and Arthur Clough lack standing to prosecute this appeal. Their individual statutory appeals are dismissed for this reason. However, other plaintiff's clearly have standing because they are tenants in an abutting building.

2. Plaintiffs' motion to expand the record is GRANTED. The Court has considered the additional documents submitted by Petitioners on January 31, 2019.

3. The decisions of the planning board are AFFIRMED and the appeals are DISMISSED on the merits.

II. SCOPE OF REVIEW

The court's scope of review is limited, deferential and circumscribed by statute. Upton v. Town of Hopkinton, 157 N.H. 115, 118 (2008); Summa Humma Enterprises, LLC v. Town of Tilton, 151 N.H. 75, 79 (2004). RSA 657:15 vests this court with subject matter jurisdiction to review planning board decisions, but requires the court to affirm such decisions unless the planning board acted unlawfully or unreasonably. Summa

Humma Enterprises, 151 N.H. at 79. In making this determination, "The superior court is obligated to treat the factual findings of the planning board as prima facie lawful and reasonable." Id. The burden of proof is on the plaintiffs to show that the board's decisions were unlawful or unreasonable. Bayson Props. v. City of Lebanon, 150 N.H. 167, 169 (2003).

III. FACTS[1]

A. The Nature Of The Proposed Project

The Portsmouth Housing Authority owns a tract of real estate at 140 Court Street in the compact, urban area of downtown Portsmouth. This lot contains a six story, 100 unit apartment building known as the Feaster Building. The Feaster Building is owned and operated by PHA and is entirely dedicated to senior and disabled housing.

PHA has a contract to purchase an abutting lot at 152 Court Street. That lot contains a structure consisting of an old Victorian home and a more modern addition used for office space.

Finally, PHA owns land on the far side of 152 Court Street that is presently used for public parking.[2] PHA has the unfettered right to unilaterally stop that use at any

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[1]The facts are taken from (a) the certified records that have been filed with the court and (b) the transcripts of Planning Board hearings that have been filed by the plaintiffs. Additionally, the court has reviewed and considered the zoning board of adjustment records that the plaintiffs have filed with the court's permission. To the extent that the record is cited in this order, it is cited as follows:

- "M, month/day, page" refers to the minutes of the Planning Board's meeting of a particular date.
- "T, month/day, page" refers to the transcript of the Planning Board's meeting of a particular date.

[2]PHA's land on the far side of 152 Court Street is part of the same tract that contains the Feaster Building. PHA's property forms a "U" shape around the 152 Court

Continued on next page

time. In other words, the City and its residents cannot force PHA to perpetually use the land as their parking lot.

PHA seeks to use the 152 Court Street lot and part of the parking lot for workforce housing. PHA's plan entails the following (a) the adjustment of lot lines, (b) the elimination of most of the parking lot, (b) the destruction of the office addition at 152 Court Street, (b) the construction of a new four story, 64 unit apartment building dedicated to workforce housing (which building would stand on the present parking lot and the land presently occupied by the office addition), (c) the integration of the existing Victorian home at 152 Court Street into the project, (e) the construction of a pedestrian walkway and open space between the new apartment building and the Feaster Building, (f) the elimination of a small grassy area behind Feaster Building, and (g) the construction of a driveway behind the Feaster Building to reach the new building.

PHA uses the term "workforce housing" to describe rental units that those who earn less than 80% of the area's median income will be able to afford.[3] The target tenant cohort would struggle to find affordable housing in Portsmouth, even though it is better off than the cohort served by PHA's subsidized housing programs.

Continued from previous page
Street property. The 152 Court Street lot is a long, thin rectangle that is not much wider than the structure that sits upon.

[3]The City's proposed findings of fact state that 75% of the units will be rented to households earning less than 60% of the median income and remaining 25% of the units will be rented to households earning less than 80% of the median income. Unfortunately, the proposed findings do not include citations to the record and the court has not been able to ground these figures in a particular presentation or submission to the planning board. However, at the August 16, 2018 final site plan review PHA's executive director stated that under the tax credit rules a resident can't earn more than 80% of the median income, but PHA's target cohort was households with less than 60% of the median income. M, 8/16, p. 14.

Consistent with the city's demographics, PHA's proposed apartment building is not designed for large families. Most of the apartments will be small, one-bedroom units. None of the apartments will have more than two bedrooms.

PHA does not claim that the building will meet the statutory definition of "workforce housing" in RSA 674:58. That definition requires, among other things, that more than 50% of the units in a workforce housing development contain at least two bedrooms. However, that statutory definition only applies for the limited purpose of enforcing RSA 674:58 through 61, and no party argues that those statutes have any application to this case. PHA did not obtain any funding, zoning variances, special exceptions, conditional use permits, site plan approvals or other land use permits that would have required the project to fit within the statutory definition.

The statutory definition notwithstanding, PHA's project counts as workforce housing for the purpose of the federal low-income tax credit program. The project qualified for this program and has received loan commitments from the N.H. Housing Finance Authority and the Federal Home Loan Bank of Boston for $10 million in capital financing. The use of the building for affordable housing will be enforced through deed restrictions and covenants that will last a century. The lenders will monitor compliance with these legally binding requirements.

B. The Conditional Use Permit For Off-Street Parking

Plaintiffs' primary complaint with the project is that there is insufficient off-street parking to accommodate both the project's tenants and the Feaster Building tenants. Plaintiffs further argue that, because parking is already tight in downtown Portsmouth,

and because the project would result in the elimination of a public parking lot, its approval would adversely affect both the neighborhood and the city.

This issue was first joined in the context of PHA's application for a conditional use permit. Article 11 of the City's zoning ordinance presumptively requires a certain number of off-street parking spaces for residential uses but allows the planning board to grant conditional use permits for developments with less than the required number of spaces. See Ordinance 10.1112.31 and 10.1112.52. The City's Master Plan states that affordable housing in multifamily buildings should be encouraged in appropriate locations through such means as reductions in the required amount of off-street parking. Master Plan, Goal 3.2.2. One obvious "appropriate location" for multifamily buildings is the downtown area of the city.

The default number of off-street parking spaces required by the ordinance for both the proposed 64 unit workforce housing building and the 100 Unit Feaster Building is 135 spaces. Thus the Ordinance requires approximately 1.21 off-street parking spaces per dwelling unit for both buildings combined.

The proposed development will have just 60 parking spaces, i.e. .36 spaces per dwelling unit. While at first glance this seems unreasonably low, the record establishes the following:

1. The default requirement of 135 parking spaces was calculated by the using a formula in the ordinance that applies to *all* residential uses.[4] See Ordinance §10.1112.31. In other words, the ordinance presumes that

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[4] In general, the ordinance requires (a) 0.5 parking spaces for every unit that has less than 500 square feet, (b) 1 parking space for every unit with 500 to 750 square feet and (c) 1.3 parking spaces for every unit with more than 750 square feet.

PHA's senior and disabled apartments need as many parking spaces per unit as competitively priced, similarly sized apartments for working families. Thus, the same requirement of 135 parking spaces would apply to a development of 164 condominiums sold at market rates to young families.

2. The Feaster Building is attractive precisely because it provides apartments for seniors and others who do not wish to maintain cars. It is located in downtown Portsmouth, in easy walking distance from many local destinations and in an area that is richly served by alternative means of local, intra-city transportation.

3. The City commissioned a detailed parking study by the engineering firm Gorrill & Palmer. The engineers first looked at the actual off-street parking demand for the Feaster Building. Feaster Building residents must obtain permits for off-street parking. Only 32 such permits were issued and remained outstanding at the time of the parking study. Thus, the maximum parking demand is approximately 32 spaces or .32 spaces per unit. This is approximately one-third of the amount of spaces required under the ordinance.

4. However, the Feaster Building's actual demand may be lower. Feaster Building tenants do not actually use all 32 parking spaces. The engineers counted the number of Feaster Building permitted vehicles that actually used the off-street parking. The engineers took two surveys. One survey was conducted in mid-morning and the second was conducted on

a different day in the late evening when residents were expected to be home. The engineers discovered that only 14 spaces were used in the morning and 24 spaces were used in the afternoon. Thus, it would appear that the Feaster Building actually uses approximately 24 parking spaces (or .24 per unit).

5. The engineers next estimated the expected parking needs of the 64 unit workforce housing building. Because the building would contain 48 one-bedroom apartments and 18 two-bedroom apartments, the engineers assumed that it would not have the same off-street parking needs as an apartment building devoted to large families. The engineers looked to what they opined to be the closest use in the *Institute of Traffic Engineers Parking Generation Manual, 4th Edition* ("the Manual"). This use is "low/mid-rise apartments." However, the Manual assumes that the average "low/mid-rise apartment" has 1.9 bedrooms. The proposed workforce housing building will have only 1.25 bedrooms per unit. Adjusting for this difference, the engineers calculated a need for .75 to 1 space per unit. This jibes with the .7 spaces per unit that would be required under the *Third Edition* of the Manual for residences in a central business district.

6. The workforce housing building would be attractive to households that don't want to maintain a vehicle. Some residents would be able to walk to work and shopping. Like urbanites in larger cities, they

could save money by renting vehicles only on those days that they need to take longer trips.

9. The traffic and parking engineers found a demand for 77 parking spaces (i.e. 32 for the Feaster Building, which as noted above, is an overly generous estimate of demand, and 45 for the workforce housing building), including visitor parking.

10. Although the proposed development will only have 60 parking spaces, the engineers suggested that the 17 car deficit would not be a problem because:

A. The project will create some additional *on-street* parking where none presently exists.

B. The PHA will provide parking permits for 16 more spaces in nearby satellite lots (with two lots within .3 miles and the third within 1 mile). This measure, standing alone, would provide the combined workforce housing/Feaster Building development with all but one of the 77 parking spaces deemed necessary by the traffic and parking engineers. While satellite parking may not be appropriate for disabled Feaster Building residents, there is nothing incongruous about city dwellers having a permanent, dedicated parking spot a third of mile from their apartments. To be sure, downtown Portsmouth is not Manhattan, or even Cambridge, but it is not the suburbs either.

C. PHA will provide Feaster Building residents with an on-demand shuttle service to local appointments, grocery shopping, and other destinations. This will likely further depress the need for off-street parking by the senior and disabled tenants of the Feaster Building.

D. Both buildings are directly in front of a bus stop. The city is well-served by taxis, rideshare services and car rental agencies.

Ultimately, the traffic and parking engineer told the Planning Board that "the 60 proposed spaces are plenty for on-site. .. .May be actually a little more than needed but it's not excessive." (T, 7/19, pp.4-5).

The City's Planning Department took a close look at the engineers' report and, more generally, at parking needs for the project. The planning department recommended that the planning board grant the conditional use permit, but do so subject to a requirement that PHA provide five annual performance reports to the planning department. Each report would discuss the effectiveness of PHA's measures to offset parking demand (i.e. on-street parking, satellite parking, on-demand van service for Feaster Building residents, municipal bus service, bicycle racks, etc. etc.). Further, the planning department recommended that PHA be required to implement additional offset measures if the proposed measures are not entirely effective. The City's representative on the planning board called the proposals "worthy offsets," and suggested that if more was needed, PHA could provide additional shuttle services and other offsets. (Id., at p. 11). PHA is in a position to provide such offsets because, per its executive director, it is the City's largest landlord and it owns nearby properties.

The City's representative on the planning board opined that PHA's consulting engineers "did a good job to quantify the anticipated demand and parking requirements." (Id. at p. 12). In other words, the planning board independently reviewed the parking study and accepted its findings. With respect to the offsets for the 17 parking space deficits, the City's representative opined that while the proposal fell short of "perfect[ion]," it was nonetheless what the City's Master Plan envisioned and encouraged:

> So, I wouldn't say it's perfect. . . .I am compelled however, by the Master Plan's comment about [what] the Planning Board should be doing with regard to parking and affordable housing. . . . The reason why the Planning Board has, I think been empowered to consider this is, in fact to carry forward the objectives of the Master Plan. So in the Master Plan under the theme of diversity, [ ] 3.2.2 states "promote the development of mixed income[,] multi[-]family housing in appropriate locations with incentive zoning provisions *such as reductions in parking requirements. . .*

T, 7/19, pp. 19-20.

The planning board's chairperson agreed with the City's representative on the board. He recognized that parking and affordable downtown housing were "two issues the City has been grappling with a long time." M, 7/19, p. 13. The Chair opined that he was "comfortable" with PHA's proposal for 60 parking spaces and offsets because it was consistent with the Master Plan. Id.

Several individuals, including plaintiffs Brighton and Clough, told the Planning Board that they believed the parking plan was insufficient. Plaintiff Brighton suggested that the parking demand would be greater than anticipated in the workforce housing building because the targeted cohort could afford cars as well as rent. Plaintiff Clough opined that the offsets would not reduce demand because "people will need cars and families or couples will need two." Id., at p. 10. He also opined that the Portsmouth

municipal bus system would not offset parking needs because it is hardly used. Another individual said that he believed additional parking spaces were needed.

Brighton, Clough and a third individual also raised the fact that the proposed workforce housing development would not qualify as "workforce" housing within the meaning of the state statute. However, as several Board members noted, PHA was not seeking any of the benefits or incentives that the statute provides for projects that qualify under that definition

Several other individuals told the Planning Board that they believed the parking plan was adequate. One man, who identified himself as a former developer, thought the project was "well regulated," and noted that "cities are dense and don't have a lot of parking." (M, 7/19, p. 9). Another individual said that he was happy with just 60 spaces because the City needed more affordable housing.

Of note, no individual objected or raised any concern to the participation of any of the planning board members. This is of some importance because plaintiffs argue that two *ex officio* members and two regular members should have recused themselves.

After consideration of all of the evidence, and following a public hearing, the planning board voted to approve PHA's application for a conditional use permit with respect to the required number of parking spaces. Per the planning department's suggestion, the permit was issued subject to the requirements that (a) PHA provide annual reports for five years with respect to the effectiveness of the parking offsets and (b) PHA agree to provide additional offsets if necessary.[5]

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[5]Following the same public hearing the planning board granted PHA's request for subdivision approval (i.e. a lot line adjustment). This was not the subject of any

Continued on next page

C. Site Plan Approval

At the same time that the Planning Board granted the conditional use permit, it also accepted jurisdiction over PHA's proposed site plan. Plaintiffs have appealed from this interlocutory decision even though it did not result in the issuance (or non-issuance) of any permit.

Thereafter, the project was reviewed the City's technical advisory committee. That committee held three public hearings. It then recommended approval of the site plan subject to several conditions that are not relevant to this appeal.

The planning board held a public hearing on the question of whether to grant final site plan approval. A number of individuals, including plaintiffs Brighton and Clough, testified in opposition to the project. Other individuals testified in support of the project.

In lieu of cataloging all of the nits that were picked during the technical review process and at the Planning Board hearing, the court will describe only the nature of the objections that were raised before the Planning Board:

1. The issue of parking was raised, this time in the context of final site plan approval. The facts and arguments on both sides were identical.

2. Some individuals, including a number of Feaster Building tenants, complained that the project would entail the elimination of a small yard at the back of the narrow side of Feaster Building. PHA's site plan envisions that the Feaster Buildng driveway

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Continued from previous page
discussion or controversy, except to the extent that Brighton, Clough and other individuals objected to the entire project because it did not meet the statutory definition of workforce housing.

will be extended through this area to provide access to parking on the workforce housing site.

To some extent, PHA's site plan offsets the loss of this small yard through the creation of a new pocket park with a pedestrian serpentine walkway that runs the entire length of Feaster Building. The total amount of dedicated community open space will be increased rather than decreased.

3. At least one Feaster Building resident complained that PHA would not allow cigarette smoking in the new park/walkway, even though smoking is presently allowed in the small side yard.

4. Some individuals, including Feaster Building residents, objected to the proposed driveway because they would need to cross it. They viewed this as a safety concern. However PHA's site plan includes a speed bump and the driveway will not provide a cut-through for vehicular access to Parrot Ave. The driveway was thoroughly vetted by the technical advisory committee with respect to safety and traffic issues.

The Planning Board granted final site plan approval.

D. Challenges To The Membership Of The Planning Board

Plaintiffs argue that the Planning Board's decisions must be vacated because four members of the Planning Board were not qualified to sit on PHA's applications. The relevant facts are as follows.

Two ex officio members—i.e., Deputy City Manager Nancy Colbert-Puff and Assistant City Manager David Moore—did not live in the city. Plaintiffs argue that this made them ineligible to serve on the planning board, even as ex officio members.[6] However, this issue was not raised before (a) the conditional use permit proceeding concluded with the issuance of the permit and (b) the planning board accepted jurisdiction over PHA's proposed site plan. Thus, the certified record for those two events is bereft of any evidence or argument related to the residency issue.

Plaintiffs did raise the residency issue prior to the Planning Board's public hearing on final site plan approval. However, the two challenged ex officio members did participate in the final site plan approval proceeding. They were not present for the public hearing and they did not vote on the application for final site plan approval. The reason for their absence is not stated in the record.

Plaintiffs also argue (a) ex officio member Colbert-Puff, (b) chairperson Dexter Legg and (c) member Elizabeth Moreau should have been disqualified from hearing PHA's application due to alleged bias. This issue was not raised until after the conditional use permit was issued and the planning board accepted jurisdiction over the

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[6]Plaintiffs ground this argument on RSA 673:1,I, which provides that all planning board "members" must be residents of the municipality. However as discussed below this statutory requirement must be read *in pari materia* with (a) RSA 673:2,I-a(a) which the city manager or his designee serve as an ex officio member of the planning board," (b) RSA 673:2,I-a(c) which allows the city to choose the method of appointment for other members including, arguably, non-statutory ex officio members, (d) RSA 672:5 which defines the term "ex officio member" for planning and zoning purposes, and (c) RSA 49-C:17, relating to the appointment of city managers. Whether "ex officio members" are subject to the same residency requirements as ordinary "members" presents challenging questions of statutory construction.

proposed site plan. Thereafter, plaintiff Clough wrote to the City's attorney to complain that Colbert-Puff, Legg and Moreau were too biased to sit on PHA's application.

Before detailing plaintiffs' concerns about bias, it must be emphasized that nobody has suggested that any of the challenged members, or their families, stood to gain or lose anything as a result of the outcome of PHA's application. There was no hint of any sort of direct, indirect, contingent or familial pecuniary interest. There was no suggestion that any of the challenged members, or their family members, were abutters. There was no suggestion that they or their families might serve as vendors, consultants or contractors for PHA's project. The only issue raised was an alleged lack of impartiality.

It is also important to note that there is no suggestion that any of the three challenged members made any public statements relating to PHA's application outside of the record.[7] To be sure, ex officio member Colbert-Puff may have been part of the formal planning process, but that is the whole purpose of seating ex officio members on the Planning Board. There is no suggestion that Colbert-Puff ever spoke about PHA's application outside of her role in this case.[8]

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[7]Plaintiff Clough noted that Planning Board member Moreau made public advocacy statements in favor of a *different* affordable housing project, in a *different* location, with a *different* developer, and *different* factors militating in favor and against the project.

[8]In contrast, another Planning Board member, Rebecca Perkins, did make public advocacy statements favoring PHA's application, but she recused herself without any prompting each time the Planning Board met to consider the matter. Perkins did not participate in the decision to issue the conditional use permit, the decision to accept jurisdiction over the site plan, or the decision to grant final site plan approval.

For the most part, plaintiffs' claims of bias relate to the challenged members' involvement in two groups that promote affordable housing in Portsmouth, i.e. the Portsmouth Housing Huddle and the Workforce Housing Coalition. These groups bring "housing stakeholders" together. Both groups would like to see more affordable housing in Portsmouth.

However, promoting affordable housing is (a) an express goal of the City's Master Plan (which includes an "action item" for "promot[ing] the development of mixed-income multifamily housing in appropriate locations with incentive zoning provisions such as reductions in parking requirements and increased maximum heights." (Master Plan, Goal 3.2.2)), (b) a State priority, cf RSA 674:58 – 61, and (c) an important concern for the Planning Board.

Plaintiffs' also suggest that chairperson Legg displayed a lack of impartiality when he made certain comments at the conditional use permit hearing. Legg made these comments in the course of recognizing that both downtown parking and affordable housing were important concerns for the planning board. He stated that he would approve the conditional use permit because, in this specific case, the benefit of additional downtown affordable housing, outweighed the limited parking for the project:

> Chairman Legg noted that the Board was not taking this application lightly. It is a difficult decision that focuses on two issues the City has been grappling with a long time. Parking and workforce housing are both important. . . . The City has been crying out for affordable housing and this plan is so consistent with the Master Plan. The Chairman was comfortable offsetting parking because the plan was providing affordable housing. The project would not be built if it needed to provide 135 or 77 parking spaces.

M, 7/19, p. 13.

As noted above, the issue of bias was raised only in connection with the final site plan approval hearing, for which Colbert-Puff was absent.

IV. The Issues Raised In These Statutory Appeals

The following issues have been raised by the parties and are addressed by the court in the following order:

A. Standing: The City claims that plaintiffs Mark Brighton and Arthur Clough lack standing to prosecute this appeal.

B. Definition Of Workforce Housing: The plaintiffs argue that because the proposed development does not meet the state statutory definition for workforce housing, all of the land use permits it received should be vacated.

C. Allegedly Biased Planning Board Members: The plaintiffs argue that all of the planning board's decisions relating to the PHA's project should be vacated due to the participation of allegedly biased members.

D. Non-Resident Ex Officio Planning Board Members: The plaintiffs argue that all of the planning board's decisions relating to the PHA's project should be vacated because two non-resident ex officio members participated in the decisions to grant the conditional use permit and to accept jurisdiction over the site plan.

E. The Appealability Of The Decision To Accept Jurisdiction Over The Site Plan: The City argues that the Planning Board's interlocutory decision to accept jurisdiction over the site plan cannot be appealed under RSA 677:15.

F. The Merits Of The Conditional Use Permit For Reduced Off-Street Parking: The plaintiffs argue that the planning board's decision granting the conditional use

permit for reduced parking spaces should be reversed because the evidence in support of that decision was legally insufficient.

G. The Merits Of The Final Site Plan Approval: The plaintiffs argue that the planning board's decision granting final site plan approval must be reversed because the evidence in support of that decision was legally insufficient because (i) the site plan does not provide for adequate parking, (ii) the site plan results in the elimination of a grassy area behind the Feaster Building, (iii) the site plan creates a safety hazard by placing a driveway behind the Feaster Building, and (iv) the site plan fails to provide adequate access for the disabled residents of the Feaster Building.

V. Analysis

A. Standing

Plaintiffs Mark Brighton and Arthur Clough plainly lack standing to prosecute their appeals. RSA 677:15 allows "any person aggrieved" to appeal a planning board decision to the Superior Court. However, that statute does not grant standing to anybody who feels bad about a planning board's decision. Rather, in order to have standing to appeal a planning board's decision, a plaintiff must have a "definite direct interest" in the outcome of the case. Johnson v. Town of Wolfeboro Planning Board, 157 N.H. 94, 99 (2008); Joyce v. Town of Weare, 156 N.H. 526, 528 (2007); Weeks Restaurant Corporation v. City of Dover, 119 N.H. 541, 545 (1979). To be sure, a plaintiff need not be an abutter, or even a visual abutter. But he or she must have a concrete, specific interest that is not shared with all members of the community.

"Whether a person's interest in the planning board decision is sufficiently direct and definite to bestow standing is factual determination." Johnson, 157 N.H. at 99. To

make this determination, the court considers "the proximity of the plaintiff's property to the site for which approval is sought; the type of change proposed; the immediacy of the injury claimed; and the plaintiff's participation in the administrative hearings." Id.

At the oral argument in this court, plaintiff Brighton admitted that he was not an abutter or visual abutter. He did not cite any direct or definite interest in the outcome of the case. He did not provide the court with any facts from which the court could say that his interest is different from that of the community at large. While he did participate in the administrative hearings, this factor, standing alone, is insufficient to confer standing.

Plaintiff Clough's situation is similar. He is not an abutter or visual abutter. When asked to explain how he would be individually affected by the Planning Board's decision he explained that he sometimes uses a public parking lot near the proposed development and he fears that the lot will be overburdened. To be fair, Clough indicated that he lives in the neighborhood (which is to say downtown Portsmouth) and must move his car from the street when it snows. However, his interest in using the public parking lots of downtown Portsmouth does not separate him from the downtown community at large. He lacks a specific, direct and definite interest in the Planning Board's decision.

The recent "taxpayer standing" amendment to Part 1, Article 8 of the New Hampshire Constitution does not confer standing on either Brighton or Clough. By its express terms, taxpayer standing does not exist "when the challenged governmental action is the subject of a judicial or administrative decision from which there is a right of appeal by statute or otherwise by the parties to that proceeding." Furthermore, the constitutional predicate for taxpayer standing under Article 8 is a government entity's

expenditure or approval of expenditure of tax dollars. The planning board granted permits; it neither spent nor approved the expenditure of public funds.

Brighton's and Plaintiff's Clough's statutory appeals are DISMISSED.

B. "Workforce Housing"

Plaintiffs argue that the Planning Board's decisions must be set aside because PHA's proposed apartment building does not qualify as "workforce housing" as that term is defined in RSA 674:58. Plaintiffs further argue that the planning board's decisions should be vacated because the zoning board of adjustment may have been confused about the same issue earlier in the permitting process.

Plaintiffs' arguments are not merely without merit; they are frivolous. The Revised Statutes Annotated are divided into titles, chapters, subdivisions, sections, paragraphs and subparagraphs. This taxonomy is important because the RSAs contain both (a) a set of general definitions that apply throughout all 64 titles and 678 chapters "unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the same statute," RSA 21:1, and (b) innumerable (or at least uncounted by the court) definitions that apply only to particular titles, chapters, subdivisions, sections or paragraphs. The statutory definition of "workforce housing" in RSA 674:58 falls into the latter category. It was added by the legislature in 2008 as part of a new subdivision entitled "Workforce Housing." RSA 674:58 to 61. Choosing its words carefully, or at least presumably so, the Legislature wrote that this definition applies only "[i]n this subdivision."

The operative provisions of the subdivision require all municipalities to "provide reasonable and realistic opportunities for the development of workforce housing,

including rental multi-family housing." RSA 674:59. To meet this requirement, municipalities must maintain "reasonable" lot size and overall density requirements for workforce housing. Id. Subject to a number of procedural and substantive requirements, a developer may appeal an adverse decision on a proposed workforce housing development to the Superior Court on the grounds that the decision was due to the municipality's failure to comply with these obligations. RSA 674:61.

As one might expect, the statutory definition for "workforce housing" under this subdivision is sufficiently precise to inform municipalities and developers as to whether a proposed development has statutory protection under the subdivision:

> "Workforce housing" means housing which is intended for sale and which is affordable to a household with an income of no more than 100 percent of the median income for a 4-person household for the metropolitan area or county in which the housing is located as published annually by the United States Department of Housing and Urban Development. "Workforce housing" also means rental housing which is affordable to a household with an income of no more than 60 percent of the median income for a 3-person household for the metropolitan area or county in which the housing is located as published annually by the United States Department of Housing and Urban Development. Housing developments that exclude minor children from more than 20 percent of the units, or in which more than 50 percent of the dwelling units have fewer than two bedrooms, shall not constitute workforce housing for the purposes of this subdivision.

RSA 674:58,IV.

PHA's proposed apartment building does not fall within this definition because the building will have substantially more one-bedroom apartments than two-bedroom apartments. However, PHA did not seek any zoning or planning benefit that the City makes available for statutory workforce housing developments. In other words, PHA did not invoke the statute and it seeks no rights under the statute or under any ordinance enacted to comply with the statute. Thus, PHA used the term "workforce

housing" in a more general sense, consistent with the notion of affordable housing for low and moderate wage workers.

The planning board was well aware that PHA's workforce housing building did not fall within the statutory definition. This was expressly discussed during both public hearings. The planning board never treated PHA's application as if were made pursuant to RSA 674:59. It never extended PHA a procedural or substantive benefit that is only available for statutory "workforce housing" developments. Instead, the Board saw fit to grant PHA a conditional use permit and final site plan approval based on the overall merits of PHA's plans.

To be sure, the planning board gave considerable weight to the fact that PHA's project would provide affordable housing in downtown Portsmouth, consistent with one of the express goals in the City's Master Plan. However, there is nothing wrong with the planning board looking towards the Master Plan for guidance in balancing the positive and potentially negative impacts of a project. Thus, the planning board properly considered the realities of PHA's proposed building and was not led astray by PHA's use of the term "workforce housing."

Plaintiffs argue in the alternative that the planning board's decisions must be set aside, even if it understood that PHA was not claiming the benefit of RSA 674:59, because its decisions were the fruit of an earlier, allegedly tainted, zoning board of appeals proceeding. More particularly, plaintiffs argue that the ZBA issued several minor variances for the project under the mistaken belief that PHA's project met the statutory definition for "workforce housing." Yet even assuming, dubitante, that the ZBA

conflated the statutory definition of "workforce housing" with PHA's use of the term, its decision to grant variances must stand because no party ever filed a statutory appeal.

Because the time to appeal the ZBA's decision has long passed, that decision is final and binding. Bartlett v. City of Manchester, 164 N.H. 634, 640 (2013) (explaining that the Superior Court's subject matter jurisdiction over a statutory ZBA appeal depends on whether the appeal was filed within thirty days of the ZBA's final decision). Plaintiffs cannot evade this rule of finality by recharacterizing a woefully late ZBA appeal as a timely Planning Board appeal on the grounds that the proposed site plan included the variances previously granted by the ZBA.

Although this court can spin out hypotheticals in which a ZBA decision may be collaterally attacked (as, for instance, if the ZBA lacked jurisdiction, Hussey v. Town of Barrington, 135 N.H. 227, 232 (1992), or if there was the administrative equivalent of a fraud on the court, see generally, Conant v. O'Meara, 167 N.H. 644, 651 (2015), or for corrupt misconduct on the part of a ZBA member), plaintiffs have neither filed an action for injunctive relief nor alleged any grounds to do so. Accordingly, the merits of the ZBA's decisions cannot be revisited in the context of this statutory Planning Board appeal.

C. Bias

The Planning Board's decisions to grant PHA's applications for a conditional use permit and for final site plan approval were quasi-judicial acts. CBDA Dev., LLC v. Town of Thornton, 168 N.H. 715, 721 (2016); Winslow v. Town of Holderness Planning Board, 125 N.H. 262, 267(1984). Accordingly, both PHA and any person with standing who objected to PHAs applications were entitled to procedural due process. Id.

Although the parties to a Planning Board proceeding are not guaranteed the full panoply of procedural safeguards required in a court of law, they are nonetheless entitled to a fundamentally fair hearing. Id.

One indispensable requirement for such a hearing is a fair and impartial Planning Board. See Winslow, 125 N.H. at 267 ("Our State Constitution demands that all judges be 'as impartial as the lot of humanity will admit.' . . . This applies similarly to members of boards acting in a quasi-judicial capacity"); see also Appeal of City of Keene, 141 N.H. 797, 800-801 (1997); City of Dover v. Kimball, 136 N.H. 441, 445 (1992).

This requirement of impartiality is codified in RSA 673:14,I which provides that:

> No member of a . . . planning board . . . 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 has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or 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. Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

This statute thus commands disqualification in two situations: (a) when a member has a personal of pecuniary interest in the case and (b) when the member would be disqualified as a juror for cause. The participation of a single Planning Board member who is disqualified for either of these reasons will invalidate the Board's decision, even if that member's vote was not necessary to reach a majority. Winslow, 125 N.H. at 268. This is so because it impossible to estimate the influence that a biased member may have on his or her associates. Id.

Plaintiffs do not claim that any of the challenged members have a personal or pecuniary interest that might be affected by the Planning Board's decision. However, they claim that ex officio member Colbert-Puff, chairperson Legg and member Moreau

would be disqualified as jurors because they are biased, rather than impartial. In considering this claim, the court is mindful that "[a]dministrative officials who serve in an adjudicatory capacity are presumed to be of conscience and capable of reaching a just and fair result [and] [t]he burden is upon the party alleging bias to present sufficient evidence to rebut this presumption." Webster v. Town of Candia, 146 N.H. 430, 441–42 (2001) (quotation omitted and formatting altered).

This burden is met when a challenged board member has made public statements unequivocally favoring the application of the particular project under consideration. Winslow, 125 N.H. at 267. However, in this case, plaintiffs do not allege that Colbert-Puff, Legg or Moreau made any public statements indicating that they prejudged the case. Plaintiffs submitted seventy-two pages of emails to support their claims of bias. Not one of those emails includes a comment on the merits of PHA's proposed Court Street apartment building.

To be sure, plaintiffs quote snippets of Legg's comments at the conditional use hearing. Legg made these comments as part of the Board's formal deliberative process, following the presentation of all of the evidence, and after hearing from members of the public who supported and opposed the project. Legg's on-the-record statements did not betray prejudgment of the facts; they explained the reasons for his post-hearing judgment of the facts.[9]

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[9]Plaintiffs also complain that Legg made statements at the conditional use hearing suggesting that he may have spoken with PHA's executive director beforehand. Even if he did, this would not prove bias or prejudice. Nor would it, as plaintiffs allege, amount to a violation of the public meeting requirements set forth in RSA 673:17 and RSA 91-A:2, because there was never a non-public "meeting" of the planning board as that term is defined in RSA 91-A:2,I.

Further, Legg's on-the-record statements did not suggest a lack of impartiality. Legg recognized that he had to balance two important Planning Board objectives, i.e. to ensure adequate parking for a downtown development and to promote affordable housing, and an economically diverse community, in downtown Portsmouth. The City's Master Plan and the parking provisions of the Zoning Ordinance envisioned that the Planning Board would make this balance on a case by case basis, according to the specific facts of each case. While Legg found that the balance in this case favored granting the conditional use permit, he stated that he did not take PHA's application lightly.

Finally with respect to Legg's on-the-record comments at the conditional use hearing, the court rejects plaintiffs' argument that those comments disqualified Legg from later sitting at the site plan approval hearing. RSA 674:13,I expressly allows a planning board member to rely on "knowledge of the facts involved gained in the performance of the member's official duties." The same rule applies to judges and it is plainly constitutional. See State v. Bader, 148 N.H. 265, 270–71 (2002), quoting Liteky v. United States, 510 U.S. 540, 551, 555 (1994):

> Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.
>
> ....
>
> [J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.... [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to,

counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

Plaintiffs' claims of bias are primarily grounded on the fact that the three challenged members are all advocates of workforce housing *in general.* This is hardly surprising; supporting affordable housing *in general* is about as controversial as supporting literacy or disease eradication. Indeed, even plaintiffs Brighton and Clough made comments on the record indicating that workforce housing is a worthy goal *in general.* The question is not whether the challenged Planning Board members have strong opinions about housing in downtown Portsmouth—they would likely be inappropriate candidates for membership if they didn't—but rather whether such opinions interfered with their ability to judge the merits of PHA's application impartially.

By way of analogy, we expect that jurors will have strong, negative opinions about serious crimes, such as murder, rape and robbery. Yet they may nonetheless sit on such cases if they can set those opinions aside, apply the law provided by the court, and impartially decide the facts of a case. See, e.g., State v. Afshar, 171 N.H. 381, 386 (2018) ("A juror is considered impartial if the juror can lay aside his or her impression or opinion and render a verdict based on the evidence presented in court."); State v. Town, 163 N.H. 790, 794 (2012) (same); State v. Addison, 165 N.H. 381, 447 (2013) ("The question of indifference is determined by whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."); Wainwright v. Witt, 469 U.S. 412, 421 (1985) (noting the "difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the

law to the facts adduced at trial"); United States. v. Wood, 299 U.S. 123, 145–46 (1936) ("Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.").

The case of New Hampshire Milk Dealers' Association v. New Hampshire Milk Control Board, 107 N.H. 335, 339 (1966) is instructive. Although the case is now half a century old, its holdings are evergreen and reflected in the more recent caselaw cited above. The Milk Dealers case involved an appeal from the decision of a governmental board empowered to set the wholesale and retail prices for milk. The board's chairperson had been a minority floor leader in the Legislature. During his time in office he co-sponsored and supported legislation that would have eliminated the power of the board to set retail prices. Later, when serving as chairperson of the board, he voted to increase wholesale prices while leaving in place the minimum retail price. Prior to participating in that vote, the member refused to disqualify himself and stated that he could be fair and impartial. The retailers who paid wholesale and sold retail objected to the chairperson's participation in the hearing. They claimed that he had prejudged the issue and improperly failed to disqualify himself. The New Hampshire Supreme Court disagreed, holding as follows:

> Since 1784, Article 35, Part 1 of our Constitution has provided that "It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit". . . .[I]t is an obvious principle of justice that all persons who act as judges should be impartial, without any interest of their own in the matter of controversy, and without any such conne[ct]ion with the parties in interest, as would be likely, improperly to influence their judgment. There is no doubt that these principles apply to the members of the Milk Control Board acting in a quasi-judicial capacity as they were in this case. However whether there exists in a case sufficient interest or

bias to disqualify such a member depends upon its particular circumstances.

It is a well-established legal principle that a distinction must be made between a preconceived point of view about certain principles of law or a predisposed view about the public or economic policies which should be controlling and a prejudgment concerning issues of fact in a particular case. There is no doubt that the latter would constitute a cause for disqualification. However [b]ias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification.' If this were not the law, Justices Holmes and Brandeis would have been disqualified as would be others from sitting on cases involving issue[s] of law or policy on which they had previously manifested strong diverging views from the holdings of a majority of the members of their respective courts. Decisions of judges on certain questions of law and policy may reflect the economic and social philosophy of the times. This detracts in no way from the requirement that a judge or board member must not have a bias or prejudgment concerning issues of fact in a particular controversy.

The record in this case warranted a finding by the Board that [the Chair] had no pecuniary interest in this case, that he entertained no ill will or prejudice toward any of the parties, and that he had no bias or prejudgment concerning the issues of fact involved nor as to the outcome of the hearings. The record surely does not demand a ruling by this court that he was disqualified as a matter of law and that his participation in these hearings and the decision constituted a violation of the constitutional rights of the plaintiffs.

(internal citations and quotation marks omitted; bracketing added; formatting cleaned up).

In this case the participation of the challenged planning board members in the Portsmouth Housing Huddle and the Workforce Housing Coalition does not, standing alone, require a finding of bias. Plaintiffs have not rebutted the presumption of impartiality.[10]

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[10]Plaintiffs also complain that chairperson Legg and member Moreau are "publicly connected" via Facebook with PHA's executive director. Plaintiffs suggest that this Facebook connection destroys Legg's and Moreau's impartiality. However, there is

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a world of difference between a Facebook "friendship" and a personal friendship in real life. See, e.g., Law Offices of Herssein and Herssein, P.A. v. United Services Automobile Association, ___ So. 3d ___, 2018 WL 5994243, at *6 (Fla. Nov. 15, 2018):

> Facebook "friendship" is not—as a categorical matter—the functional equivalent of traditional "friendship." The establishment of a Facebook "friendship" does not objectively signal the existence of the affection and esteem involved in a traditional "friendship." Today it is commonly understood that Facebook "friendship" exists on an even broader spectrum than traditional "friendship." Traditional "friendship" varies in degree from greatest intimacy to casual acquaintance; Facebook "friendship" varies in degree from greatest intimacy to "virtual stranger" or "complete stranger."

see also In re Air Crash Near Clarence Center, New York, No. 09-CV-769S, 2013 WL 6073635, at *5 (W.D.N.Y. Nov. 18, 2013) ("[O]ne can be [Facebook] 'friends' with people known to them, with strangers, with celebrities, with animals, and even with inanimate objects").

There is presently disagreement among American jurisdictions as to whether judges should be automatically disqualified from all cases in which a Facebook friend appears as an attorney, even if the judge has no meaningful relationship with the attorney. In Law Offices of Herssein, the Florida Supreme Court rejected such a blanket rule. Along the way, it noted that a majority of state judicial ethics rulings supported this position. The Florida Supreme Court also cited several state judicial ethics rulings that took the opposite view to protect against an appearance of impropriety.

There is also no uniform national rule for jurors. For example in McGaha v. Commonwealth, 414 S.W.3d 1, 6 (Ky. 2013) the court found that a juror, who previously disclosed that she knew the victim's family "casually," was not disqualified by the fact that she was Facebook friends with the victim's wife. The court reasoned as follows:

> [The juror] manifestly did not give a false answer regarding her Facebook relationship with the victim's wife. If her casual relationship with some members of the [victim's] family was cause for concern for any party, it was incumbent upon that party, not the juror, to delve more deeply into the matter. We see no misconduct on the part of [the juror].
>
> Moreover, the post-trial revelation that [the victim's wife] and [the juror] were Facebook friends does not establish grounds for a new trial. It is now common knowledge that merely being friends on Facebook does not, *per*

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Because the court finds that plaintiff's claims of bias are without merit, it is not necessary for the court to determine whether plaintiff forfeited those claims with respect to the conditional use permit hearing by failing to raise them in a timely manner. See, e.g., Bayson Properties, Inc. v. City of Lebanon, 150 N.H. 167, 171 (2003).

D. Residency Of Ex Officio Members

Plaintiffs argue that two ex officio members of the planning board were ineligible to serve on the Board because they were not residents of the City. Neither of these ex officio members sat or participated at the final site plan approval hearing. However, both ex officio members participated in the earlier decisions to grant PHA a conditional use permit and to accept jurisdiction over PHA's application.

Relying on RSA 673:1, which requires "members" of a planning board to be residents of the municipality, plaintiffs argue that all of the planning board's decisions must be set aside because (a) ineligible members participated in the conditional use

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> se, establish a close relationship from which bias or partiality on the part of a juror may reasonably be presumed.

Plaintiffs have not cited a single authority favoring a blanket rule that requires local land use board members to recuse themselves merely because they are Facebook friends with an officer of an applicant who presents evidence at a hearing. Plaintiffs have not suggested a real world friendship, or any sort of social connection beyond the conclusory allegation of a "connection on Facebook." Standing alone this is plainly insufficient to support a conclusion of actual bias, prejudice or lack of impartiality. Cf: Taylor-Boren v. Isaac, 143 N.H. 261, 269 (1999) ("It is inevitable that judges will have had contact with attorneys before appointment to the bench, and will continue to have some contact after they are appointed. Judges are members of society and are not expected to live isolated and sheltered lives. Some relationships are per se bases for recusal. Other relationships and contacts with parties and attorneys become disqualifying when those connections affect a reasonable observer's perception of fairness." (internal citations omitted)).

permit hearing and (b) the final site plan approval hearing could not have taken place if there was no conditional use permit and if the Board never accepted jurisdiction over the site plan.

(i) Timeliness

Plaintiffs forfeited their eligibility argument because they did not raise it in a timely manner. A claim that a board member is ineligible to serve, much like a claim that a board member is biased, must be raised at "the earliest opportunity" or it will be forfeited. See Bayson Properties, 150 N.H. at 171:

> A party claiming bias on the part of a planning board member must raise that issue before the board at the earliest possible time. We require issues to be raised at the earliest possible time, because trial forums should have a full opportunity to come to sound conclusions and to correct errors in the first instance. . . . [T]he burden was on the plaintiffs to raise an objection to the participation of [the challenged board member] when it became aware of the grounds for the objection.

(internal citations and quotation marks omitted); Fox v. Town of Greenland, 151 N.H. 600, 604 (2004) ("Interested parties are entitled to object to any error they perceive in governmental proceedings, but they are not entitled to take later advantage of error they could have discovered or chose to ignore at the very moment when it could have been corrected."); Taylor v. Town of Wakefield, 158 N.H. 35, 38 (2008); Appeal of Cheney, 130 N.H. 589, 594 (1988).

In some cases, a diligent plaintiff may first learn of grounds for disqualification after the fact. Thus, for example, in Taylor, the issue of disqualification was raised and preserved at "the earliest possible time" via a motion for a rehearing because the plaintiff first learned of a ZBA member's potential conflict only after the ZBA voted on the application. Taylor, 158 N.H. at 38.

Nonetheless, while our Supreme Court has not parsed the issue closely, it seems obvious that the phrase "the earliest possible time" includes within it an obligation of reasonable diligence. Put another way, a plaintiff cannot sandbag a potential disqualification argument through the expedient of willfully delaying actual knowledge of the facts.

The certified records in these two cases, and the additional materials submitted by the plaintiffs, are silent regarding the reasons for plaintiff's delay in raising the issue of the ex officio members' residency. But this much is clear, the residency of the ex officio members is a matter of public record and if plaintiffs wished to challenge the composition of the planning board they certainly could have done so before the Board granted the conditional use permit. Instead, plaintiffs chose to stand mute and to stockpile their challenge to the manner in which the City has staffed its planning board for many years.

Plaintiffs denied the two ex officio members the opportunity to consider and potentially cure the issue before they sat on the conditional use permit case. Plaintiffs denied the planning board the opportunity to discuss the issue before it granted the conditional use permit. Plaintiffs denied the City the opportunity to make a record before the planning board concerning its historic practice with respect to ex officio members. All of this is precisely the situation that Bayson, Fox and Cheney warn against.

Plaintiffs have not met their burden of establishing that their after-the-fact claims of ineligibility were brought in a timely manner. Therefore, the court finds that those

claims have been forfeited. See United States v. Olano, 507 U.S. 725, 733 (1993) (distinguishing forfeiture from waiver).

(ii) The *De Facto* Officer Doctrine

Putting the issue of residency aside, the ex officio members were otherwise lawfully appointed and seated. The court presumes that they took the oath required by RSA 41:2. They certainly believed they were lawful ex officio members (as, perhaps, they were). Their colleagues believed this as well. They fully participated in planning board hearings and voted on other matters, including unrelated matters that came before the Board on the same night as PHA's proposal for a conditional use permit.

Thus, the two challenged ex officio members were *de facto* planning board members and their actions in the conditional use permit case are valid and cannot be challenged for the first time on appeal. See State v. Doyle, 156 N.H. 306, 310 (2007):

> Broadly speaking, an officer *de facto* is one who has the reputation of being the officer he or she assumes to be, and yet is not a good officer in point of law. . . . The practical effect of the doctrine is to remove any distinction between the acts of a *de facto* and a *de jure* officer insofar as the public and third persons are concerned

(internal citations and quotation marks omitted). In Doyle, the New Hampshire Supreme Court cited Health Facility Investments v. Georgia Department of Human Resources, 233 S.E.2d 351, 352 (1977) for the proposition that, "Although a person may be absolutely ineligible to hold public office, his official acts while in office are valid as the acts of an officer de facto" (internal quotation marks and bracketing omitted); see also State v. Boiselle, 83 N.H. 339 (1928) ("It is held here and everywhere that one who assumes a public office under color of an election or appointment illegal in fact is a *de facto* officer, and his official acts are valid as to third persons when they are not from

their nature or by express statutory enactment void."); Save the Bay Committee, Inc. v. Mayor of City of Savannah, 181 S.E.2d 351, 360 (Ga. 1971) (Individuals who were ineligible to serve on a zoning board because they were non-residents of the city, "were *de facto* members of such board and their acts in that capacity were valid until their ineligibility to serve as members of the board had been judicially ascertained."); Quest Land Development Group, LLC v. Township of Lower Heidelberg, 971 A.2d 540, 542 (Pa. Cmmw. 2009) (Decision of local zoning board was valid even though none of the board members had yet filed their financial disclosure forms or taken the oath of office, both prerequisites for membership on the board, because they were *de facto* board members).

The *de facto* officer doctrine is a rule of necessity that protects the orderly operation of state and municipal government and furthers the compelling interest in the finality of decisions. Had plaintiffs objected to the ex officio members' participation at the conditional use hearing, the issue would have been raised and preserved for adjudication in this statutory appeal. Alternatively, plaintiff could have filed an action for declaratory or injunctive relief to determine whether the ex officio members were eligible to serve on the planning board. Having done neither, plaintiff cannot now make such a challenge in the context of a statutory appeal grounded on a static record.

(iii) Harmless Error

Even if plaintiffs had raised and preserved a challenge to the participation of non-resident ex officio members, their appeal on this issue would still fail on grounds of harmless error. As explained above, when a biased, partial or conflicted land use board member participates in a case, this taints the resulting decision. Winslow, 125 N.H. at

268. However, the New Hampshire Supreme Court has never extended this rule of automatic reversal to the situation in which a disinterested but formally ineligible board member participates in a case.

The concern in Winslow was that a quasi-judicial decision could be tainted by bias or prejudice in violation of the parties' constitutional rights to procedural due process. The same fear of constitutional harm—i.e., of a fundamentally unfair hearing—is absent when a disinterested and impartial person is appointed or elected to a municipal board, takes the oath required by RSA 41:2, but is later determined to be ineligible for the office. Instead of throwing the baby out with the bathwater, the court should simply strike the ineligible board member's vote and then determine whether the board's decision was still supported by the requisite number of votes. See, e.g., Sierra Club v. Castle & Cooke Homes Hawaii, Inc., 204, 320 P.3d 849, 869, (Haw. 2013) (land use commission's decision vacated because one member was ineligible to serve a second term, and was not a *de facto* member, and "without [his] disqualified vote, the [commission] lacked the requisite six affirmative votes to approve the decision.") Reed v. Arvis Harper Bail Bonds, Inc., 368 S.W.3d 69, 76 (Ark. 2010) (when a member of an executive branch board is ineligible to serve because he is a judge, "the solution is to remove the ineligible member from the Board but not invalidate the Board's action." (Brown, J, concurring);[11] Stowers v. Blackburn, 90 S.E.2d 277, 287 (W.Va.1955) (civil service board's decision reversed because, once the vote of an individual who was

[11]The majority opinion in Reed did not reach the question of the board member's eligibility for procedural reasons.

neither a *de facto* nor a *de jure* member was ignored, there was not a majority vote in favor of the decision).

There are nine members of the City of Portsmouth Planning Board. One member recused herself at both the conditional use permit stage and the final site plan approval stage of PHA's project. The conditional use permit was granted by a vote of 7 in favor and 1 opposed. If the votes of the two challenged ex officio members are ignored, there would still be a majority of 5 in favor to 1 opposed. Thus, the conditional use permit was approved by a majority in every sense of the word, i.e. a majority of the votes (5 to 1), a majority of the eligible and non-recused members of the planning board (5 to 1), a majority of all sworn planning board members (5 of 9), and a majority of all sworn planning board members in the room (5 of 9).

(iv) The Merits Of The Residency Argument With Respect To Ex Officio Member Colbert-Puff

For the reasons set forth above, the court need not reach the merits of plaintiffs' challenges to the non-resident *ex officio* members. Nonetheless, some discussion is in order, if only to demonstrate that the issue is not as straightforward as the plaintiffs suggest. The is particularly so with respect to ex officio member Colbert-Puff who served as the city manager's designee.

It is true that RSA 673:1,I provides in seemingly absolute language that, "Any local legislative body may establish a planning board, the members of which **shall** be residents of the municipality" (emphasis added). It is also true that the New Hampshire courts, and indeed all American courts, apply the general rule of statutory construction that "the word 'shall requires mandatory enforcement." City of Rochester v. Corpening,

153 N.H. 571, 574 (2006). Thus, while the word "may" is permissive, the word "shall" is a "command." McCarthy v. Wheeler, 152 N.H. 643 (2005).

Yet RSA 673:2,I-a(a) also uses the word "shall." That statute commands that in cities with a city manager, "the city manager, or with the approval of the local legislative body the city manager's designee, ... **shall** be an ex officio member" (emphasis added). The term "ex officio member" is defined for planning board purposes by RSA 672:5 as "any member who holds office by virtue of an official position and who **shall** exercise all the powers of regular members of a local land use board" (emphasis added).

All three of these statutes must be read *in pari materia*. One reading, that has the advantage of enforcing each and every syllable of all three statutes, is to read them to say that the *ex officio* ember must be a city resident. However, this reading would impose *sub silentio* a residency requirement for city managers.

No other statute imposes a residency requirement for city managers. RSA 49-C:17,I provides that a city manager "need not be a resident of the city or the state at the time of appointment." But that statue does not require residency thereafter. Indeed, such a requirement would likely raise constitutional concerns. See Seabrook Police Assoc. v. Seabrook, 138 N.H. 177, 179 (1993); Angwin v. Manchester, 118 N.H. 336 (1978).[12] It is a hard sell to say that the Legislature intended to impose a residency requirement for city managers that would only become visible when two statutes relating to planning boards, i.e. RSA 673:1 and 673:2, are read together, and then to also allow cities to opt of this residency requirement by the circuitous route of passing an

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[12]By virtue of Article V, §5.2 of the City of Portsmouth Charter, its city manager must become a city resident within one year of appointment. The constitutionality of this requirement is not before the court.

ordinance that allows the city manager to designate a ex officio planning board member to serve in his place. The Revised Statutes are not a Rube Goldberg machine.

The question presented is thus whether the Legislature intended the term "member" in RSA 673:1 (relating to residency) to apply to ex officio members. On the one hand, RSA 672:5 (defining ex officio members) can be read to create a sub-category of "ex officio members" within the larger category of "members." Yet ex officio members "hold office by virtue of an official position," RSA 672:5. Thus, membership on the planning board is a statutory accouterment of the office of city manager. This suggests that the Legislature may have intended to create two genera of "members," i.e. "ex officio members" and "regular members," rather than two species of the single genus of "members."

Ex officio members are appointed differently that regular members. They serve different terms than regular members. They also serve a different function. Regular members are appointed or elected to ensure community representation. The city manager, or designee, is automatically seated so that the city's executive administration will have input into the planning board's work. See Nazarko v. Conservation Commission. of Town of East Lyme, 717 A.2d 850, 851 (Conn. App. 1998) (The purpose of making the mayor an ex officio member of boards and agencies "is to allow him to have some input into the work of these agencies."). It would be entirely reasonable to conclude the Legislature intended for the city manager to sit on the planning board by virtue of his or her day job regardless of where he lives.

There is a second level of analysis, however, when it comes to the ex officio member Colbert-Puff. She was not the city manager but rather the city manager's

designee. It is possible to read the three relevant statutes (i.e. RSA 673:1, 673:2 and 672:5) to require that the city manager's designee be a resident of the city. The designee is not an ex officio member by virtue of the designee's office (although Colbert-Puff was the deputy city manager), but rather by virtue of the city manager's designation.

There is also a third level of analysis with respect to Colbert-Puff. By local ordinance, Portsmouth's city manager may designate an ex officio planning board member to take his place. However, the local ordinance also provides that:

> Eligibility for appointment to Municipal Boards shall be limited to residents of the City of Portsmouth. Any individual who is a resident of the City at the time of appointment to a Municipal Board shall become ineligible to remain on that Municipal Board in the event that the individual shall discontinue residency in the City.

Portsmouth City Ordinance Ch. 1, Article III, §1.302(E).[13] On the one hand, this seemingly pellucid language suggests that the city manager acted contrary to the ordinance (even if not contrary RSA 673:1 and 673:2) when he appointed a non-resident, Colbert-Puff, as his ex officio designee. On the other hand, the City invokes the administrative gloss doctrine, noting that it has a long history of allowing nonresident ex officio members to serve on the planning board. See City's Trial Memorandum at p. 16 (citing a history going back to 2000). Anderson v. Motorsports Holdings, LLC., 155 N.H. 491, 502 (2007); Nash Family Investment Properties v. Town of Hudson, 139 N.H. 595, 602 (1995). Thus, one possible, albeit strained, reading of the ordinance is that it

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[13]Neither party provided the Court with this provision of the ordinance. The Court takes judicial notice of the ordinance as it appears on the City's website. The court further takes judicial notice that §1.302(E) has been in effect since 1997 (as the text of the section indicates). Any objection to judicial notice may be made via a motion to reconsider.

does no more than recodify the statutory residence requirement, without attempting to resolve the ambiguity created by the statutory requirement of ex officio membership.

This interpretation of §1.302(E) would be consistent with another ordinance provision, i.e. Chapter 1, Article III, §1.303(A). Section 1.303(A) establishes the criteria for membership on the planning board. It states there are nine members and two alternates. Three of the nine members are ex officio members. Section 1.303(A) says nothing about a residency requirement for any of these three ex officio members. In contrast, §1303(A) expressly provides that all of the remaining six members of the planning board (i.e. those who are not ex officio members) and the two alternative members must be "residents of the City." Thus, §1303(A) can be construed to allow for non-resident ex officio members, to the extent this would be consistent with statute.

The ambiguities in both the statutes and the ordinances counsel strongly against reaching the merits of plaintiffs' challenge to Colbert-Puff's status as an ex officio member. Because plaintiffs' challenge fails for other reasons (i.e. timeliness, *de facto* membership and harmless error), to reach the merits would be to give an advisory opinion. The court declines to do so.

(v) The Merits Of The Residency Argument With Respect To Ex Officio Member Moore

Ex officio member David Moore's position was created by ordinance rather than statute. This makes the analysis of his case somewhat different from that of ex officio member Colbert-Puff.

RSA 673:2 mandates only two ex officio members, i.e. (a) the city manager or designee (in this case Colbert-Puff) and (b) a member of the city council (whose eligibility plaintiffs do not challenge in this case). The same statute requires seven

additional members, to be either appointed by the mayor or, alternatively, appointed or elected pursuant to ordinance or city charter.

As noted above, Ordinance Section 1.303(A) governs the composition of the City's planning board. That section provides for (a) the two statutory ex officio members, (b) a third <u>non-statutory</u> ex officio member, who must be an administrative official appointed by the City Manager, and (c) six "residents of the city" appointed by the Mayor and approved by the council. The plaintiffs argue that the <u>non-statutory</u> ex officio member, David Moore, was ineligible to serve on the planning board because he was not a resident of the city.

This raises the question of whether RSA 673:1 and 673:2 permit a municipality to staff its planning board with nonresident, non-statutory ex officio members. Could, for example, a city create six non-statutory ex officio memberships (for say, the planning director, the building inspector, the director of public works, the fire chief and the police chief), leaving only one plain vanilla residency-based seat to be filled? Indeed, could a city make all planning board members ex officio and risk the possibility of not having a single resident on the board?

No party has briefed this issue. Both the City and the plaintiffs have instead applied the same analysis to Moore's non-statutory, ex officio status as to Colbert-Puff's statutory, ex officio status. The court will not reach the issue on its own because it was not raised and because the issue need not be decided to resolve the case.

E. <u>Preliminary Site Plan Approval</u>

The Petitioners claim that the planning board erred when it accepted jurisdiction over PHA's site plan. The City argues that this was an unreviewable interlocutory order.

The Court agrees. The decision to accept an application does not constitute a final order and it is not appealable under RSA 277:15. Totty v. Grantham Planning Bd., 120 N.H. 388, 389 (1980), *overruled in part on other grounds by* Winslow, 125 N.H. at 268-269; DHB, Inc. v. Town of Pembroke, 152 N.H. 314, 318 (2005); Hobbs v. City of Dover, 2008 WL 7810368 (Strafford County Superior Court, July 11, 2008).

F. The Merits Of The Conditional Use Permit

Petitioners argue that the evidence presented to the planning board was insufficient to support the issuance of a conditional use permit for reduced off-street parking. The court disagrees.

The evidence before the Board included a site specific engineering report. The engineers relied on (a) learned treatises, (b) their knowledge of downtown Portsmouth and (c) a two-day study of the actual, rather than theoretical off street parking use by Feaster Building residents. The engineers took into account PHA's ability to provide some additional on-street parking as well satellite parking at its nearby properties. Additionally, the engineers considered the availability of other parking offsets. The engineers' conclusion was that sixty off-street parking spaces plus offsets would be sufficient.

The Board members are intimately familiar with their city and, more particularly with downtown Portsmouth. They are well aware of the parking situation downtown. Thus, they were free to rely on their own knowledge of the area in addition to the engineering report.

The plaintiffs did not come forward with an engineering study of their own. They offered only seat-of-the-pants projections of the off-street parking need. The planning

board was not required to reject the expert evidence before it in favor of the plaintiffs' opinions and conclusions.

More to the point, the expert and other evidence in the record was sufficient to support the grant of the conditional use permit. The court cannot say that the planning board's decision was unlawful or unreasonable. Therefore, the court must affirm the planning board's decision and dismiss plaintiffs' appeal from the decision to issue the conditional use permit.

G. The Merits Of Final Site Plan Approval

"Site plan review is designed to insure that uses permitted by a zoning ordinance are constructed on a site in such a way that they fit into the area in which they are being constructed without causing drainage, traffic, or lighting problems." Derry Senior Development, LLC v. Town of Derry, 157 N.H. 441, 447 (2008), quoting Summa Humma Enterprises, 151 N.H. at 78. Site plan review also ensures that "sites will be developed in a safe and attractive manner and in a way that will not involve danger or injury to the health, safety, or prosperity of abutting property owners or the general public." Id. In this case, the planning board's site plan review took place after PHA's proposed plans had already been vetted and approved (with conditions that are not relevant to this appeal) by the City's technical review committee.

Plaintiffs argue that the planning board should have rejected PHA's application due to (a) the parking concerns that have been previously described, (b) the hazard caused to Feaster Building residents who might wish to cross the proposed driveway that will run behind the Feaster Building and (c) the elimination of the Feaster Building's small yard.

With respect to the parking issue, no more need be said. The court has exhaustively set forth the relevant facts in the factual section of this order. By the time PHA's proposal reached the final site plan approval stage, it had already garnered a conditional use permit for reduced off-street parking. There was nothing otherwise objectionable about the proposed parking lot.

With respect to the alleged hazard caused by the driveway, PHA's site plan includes (a) a speed bump, (b) signage and (c) a barrier will completely prevent the use of the driveway to reach any destination beyond the project's parking lot. The City's Planning Department and the City's Technical Advisory Committee did not see a safety problem with this arrangement. Earlier in the process, PHA obtained a parking study that included an evidence-based estimate of the number of likely daily vehicle trips that the project will generate. As it stands, to get anywhere the Feaster Building residents must cross much larger streets with much more in the way of vehicular traffic. The Planning Board did not act unreasonably or unlawfully in refusing to block PHA's project because it included a driveway.

With respect to the elimination of the small, grassy yard behind the Feaster Building, PHA's site plan includes new open space between the Feaster Building and the new workforce housing building. Although the new space will be paved, it amounts to a net increase in the amount of public open space. To the extent that some Feaster Building tenants might not be allowed to smoke cigarettes in the new walkway area, this is a building management concern rather than a planning board concern. The same is true with respect to the Feaster Building management's rules concerning the location of small grills.

Finally, plaintiffs make a conclusory claim that the site plan violates the Americans With Disabilities Act and, perhaps, other statutes that guarantee disabled individuals proper access to buildings. However, plaintiffs do not cite either a particular statute or regulation or any proposed change to the Feaster Building. Their summary argument can be rejected in an equally summary manner.

V. Conclusion

For the reasons discussed above, all of the planning board's decisions are AFFIRMED and plaintiffs' appeals are DISMISSED.

April 30, 2019

Andrew R. Schulman,
Presiding Justice