

# CITY OF PORTSMOUTH

## LEGAL DEPARTMENT

### MEMORANDUM

DATE: FEBRUARY 11, 2021

TO: BEVERLY MESA-ZENDT, PLANNING DIRECTOR

FROM: TREVOR P. MCCOURT, STAFF ATTORNEY *TPM*

RE: ZONING BOARD OF ADJUSTMENT  
REHEARING OF AN APPEAL FROM THE PLANNING BOARD

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You have asked that I provide guidance on the following issues relevant to the Board of Adjustment's (BOA) pending rehearing of its denial of an appeal from the Planning Board:

1. Standing to appeal a decision of the Planning Board to the BOA;
2. Purpose and Procedure at an appeal from the Planning Board to the BOA;
3. Scope of the BOA's jurisdiction at a rehearing of a previous decision; and,
4. Procedure prescribed by statute at a rehearing.

This document is not intended to answer any specific questions raised by any particular application to the BOA, merely to provide a legal framework for use by Planning staff and the Board.

#### **1. Standing to appeal a decision of the Planning Board to the BOA**

To have standing is to have the right to bring a case or appeal to a judicial or quasi-judicial body. Standing is a jurisdictional question, which may be raised **at any time and by any party** or by the judicial or quasi-judicial body on its own. The standard for standing is different depending on which body or entity a case is before, and the type of case may also effect the standard for standing. In order to appeal a decision of the Planning Board to the BOA, a person must be "aggrieved" and "directly affected" by the Planning Board decision under appeal. RSA 676:5, I.

In determining if a particular individual has standing to appeal the decision of the Planning Board to the BOA, courts have provided four factors to determine when a person is "aggrieved" and "directly affected" by the challenged action in the so-called "Weeks Test", which are as follows:

- (1) proximity of the challenging party's property to the site for which approval is sought;
- (2) the type of change proposed;
- (3) the immediacy of the injury claimed; and,

(4) the challenging party's participation in the underlying Planning Board action.

Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541, 544-45 (1979). The New Hampshire Supreme Court has further clarified that standing "will not be extended to all persons in the community who might feel they are hurt by" the Planning Board's action, but it is limited to a smaller group of persons meeting the above-referenced criteria. Golf Course Investors of NH, LLC v. Town of Jaffrey, 161 N.H. 675, 680 (2011).

## **2. Purpose and Procedure at an appeal from the Planning Board to the BOA**

The BOA is a creature of statute, and is limited to the powers and duties prescribed to it by statute and ordinance. Statute, ordinance, and the rules of procedure of the BOA define three arenas where the BOA has authority: grant a variance, grant a special exception, or reverse the decision of an administrative official interpreting, constructing, or applying the Zoning Ordinance.

When the decision of the Planning Board is appealed to the BOA, it is a subcategory of appeal of an administrative official. Therefore, the BOA is limited to consideration of that part of the Planning Board's decision which "involves the construction, interpretation, or application of the terms of the [zoning] ordinance." RSA 675:5, II(b).

## **3. Requests for Rehearing**

If a party is dissatisfied with the decision of the BOA, that party must file a request for rehearing prior to appealing to Superior Court or the Housing Appeals Board. This is to provide the BOA with an opportunity to correct errors before an appeal to court or the Housing Appeals Board. Bourassa v. Keene, 108 N.H. 261 (1967).

A request for rehearing must be filed within 30 days of the BOA's decision, and the BOA must act on the request for rehearing within an additional 30 days. RSA 677:3. Statute provides that the BOA may grant a rehearing "if in its opinion good reason therefore is stated in" the request for rehearing. RSA 677:2.

## **4. Procedure at a rehearing**

At a rehearing, any issue properly before the BOA at the first hearing may be discussed, evidence taken, and a new decision may be made. See, e.g., MacDonald v. Town of Effingham, 152 N.H. 171 (2005). The BOA is not limited to those grounds raised in the motion for rehearing, and may correct any error in its own, first decision that it identifies. Fisher v. Boscawen, 121 N.H. 438 (1981). The procedure to be followed is the same as prescribed by the BOA's Rules and Regulations, Section VII, as may be modified by a vote of the BOA.

The procedure the BOA is to follow at a rehearing is not prescribed by statute or any case law. In Peter Loughlin's treatise, "Land Use Planning & Zoning", he describes the procedure as follows:

If the [BOA] grants the motion for rehearing, an entirely new hearing must be advertised and appropriate notice given to abutters. At the time of the new hearing, all evidence is to be considered and the hearing conducted in the same manner

as the original hearing although presumably, in the interest of saving time, the [BOA] could accept as part of the record testimony and exhibits introduced at the first hearing.

P. Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning, Ch. 21, Board of Adjustment Procedure, § 18 (LexisNexis Matthew Bender).

Although the BOA has heard many rehearings over its history, the specific procedure to be followed does not appear in the BOA's rules and regulations. It is therefore my recommendation that the BOA follow the guidelines provided by Peter Loughlin and, at the outset of the rehearing, establish rules and procedures for the rehearing. It is also my recommendation that the BOA adopt formal rules for rehearings to provide future certainty of process for future applicants.

cc: Peter Stith, Principal Planner