THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

PORTSMOUTH CITY COUNCIL

City of Portsmouth

v.

Hewitt

Removal Hearing

February 12, 2024

HEWITT'S MEMORANDUM OF LAW

The City of Portsmouth has charged James Hewitt, a member of the Planning Board, with removal under RSA 673:13, I, which reads: "After public hearing, appointed members and alternate members of an appointed local land use board may be removed by the appointing authority upon written findings of **inefficiency, neglect of duty, or malfeasance in office.**" Id. (emphasis added).

Mr. Hewitt denies the grounds charged. The facts alleged are inapposite, as a matter of law, to remove him from his appointed position on the Planning Board. The effort to do so is groundless and appears to be motivated by political bias rather than good cause.

The operative language of RSA 673:13, I, in bold above, has historically been used to ensure the independence of an appointed office from supervisory pressure, and specifically from the power of the executive. BAMZAI, ADITA, TAFT, FRANKFURTER AND THE FIRST PRESIDENTIAL FOR-CAUSE REMOVAL, 52 U. Rich. L. Rev. 691, 692, n. 5 (2018) (and authorities cited) ("[I]nefficiency, neglect of duty, or malfeasance in office [is language] that Congress still uses to mark some kind of independence from presidential control on behalf of an administrative agency."). This language is "'a common formulation' for statutory provisions limiting the removal of officers." *Id.* (citing JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 257 (7th ed. 2014)).

The New Hampshire Supreme Court has interpreted this language narrowly, rejecting the argument that this language confers a discretionary removal authority for any cause. *Silva v. Botsch*, 120 N.H. 600, 602 (1980) ("Unless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive.") (interpreting RSA 36:6, the predecessor statute to RSA 673:13, I). Thus, no authority can remove Mr. Hewitt because it does not like his world view, or his politics, or his exercise of free speech, or for any other reason except (a) inefficiency, (b) neglect of duty, or (c) malfeasance in office. *See*, also, *Humphrey's*

Executor v. U.S., 295 U.S. 602, (1935) (explaining that the "inefficiency, neglect of duty or malfeasance" standard was not a unitary for cause provision but barred removal of any officer except for "one or more causes named in the applicable statute.").

The City does not allege that Mr. Hewitt acted inefficiently or neglectfully. The City charges Mr. Hewitt only with malfeasance in office, identifying six instances of such alleged conduct. I will deal with them more specifically below, but they can broadly be categorized as communications or statements from Mr. Hewitt that, allegedly, violate the so-called "juror standard" for unbiased decision-making by a planning board member, or communicate to seek information "outside the record" in order to inform his decision-making. These are meritless allegations. First, the juror standard is not a basis for removal under RSA 673:13, I. Second, at no time did he breach the "juror standard," which simply requires him not to prejudge a given application. Third, New Hampshire law very clearly allows board members to pursue information that is "outside the record" in the manner that Mr. Hewitt has allegedly done. Fourth, "malfeasance" in this context must be conduct that is not merely procedurally unorthodox, but driven by scienter, a culpable state of mind in which the actor knows his conduct is wrongful and acts despite that knowledge.

I. The "juror standard" is not a ground for removal under RSA 673:13, I.

Preliminarily, the City's focus on the "juror standard" as a basis for removal under RSA 673:13, I is grossly misplaced. The "juror standard" appears in only one place in the Planning Board Rules of Procedure: under the definition of a "conflict of interest" that would require a Planning Board member to disqualify himself or be disqualified by a vote of the Board if he had a direct interest in the application. In full, the definition of "conflict of interest" in the City of Portsmouth Planning Board Rules and Procedures states:

> Conflict of Interest: Disqualification of Member. No member of the 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 … When uncertainty arises as to the application (of the above) to a board member in particular circumstances, the board shall, upon the request of that member or another member of the board, vote on the question of whether that member should be disqualified. Any such request and vote shall be advisory and nonbinding, and may not be requested by persons other than board members, except as provided by local ordinance or by a procedural rule …"

Rules of Procedure at 10-11. Of note is that the board vote is "advisory and non-binding." *Id.* That means that the board member may take it into consideration in weighing whether he must disqualify himself, but the decision is ultimately his to make.

This rule of procedure derives directly from RSA 673:14 "Disqualification of Member." RSA 673:14 states: "No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, historic district commission, agricultural commission, or housing commission 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 memo will address this important exception below, as well as the general lack of evidence that Mr. Hewitt violated the "juror standard." But the more important point is that the "juror standard" that the City relies on to suggest that Mr. Hewitt should be removed from office is part of the *disqualification* statute, RSA 673:14, *not* the removal statute, RSA 673:13. The removal statute does not incorporate the "juror standard." The removal statute does not identify the "juror standard" as a component of any of its three grounds for removal. The "juror standard" is alien to the removal statute.

Even assuming, therefore, that Mr. Hewitt, or any given Planning Board member should be disqualified from a particular case based on the juror standard of RSA 673:14, that disqualification would only be as to the one application then being considered—nothing in the statute permits an inference that disqualification, even if merited, should require removal.

Furthermore, there is no evidence that any person, or any other board member, ever called upon Mr. Hewitt to disqualify himself from any decision of the Planning Board. Nor is there any evidence that the Planning Board ever voted to recommend Mr. Hewitt's disqualification. Nor is there any evidence, in the form of a decision that was appealed and reversed in court due to Mr. Hewitt's alleged failure to abide by the "juror standard," that Mr. Hewitt should have disqualified himself, or been disqualified, from consideration of a given application. If the City cannot even find an instance where Mr. Hewitt was asked to disqualify himself, or was disqualified, due to the juror standard, then it cannot speculate that he might have been in order to justify removal.

The City has applied the wrong law to this case. In applying the so-called "juror standard," the City of Portsmouth has imported a standard unique to the question of *disqualification*, having nothing to do with the removal statute, RSA 673:13. The City is confusing apples and oranges. More accurately, the City is trying to pass apples off as oranges in order to confuse the City Council. The fact is that the juror standard applies only to whether Mr. Hewitt might have been disqualified from a given application. It has nothing whatsoever to do with removal, and the City's reliance on it as a basis for removal is utterly without foundation.

II. <u>Even if the juror standard were an appropriate standard for considering removal, Mr. Hewitt did not violate the juror standard in this case</u>.

The best illustration of the state of the law regarding the "juror standard" and conduct "outside the record" for land use board members is the recent New Hampshire Supreme Court case of *Andrews v. Kearsarge Lighting Precinct*, No. 2021-543, Slip Op. (N.H. August 31, 2023), an unreported case decided August 31, 2023 through an order rather than an opinion. Unreported cases are not considered to be precedential, but it is important to understand why. When the Supreme Court issues an order, as opposed to an opinion, it is deciding the appeal based upon established New Hampshire law that resolves the issues in the case. Because the court is not making new law, or considering a case of first impression, it need not issue a fully published opinion explaining the new interpretation it has given to the law and the facts of the case before it.

This is important to understand, because the *Andrews* case affirmed a trial court decision finding that a land use board member had not violated the "juror standard" by engaging in ex parte communications about the pending application with interested parties. In addition, the trial court found that the board member had not sought information improperly "outside the record" by seeking answers to concerns he had about the proposed project—in principal, the very things that the City is arguing justify Mr. Hewitt's removal in this case. The Supreme Court upheld these decisions, ruling that well-established existing New Hampshire case law resolved the questions. That same law applies here, in exactly the same way.

To reiterate, the *Andrews* case was a disqualification case, not a removal case. Even if the appealing party had prevailed, the remedy would have been to annul the decision and set a new hearing without the disqualified board member, not to *remove* the board member from his office. A project applicant unsatisfied with the land use board decision on a project appealed to the Superior Court, and the Supreme Court, arguing that one board member's bias against the project meant that he had prejudged the case in violation of the "juror standard." The conduct that the applicant cited as grounds for a finding of bias was that the Zoning Board member, Wroblewski, had attended a hearing as a private citizen and asked a question about the application of the relevant ordinance; and, that his son was one of the people who had asked the land use board to enforce the ordinance against the applicants.

The Supreme Court held that no party had brought these specific allegations of bias up at the earliest possible time, *i.e.*, during the zoning board proceedings, and therefore never preserved the question. Similarly here, no person has ever asked Mr. Hewitt to disqualify himself from participation in a given application hearing, or cited any specific ground for doing so. Thus, there would be no cause here for disqualification—as there was not in *Andrews*.

Even more apt was the Supreme Court's handling of allegations that board member Wrobleski contacted other board members "over the holiday weekend, [and] had some lively conversations about the challenges facing the [Kearsarge Lighting Precinct]." Further, Wroblewski's son was "a lawyer in Brooklyn and had also participated and offered his perspective." Wroblewski noted in emails that his son was "involved in these discussions" and that he "asked his son if he would consider being Wroblewski's alternate for the hearing, and recommended that [another member] reach out to [his son] to further discuss that proposal."

The trial court decided that these off the record, out of business, non-public, non-meeting live and electronic conversations did not evidence improper bias under the "juror standard," and the Supreme Court agreed. The reason is important: despite a wealth of communication about a particular application with various members of the community, at no point did Member Wroblewski express any opinion about the appeal or the propriety of his son's complaints to the board. *Id*. at *3 ("Member Wroblewski did not himself express any opinion about the plaintiffs' appeal or the propriety of his son's complaint in the email, and there is no evidence that he did so at any other time.").

The Supreme Court's ruling that even these lively and detailed *ex parte* conversations about a pending application were not unlawful is entirely consistent with authority from other jurisdictions on the question.

> The bar for disqualification is high; no published case has concluded that disqualification was required in quasi-judicial land-use proceedings. An elected local official's "intense involvement in the affairs of the community" or "political predisposition" is not grounds for disqualification. Involvement with other governmental organizations that may have an interest in the decision does not require disqualification. An elected local official is not expected to have no appearance of having views on matters of community interest when a decision on the matter is to be made by an adjudicatory procedure.
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> In addition to those general observations, there are three salient principles from the case law that define and drive our analysis in this case. *First,* the scope of the "matter" and "question at issue" is narrowly limited to the specific decision that is before the tribunal. *Second,* because of the nature of elected local officials making decisions in quasi-judicial proceedings, the bias must be actual, not merely apparent. And *third,* the substantive standard for actual bias is that the decision maker has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented.

§ 32:18. Disqualifying prejudgment bias, 2 Rathkopf's The Law of Zoning and Planning § 32:18 (4th ed.) (*citing and quoting Beck v. City of Tillamook*, 833 P.2d 1237 (Or. App. 1992)); *see also, In re Opinion of the Justices*, 75 N.H. 613 (1909) ("In a sense all people are interested in rail roads. No one is entirely indifferent on the subject of their development which they afford. But general interest of this character could not have been meant to be a disqualification[.]") (whether potential railroad commissioner would be disqualified from holding office because he has deposited money in a bank that owns railroad stock shares).

It should go without saying that if the bar for disqualification is high, requiring definitive evidence of actual bias, then the standard for removal must be even more stringent. None of the allegations charged against Mr. Hewitt in this case demonstrated actual bias that led to disqualification, or even gave rise to a vote on the subject. If no fellow board member, no applicant, and no court ever charged Mr. Hewitt with bias, it is hubris, to the say the least, for the City to blithely do so in this forum.

Lastly, under the disqualification statute, RSA 673:14, "[r]easons 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*." *Id*. (emphasis added). Very clearly, Mr. Hewitt through the allegedly problematic communications was seeking information "in the performance of the member's official duties." He was trying to inform himself and the board of facts he believed relevant to its consideration. Thus, he cannot be disqualified due to his knowledge of those facts.

Scrutinizing the communications that have ostensibly led to these proceedings, there is no evidence in them of Mr. Hewitt having actually prejudged a case.

- Exhibit 1 (Raynes Ave)—Mr. Hewitt commented in an email to other private citizens *before he was a board member* that a proposed project that had *already been approved* was "a monster" in a wetland setback area. While his characterization of the approved project was colorful, it does not signal an intent to prejudge the matter. Moreover, the project was already approved so Mr. Hewitt had no specific decision before him at the time he made the comment.
- Exhibit 2 (Raynes Ave): In the set of emails contained in Exhibit 2, Mr. Hewitt writes to the City Planning Department to obtain documents from its files relating to the subject property at Raynes Avenue. He did so *before* the Planning Board rehearing of the Raynes Avenue application, presumably so that the information could be considered publicly by the Planning Board at its February 17, 2022 rehearing. Applying the *Andrews* interpretation of the "juror standard," there is no evidence of prejudgment or bias in Mr. Hewitt's request for public records relating to the applicant's property. It is a request for information.
- Exhibit 3: March 2022 communications regarding parking: No evidence of prejudgment. Mr. Hewitt asked the Planning Board to take its own prior proceedings regarding this property into account as part of the record of the upcoming hearing. Mr. Hewitt wanted the public record to reflect these earlier decisions and considerations concerning parking, a request by the owner for an expansion of which was on the Planning Board's agenda. His communications do not evidence prejudgment. They are facts from the City's own files, which he acquired in the performance of the functions of his office.
- Exhibit 4: Mr. Hewitt made these communications as a private citizen publicly opposed to the project at issue. He had no decision before him on the Planning Board concerning this matter. When he did, he recused himself.
- Exhibit 5: These communications concern environmental litigation over a property that the Planning Board an application for on October 19, 2023. Mr. Hewitt made these communications after opposing that approval because he felt the application was incomplete without evidence of the environmental status of the property. The Planning Department's own memorandum concerning the application alluded obliquely to the contamination issues, which the Planning Department instructed the Planning Board to ignore. Mr. Hewitt's position at the hearing was not for or against the application; it was that the application was not complete. He deferred taking a position on it. The emails he

sent, with publicly available materials relating to environmental contamination on the site, were to demonstrate to the Planning Board why he felt the application was incomplete. These communications do not evidence bias. They evidence, again, a desire to obtain more and better information for the Planning Board to consider.

- Exhibit 6: In June of 2023, Mr. Hewitt participated in a pre-hearing consultation by an applicant concerning an application at 581 Lafayette Road. He made recommendations to the applicant for how to improve the application and eliminate clear areas where the application would not comply with the City's site plan regulations, in particular, a series of encroachments of the applicant's site plan improvements onto the abutting property. He assumed that the applicant would adopt those changes before moving forward with the planning process. When he learned that the applicant had not in fact made those changes, he wrote to the planning department, which was considering the proposal at a technical advisory committee meeting, to inform the planning department of those defects. To be clear, facts he learned in the course of his work on the Planning Board reflected his earlier feedback and input to the applicant. The juror standard expressly exempts facts learned in the course of a board member's performance from its application.

These communications are substantially less problematic than even member Wroblewski's communications in *Andrews*. At worst, Mr. Hewitt's communications show a health skepticism of the claims of applicants and a desire to get more information before making a definitive decision—that is the opposite of bias. Even "[a] predilection toward a particular decision does not prevent the decision maker from deciding the case fairly." § 32:18. Disqualifying prejudgment bias, 2 Rathkopf's The Law of Zoning and Planning § 32:18.[1]

For these reasons, there is no evidence that Mr. Hewitt's communications violated the "juror standard" for land use boards. The City's allegations are devoid of merit and substance. This matter should be dismissed and Mr. Hewitt permitted to serve out his term.

III. Mr. Hewitt's alleged communications "outside the record" were lawful and wholly consistent with his duties as a Planning Board member.

The other category of alleged malfeasance by Mr. Hewitt is communications related to information "outside the record." The City has nothing to stand on here, because the Supreme Court disposed of this argument as well in the *Andrews* case. The facts of *Andrews* are directly analogous to the alleged facts in this case, including a body of emails between and amongst people

[1] "[I]n local land use decision making, if courts were to define freedom from bias in a strict dictionary sense of absence of preconceptions, many decisions would probably be struck down, since it is unlikely that zoning decision makers will be totally without opinions concerning the development of their community. In zoning and other cases, courts generally try to distinguish between a strongly held philosophical or policy position as opposed to actual prejudgment of the specific adjudicative facts at issue in a particular case.[5] As stated by the Connecticut Supreme Court: 'The law does not require that the zoning authorities have no opinion concerning the proper development of their communities.'" *Id.* (*quoting Furtney v. Simsbury Zoning Commission*, 217 A.2d 319 (Conn. 1970)).

interested in the outcome of the zoning board hearing. The applicants in Andrews argued that the repeated reliance of a board member and the ZBA generally "upon information outside of the record to inform its decision in this case thereby further contribut[ed to] the fundamental unfairness of the proceedings and den[ied the plaintiffs] procedural due process.

The Supreme Court rejected this argument definitively, citing and quoting from the matters of *Dietz v. Town of Tuftonboro*, 171 N.H. 614, 618 (2019) and *Biggs v. Town of Sandwich*, 124 N.H. 421, 427 (1984). "We have previously held that ZBA members may base their conclusions upon their own knowledge, experience and observations, as well as upon their common sense. Moreover, the plaintiffs have not shown how, under these circumstances, such outside information amounted to fundamental unfairness so as to constitute reversible error." *Andrews*, Slip Op. at *3 (cleaned up). The bottom line is that nothing bars a land use board member from ensuring—as Mr. Hewitt attempted to do here—that relevant information in city records, and from the public history of the subject properties, was part of the Planning Board's consideration. Applying these principles to the facts in the City's exhibits, it is clear that Mr. Hewitt's use of information of which he was aware constituted "his own knowledge, experience and observation, as well as … his common sense." *Id.*

- Exhibit 1: The materials in Exhibit 1 do not relate to any aspect of Mr. Hewitt's work for the Planning Board because they occurred prior to his appointment.
- Exhibit 2: The materials in Exhibit 2 concern Mr. Hewitt's own knowledge, experience and observation about the subject property over time, including his knowledge of wetland related impacts and studies that were part of the public record and which he believed had a bearing on the application.
- Exhibit 3: The materials in Exhibit 3 concern Mr. Hewitt's own knowledge, experience and observation about the subject property over time, including the previous occasions when the applicant's needs for parking spaces exceeded its initial approved allotment. Mr. Hewitt applied his common sense that the city's parking regulations underserved the needs of proposed projects, and wanted to ensure that those issues would be part of the documentary record for the upcoming hearing.
- Exhibit 4: The materials in Exhibit 4 do not relate to any aspect of Mr. Hewitt's work for the Planning Board because they concern a project he publicly opposed and, in fact, had litigated, and from which he recused himself from decision-making motions.
- Exhibit 5: Mr. Hewitt was aware that the Banfield Road application concerned land that was beset by substantial environmental contamination. The Planning Department, he knew, had some of this information in its files and, in fact, alluded to it in its hearing memorandum. But Mr. Hewitt was aware through decades of community knowledge of the serious nature and extent of the contamination, as well as ongoing litigation over it. This information was "his own knowledge, experience and observation" and therefore, not "outside the record."
- Exhibit 6: Mr. Hewitt was aware of enroachments onto the neighboring abutter's lot by the applicant's improvements on its proposed site plan—because the applicant had already asked the Planning Board to engage in a pre-application consultation that Mr. Hewitt had participated in. Therefore, what he learned in that context is part of his

"knowledge, experience and observation" and fair game for his consideration of the application.

Based on the *Andrews*, *Dietz* and *Biggs* standards, nothing about these communications was unlawful. Not only could Mr. Hewitt rely on his own "knowledge, experience and observations" which included the information he was seeking to ensure made it into the record; but an aggrieved applicant must also show how obtaining the "outside the record" information was "fundamentally unfair." It is frankly ludicrous that any person could argue that it was fundamentally unfair for Mr. Hewitt to reach out to ensure that the Planning Board duly considered history and information relating to these subject properties that the applicant and the City had elected not to put before the Planning Board—but which was a matter of common knowledge. No applicant would have been able to disqualify Mr. Hewitt on the basis of these communications, and it is an even greater leap to argue that they justify removal from office.

In addition, the City wagged its finger at Mr. Hewitt for sending emails to board members "outside the record" because he was communicating after hours and not during a formally noticed meeting. Setting aside that the Supreme Court found after hours communication to be not-disqualifying in Andrews, there is no statutory prohibition on a board member doing so.

RSA 91-A governs public records in New Hampshire. This is what it says about board member email communications:

RSA 91-A:2-a: "I. Unless exempted from the definition of meeting … public bodies shall deliberate on matters over which they have supervision, control, jurisdiction or advisory power only in meetings held pursuant to and in compliance with the provisions of [this chapter]. II. Communications outside a meeting, including but not limited to sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter[.]"

To be sure, any communication by Mr. Hewitt with other board members or the City planning staff would be expected to be public. The City should not have a problem with that. But for an email communication between and amongst all the Planning Board members to constitute a "meeting" requiring public notice and an option for the public to simultaneously participate, a decision would have to be made regarding a matter over which the Planning Board has jurisdiction. RSA 91-A:2, I. There is no "meeting" if there is no decision, and the only consequence of a decision being made during an unnoticed electronic "meeting" between the Planning Board members would be invalid. Furthermore, under RSA 91-A:2-a, the prohibition is against using electronic communications to "circumvent the spirit and purpose of this chapter[.]" RSA 91-A:2-a, II. None of Mr. Hewitt's communications could be reasonably characterized as such an effort. They were never intended to be non-public, and their obvious purpose was to ensure that important information bearing on these applications was brought before the board for consideration at the appropriate time. To boil it down—these communications violated no open meeting or public document provisions; the public is free to see them; they are evidence of

nothing more than a board member doing his job. To characterize them as "malfeasance" is pure libel.

IV. "Malfeasance" requires more than zealous performance of one's duties; it requires a willful, corrupt or criminal intent.

The City is trying to shoehorn a series of modest departures from what it deems "normal" board communication into the cauldron of "malfeasance." But malfeasance is a word with a specific meaning. In *Williams v. City of Dover*, 130 N.H. 527 (1988), the only case in which our Supreme Court has ever had occasion to consider removal of a land use board member, the Court canvassed the various definitions of malfeasance in the removal context. It observed that malfeasance had been identified as "the general misuse of public office"; "wrongful conduct that affects, interrupts or interferes with the performance of official duties"; "the doing of an act which ought not to be done"; "willful or corrupt action in the discharge of official duties"; and an "intentional act or omission relating to the duties of a public office." *Id*. at 529-31.

Williams was ultimately disposed of on other grounds. Specifically, the land use board member was found not to have been acting in his capacity as a board member when, expressly as an agent on behalf of his employer, he asked for driveway and curb-cut allowances that he knew to be contrary to the local ordinance. *Id*. at 31-32.

Williams, however, does not provide a direct answer as to which of the definitions of "malfeasance" should be utilized in considering allegedly malfeasant conduct. Other jurisdictions that have considered "malfeasance" as a ground for removal from office, however, have determined that "malfeasance" requires malicious intent. Chapman, writing in the Kentucky Law Journal on the removal of county clerks, observes:

> Malfeasance is the unjust performance of some act which the party had no right, or which he had contracted not, to do. Misfeasance is the wrongful and injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner. Nonfeasance is the nonperformance of some act which ought to be performed.
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> Malfeasance is the worst of the three, requiring "*evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful.*" If there is no "evil intent or motive," the act "*must have been done with such gross negligence as to be equivalent to fraud.*" More recently, the Kentucky Supreme Court has expressly held that evil intent is not absolutely required, and that willful, intentional, or grossly negligent conduct would suffice. Nevertheless, criminal culpability for malfeasance can only be shown by "a wrongful or unjust act that was an abuse of power." Regardless of its exact definition, there is little question that malfeasance is distinguished from "[a]n honest mistake of an officer concerning the discharge of an official duty, although it may be the result of ignorance." *The gravamen of the offense appears to be corruption or negligence so extreme as to be indistinguishable from intentional misconduct*. Examples of malfeasance include:

> ● A county judge knowingly ordering work on a non-county road, "violat[ing] both the laws of Kentucky and the regulations of [the county]," and demoting the worker who had reported the improper work.
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> ● A justice of the peace taking money into court to be paid out to a claimant, and telling the payor it had been paid, but keeping the money and later claiming it was to satisfy a court-cost debt.
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> ● A clerk underreporting collected fees of over $14,000 over the course of ten years, which, although not intentional, was "gross negligence, carelessness and recklessness so 'as to show an utter want of care or of concern, and such as would be tantamount to a fraud, and therefore could be said to be fraudulently done."'
>
> ● A county judge "willfully, unlawfully, knowingly, and wrongfully exonerat[ing] certain named persons of their state taxes in various respective sums, and ... thereby wrongfully and fraudulently depriv[ing] the state of specified sums of money as being taxes on the assessments so exonerated."
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> ● A coroner holding of a murder inquest with no belief (or reason to believe) in foul play.
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> ● A constable accepting bribes to not pursue cases.
>
> ● A county judge "willfully, wickedly, maliciously and corruptly issu[ing]" an arrest warrant on a "pretended charge."
>
> ● A justice of the peace "willfully and corruptly failing and refusing to report the money collected on fines as provided by section 4252, Kentucky Statutes."

SHAWN D. CHAPMAN, *Removing Recalcitrant County Clerks in Kentucky*, 105 Ky. L.J. 261, 316–17 (2017).

In *¶ 100,012 Phh Corporation, Et Al. v. Consumer Financial Protection Bureau.*, Fed. Sec. L. Rep. P 100012, the U.S. Court of Appeals for the D.C. Circuit opined that "'[m]alfeasance' was defined as 'the doing of an act which ought not to be done; wrongful conduct; especially official misconduct; violation of a public trust or obligation; specifically, the doing of an act which is positively unlawful or wrongful, in contradistinction to misfeasance." *Id.* at 12. The Court noted in an accompanying footnote:

> Contemporary definitions of malfeasance are generally comparable. *See, e.g.*, *Malfeasance*, *Black's Law Dictionary* (10th ed. 2014) ('A wrongful, unlawful, or dishonest act; esp., wrongdoing or misconduct by a public official.'); *see also Daugherty v. Ellis*, 97 S.E.2d 33, 42-43 (W. Va. 1956) (collecting definitions of 'malfeasance'). Courts have likewise interpreted malfeasance to mean corrupt conduct that is wholly wrongful, if not positively unlawful. *See, e.g.*, *State ex rel. Neal v. State Civil Serv. Comm'n*, 72 N.E.2d 69, 71 (Ohio 1947) ('Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of

an act which a person ought not to do at all.') (quoting *Bell v. Josselyn*, 69 Mass. (3 Gray) 309, 311 (1855))).

Id. at 12, n. 10 (interpreting what the Court called the "INM standard").

What unites all of these examples is a thread reflecting fundamentally and willfully corrupt, illegal or criminal acts, as opposed to procedural or communication missteps. These are acts suffused with *scienter*, or a conscious intent to defraud or corrupt. SCIENTER, Black's Law Dictionary (11th ed. 2019) ("A mental state consisting in an intent to deceive, manipulate, or defraud."). Viewed in this light, Mr. Hewitt's communications and actions fall so well short of "malfeasance" that this effort to remove him constitutes bad faith:

The City is torturing "malfeasance" beyond all recognition in asserting that a board member's zealous efforts to do his job in what he believed, in good faith, to be the public interest constitute "malfeasance." If Mr. Hewitt's conduct is deemed by the City Council to be malfeasance, then "people of common intelligence must necessarily guess as to its meaning and differ as to its application," rendering it unconstitutionally vague. *See Daily v. City of Philadelphia*, 417 F.Supp. 597, 618 (E.D. Pa. 2019). In truth, we know what "malfeasance" is. It is not sending emails that the City attorney would prefer not to see sent.

V. <u>As a Planning Board member, Mr. Hewitt does not lose his First Amendment right to speak on issues that affect and concern him.</u>

Relatedly, the essence of the Supreme Court's *Williams* opinion was that when a land use board member was acting outside his official capacity, those actions categorically cannot be grounds for removal. 130 N.H. at 531. This holding completely disposes of one of the alleged instances of "malfeasance" (July 2022 Exhibit 4) involving Mr. Hewitt's expressed concerns about a project at 710 Middle Road, *to which he was an abutter*.

The City knows that Mr. Hewitt was acting not as a Planning Board member, but as a citizen. In the City's own words, "Mr. Hewitt submitted a *citizen request* for a Capital Improvement Project through the City's on-line application portal [in]… an attempt to express his distaste for and objections to an *approved* project subject to development compliance review by City staff." Charging Document at 2 (emphasis added). Mr. Hewitt, acting as a private citizen opposed to a project that was approved by the Planning Board before he had been appointed, then sent emails to a member of the Planning Department staff, copying the chairman of the Planning Board, the planning director and the principal planner of the City. In those emails, he asked detailed questions about the applicant's compliance with the conditions of the Planning Board's original approval. Just like the land use board member in *Williams*, Mr. Hewitt was acting on his own behalf as an abutter, not as a Planning Board member.[2]

[2] Technically, the *Williams* board member was acting on behalf of his employer, the Elliot Rose Company, not himself—but he was not acting as a board member.

At no point in any of the related email exchanges does Mr. Hewitt assert his status as a Planning Board member. Nor does he threaten any professional staffer with any kind of repercussion (which he would have no power to effect anyway). Nor does he imply that he has pre-judged a matter because the Planning Board had already approved the permit in question. He was following up, as any citizen would be permitted to do, to check on the status of the project, and whether the applicant had complied with the requisite conditions imposed by the Planning Board at the time of approval. The notion that Mr. Hewitt was wielding his power as a Planning Board member through these emails is a complete fabrication. Just as the appellants did in *Williams*, the City is trying to argue that Mr. Hewitt's mere status as a Planning Board member means, *ipso facto*, that every action he takes is on behalf of the Planning Board. The City should know better. The Supreme Court rejected that kind of inferential bootstrapping in *Williams*:

> The trial court relied on the fact that, although Williams acted at all times as an employee of the Elliott Rose Company, "the council could reasonably find that [Williams], while a member of the very board which [dealt] with the driveway ordinance, ignored the ordinance...." Furthermore, the court concluded that because a building permit issued, arguably in reliance on Williams' position on the planning board, "the [city] council could reasonably [have found] that ... something was done which [Williams] ought not to have done." This is not enough to support a finding of malfeasance in office.
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> Neither the findings of the trial court nor anything in the record before us supports the conclusion that Williams' actions were directly related to or connected with the performance of his duties as a planning board member… Absent such a relationship, we conclude that it was error to order his removal from office for malfeasance. … [S]uch dealings *do not fall within the scope of malfeasance* under the existing statute.

Williams, 130 N.H. at 531.

In short, a Planning Board member does not lose his right to oppose a project that directly affects him, and from which he recused himself at the time of the Planning Board decision. Mr. Hewitt was, like the land use board member in *Williams*, not acting in his official capacity in pursuing the information he sought about 710 Middle Road. He had every right under the First Amendment to advocate for his rights with any member of the City staff or the Planning Board. These rights included his right *as an abutter* to ensure that the City compels the applicant's compliance with conditions on a permit. For these reasons, Mr. Hewitt's alleged "violations" under Exhibit 4 ("July 2022") are not grounds for removal.

Conclusion and Request for Relief

The allegations charged against Jim Hewitt are without merit, and the City knows it—or, should know it based on the controlling case law. The City Council has a last opportunity to

terminate this embarrassing abuse of power by a government against one citizen volunteer. It should seize that opportunity and deny the City's request to remove Mr. Hewitt. Removing him on the threadbare basis presented by the City in its charging letter and exhibits will constitute a vexatious, oppressive, bad faith decision for which Mr. Hewitt, on appeal, will be seeking attorney's fees and costs and initiating damages claims for defamation. It is time to put an end to this charade and dismiss this matter. Let Mr. Hewitt finish his appointed term as a dedicated Portsmouth Planning Board member.

Respectfully submitted,

JAMES HEWITT

By and through his attorneys,

ORR & RENO, P.A.

February 9, 2024 By: /s/ Jeremy D. Eggleton

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Certificate of Service

This Memorandum has been provided to the City of Portsmouth and the City Attorney's office on this the 9th day of February, 2024, for inclusion in the public agenda for the City Council's meeting on February 12, 2024.

/s/ Jeremy D. Eggleton