THE STATE OF NEW HAMPSHIRE

ZONING BOARD OF ADJUSTMENT
OF THE CITY OF PORTSMOUTH

In re Application of Stone Creek Realty, LLC, CPI Management, LLC, and Boston & Maine Corporation regarding the property located at 53 Green Street

MOTION FOR REHEARING

Pursuant to RSA 677:2, Richard Antal, Mark Brighton, William R. Castle, Lawrence J. Cataldo, Ramona Charland, Joseph R. Famularo, Jr., Philippe Favet, Charlotte Gindele, Julia Gindele, Catherine L. ("Kate") Harris, John E. Howard, Nancy B. Howard, Elizabeth Jefferson, and April Weeks (hereinafter "the appellants") respectfully move this Board to reconsider its decision of October 25, 2022, in which it refused to overturn the July 15, 2021 decision of the Portsmouth Planning Board pursuant to the appellants' appeal, and to conduct a rehearing thereon. As grounds in support of their motion, the appellants state the following:

1. During its deliberations on the appellants' appeal following the October 25, 2022 public hearing, this Board failed to address and adjudicate, or even mention, the appellants' contention that an ineligible member had participated in the Planning Board's subject decision to grant site plan approval to the owner-developers in this case and that therefore that decision was absolutely void for that reason. Although not asserted in the appellants' original notice of appeal, this issue was subsequently included in that appeal through subsequent filings, as soon as it came

to the appellants' attention and as soon as they had had a chance to research and investigate it. It was specifically raised and discussed with reasonable clarity in a filing entitled Objection to Stone Creek Realty's Motion to Reconsider ZBA's Decision on Appellants' Motion for Rehearing, filed on or about January 12, 2022, and it was also part of the appellants' attorney's oral presentation at the October 25, 2022 hearing. The participation of an ineligible member in a vote and/or in the proceedings and deliberations is sufficient, in and of itself, to invalidate the vote or other action taken by a land use board, and in fact such invalidation is required. Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480 A.2d 114 (1984). This Board should have entertained and ruled on that issue.

2. In brief, the issue was thus: One of the Planning Board members, Raymond Pezzullo, was appointed to that board in a manner which had been prescribed by the City's Administrative Code but which conflicted with state law, and therefore he was ineligible to sit on that board. It is a proposition so obvious as to barely even require any citation to authority, that if there is a conflict between state law and a local ordinance, code, or other local law, the local law must yield and the state law must prevail. Blagbrough Family Realty Trust v. Town of Wilton, 153 N.H. 234, 236, 893 A.2d 679, 681 (2006). RSA 673:2 provides that in a city manager form of government, the planning board is to consist of nine members, and two of those members are to be ex officio members. (The other seven members are appointed by the mayor and confirmed by the City Council, and the only requirement respecting their eligibility is that they be residents of Portsmouth.) The statute further provides that one of those ex officio members is to be the city manager or his/her designee, and the other is to be a member of the City Council, chosen by the Council itself. However, under the terms the City's Administrative Code, § 1.303, the city manager appoints a third ex officio member, selected from the City's administrative staff.

3. The effect of the Administrative Code's method of appointment is to increase the number of ex officio members from two to three, and to decrease the number of citizen members from seven to six, in violation of the statutory scheme mandated by RSA 673:2. Therefore Mr. Pezzullo, having been appointed to the Planning Board by the city manager, was appointed unlawfully and was ineligible to serve on that board.

4. Further, the appointment of a member of the city staff (in this case, Mr. Pezzullo) by the city manager creates an inherent conflict of interest which prevents the member from being totally objective and from exercising independent judgment when passing upon land use board applications such as the one at issue. The city manager is the board member's supervisor and has the power of hiring and firing over him, and he is beholden to her for his job. Therefore, he is going to be unlikely to vote in a manner which is contrary to her vote or to her wishes or which otherwise displeases her. In practical effect, the scheme for appointment that is prescribed by the City's Administrative Code gives the city manager two votes on the Planning Board: her own, and the vote of the member of the city staff whom she has appointed.

5. Finally, Mr. Pezzullo was also ineligible to sit on the Planning Board because he was appointed thereto not by the present city manager, Karen Conard, but by the previous city manager, John Bohenko; and as an ex officio member, Mr. Pezzullo's term of office expired upon the retirement or other termination of office of the authority who appointed him, which was Mr. Bohenko. By the time of Mr. Pezzullo's vote on the application in question, Mr. Bohenko had retired and Ms. Conard was the new city manager. Mr. Pezzullo's term as an ex officio member had ended with Mr. Bohenko's retirement, and Ms. Conard had not even gone through the motions of reappointing him and having his appointment confirmed by the City Council. Therefore, he was sitting on the Planning Board unlawfully.

6. The participation of an ineligible member in a decision of the Planning Board or other land use board renders that decision absolutely void. Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480 A.2d 114 (1984). Therefore, this Board should have reversed the Planning Board's decision and invalidated it on that basis.

7. All of the above was laid out to this Board with reasonable clarity in the aforementioned Objection to Stone Creek Realty's Motion to Reconsider ZBA's Decision on Appellants' Motion for Rehearing and in copies of two pieces of correspondence--one by the undersigned counsel and another by Planning Board Chairman Rick Chellman himself--which were attached as exhibits thereto. In addition, the appellants filed a copy of a second, updated letter from Mr. Chellman dated April 11, 2022, throwing further light on the issue and setting forth the law on the subject, at the October 25, 2022 hearing. Therefore, the issue was before this Board, and the Board should have considered that issue and rendered a ruling thereon.

8. The Planning Board also erred in approving the applicants' proposed project without requiring them to meet the requirements for the issuance of a conditional use permit relating to the size of the building's footprint, and this Zoning Board of Adjustment erred in failing to overturn that decision. The owner-developers were obligated to obtain a conditional use permit in order to allow them to erect a building having a footprint in excess of 20,000 square feet, as required by section 10.5A43.43 of the Zoning Ordinance for new buildings in the zoning district in question, and the Planning Board erred in approving the project without actually issuing a conditional use permit for that purpose. The building which the owner-applicants propose to erect has a footprint of 29,660 square feet, or almost 50% over the limit that is allowed without a conditional use permit. Therefore, a building footprint conditional use permit was required, and the Planning Board erred in failing to require the owner-developers to seek such a permit and to

meet the criteria for the issuance of same. This was specifically required by section 10.5A43.43 of the Zoning Ordinance, which requires a conditional use permit in order to erect a building having a footprint exceeding 20,000 square feet in the zoning district in question. The grant of site plan approval by the Planning Board without the issuance of such a CUP was clear error, and for its part this Board erred in failing to overturn the Planning Board's decision on that basis.

9. Additionally, the plan that was approved by the Planning Board unlawfully provides for the placement of two 3-story buildings (or two 3-story wings of the same building, depending on how one chooses to view it) within 100' of the water line. This was plainly a violation of the Zoning Ordinance, for only two stories are allowed by the Ordinance under such circumstances. In the proceedings before the Planning Board, the owner-developers relied on section 10.5A46.10 of the ordinance, which provides that a developer is entitled to an extra story (in this instance, three stories instead of two) if he provides "community space" as part of his project. However, that section is trumped by sections 10.5A21.10 & -.20 of the zoning ordinance (and Map 10.5A21B, which is incorporated therein by reference), which flatly require that any structure or portion thereof erected within 100' of the mean high water line shall have no more than two stories, period. This Board erred in denying the appellants' appeal and in declining to overturn the Planning Board's decision to grant site plan approval.

10. In conjunction with such denial, this Board erred in reasoning that the overlay district overrides the 100' wetlands buffer district and entitles the owner-developers to erect two 3-story buildings, rather than two 2-story buildings, within 100' of the water line. The way that the Zoning Map is drawn and the way that the Zoning Ordinance reads, the overlay district and the 100' buffer district are two separate districts in the location in question; there is no overlap between the two. Or, to put it another way, the overlay district does not "overlie" the 100' buffer

district, and therefore the former has no effect on the latter. The border of the overlay district falls 100' short of the water line and does not intrude into the 100' buffer zone, and this was unquestionably done by the City Council by design, not by accident or inadvertence.

11. Further, sections 10.141 and 10.511 of the Zoning Ordinance explicitly provide that in cases where two provisions of that Ordinance are in conflict with one another, the more restrictive of the two provisions shall control; and the wetlands protection ordinance, Zoning Ordinance §§ 10.1011 & 10.1012, further provides that "[w]here any provision of this Section conflicts with . . . another section of this Zoning Ordinance, or another local ordinance or regulation, the more restrictive interpretation shall apply." Zoning Ordinance § 10.1012.20 (emphasis added). Ergo, this Board (or, at least, a majority of the members thereof) erred in concluding that sections 10.5A610, 10.5A620, and 10.611 prevail over sections 10.5A21.10 & -.20 and that the owner-developers were entitled to erect two 3-story buildings (or portions thereof) within the 100' wetlands buffer district.

12. Because sections 10.5A21.10 & -.20 of the ordinance are more restrictive, and moreover because section 10.5A21.22(b) is specifically intended to address the situation in which a new structure is to erected within the wetlands buffer zone or where the height of an existing structure within that zone is to be increased, sections 10.5A21.10 and -.20 prevail over section 10.5A46.10, and no building exceeding two stories in height is allowed. By virtue of the foregoing circumstances, the Planning Board misconstrued, misinterpreted, and misapplied the provisions of the zoning ordinance, and it erred in granting site plan approval where two portions of the proposed building, three stories high, would fall within the 100' wetlands buffer zone. In

their argument, the owner-developers simply gerrymandered the provisions of the Zoning Ordinance to suit their own purposes, and this Board erred in adopting their tortuous reasoning.

WHEREFORE, the appellants respectfully pray that this Zoning Board of Adjustment grant them the following relief:

(a) that this Board conduct a rehearing on their appeal of the Planning Board's decision of July 15, 2021; and

(b) that this Board ultimately reverse the Planning Board's decision, vacate the approval of the applicants' site plan, and disapprove same.

/s/ Duncan J. MacCallum
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CERTIFICATE OF SERVICE

The undersigned, Duncan J. MacCallum, Attorney for Appellants in the within proceeding, hereby certifies that on this 28th day of November, 2022, a true and correct copy of the foregoing Motion for Rehearing was served upon the applicants both via e-mail and by forwarding same by first class mail, postage prepaid, to the following counsel of record:

Michael D. Ramsdell, Esquire
Brian J. Bouchard, Esquire
Sheehan Phinney Bass & Green, P.A.
1000 Elm Street, 17th Floor
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/s/ Duncan J. MacCallum
Duncan J. MacCallum

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Reply to: Manchester Office
1000 Elm Street, PO Box 3701
Manchester, NH 03101-3701

December 12, 2022

Via Email and U.S. Mail
Beverly Mesa Zendt, Planning Director
Portsmouth Zoning Board of Adjustment
1 Junkins Avenue, 3rd Floor
Portsmouth, NH 03801

RE: In re Application of Stone Creek Realty, LLC, CPI Management, LLC, and Boston & Maine Corporation regarding the property located at 53 Green Street

Dear Ms. Zendt:

Enclosed please find Stone Creek Realty's Objection to Intervenors' Second Motion for Rehearing in regards to the above-captioned matter.

Sincerely,

/s/ Michael D. Ramsdell
Michael D. Ramsdell

MDR/dmh

Enclosure

cc: City Principal Planner Peter Stith
City Staff Attorney Trevor P. McCourt
Duncan J. MacCallum, Esq.

ZONING BOARD OF ADJUSTMENT
OF THE CITY OF PORTSMOUTH

In re Application of Stone Creek Realty, LLC, CPI Management, LLC, and Boston & Maine Corporation regarding the property located at 53 Green Street

STONE CREEK REALTY'S OBJECTION TO INTERVENORS' SECOND MOTION FOR REHEARING

The Portsmouth Zoning Board of Adjustment ("ZBA") should deny Appellants' Second Motion for Rehearing on Appellants' appeal of the Portsmouth Planning Board's approval of Stone Creek Realty, LLC's (Stone Creek") Proposed Development at 53 Green Street for the following reasons:

I. Appellants' Second Motion for Rehearing Should Be Denied Because the ZBA's Denial of Intervenors' Appeal Was the Same Relief Afforded the Same Party for the Same Reasons.

The ZBA has considered the merits of Appellants' appeal twice now and has reached the same conclusion each time. Appellants' appeal contained three claims of Planning Board error, including: (1) Stone Creek should have been required to obtain a conditional use permit to increase the building footprint to a size over 20,000 square feet pursuant to section 10.5A.43.43 of the zoning ordinance; (2) Stone Creek failed to meet the necessary criteria for approval of the Wetlands CUP; and (3) the zoning ordinance did not allow Stone Creek to erect a 3-story building within the 100-foot wetlands buffer. At the first hearing in October 2021, the ZBA—after rejecting Stone Creek's argument that Intervenors lacked standing—denied Appellants' appeal by a 3-3 vote.

Appellants then moved for a rehearing and urged the ZBA that it had erred on the building footprint and height issues. Appellants also argued that: (a) a rehearing would be proper because a hearing before a full Board would allow the 3-3 tie to be broken; and (b) the ZBA should have asserted jurisdiction over the Planning Board's decision on the Wetlands

CUP. Appellants did not otherwise argue that the ZBA had erred or that it had failed to consider material evidence.

The ZBA granted Appellants' motion for rehearing based on the following motion: "to provide an opportunity to introduce relevant information that may or may not have been heard, or may or may not have been available in the first hearing." Although it granted a rehearing, the ZBA did not reverse any of its substantive decisions.

At the rehearing, the ZBA unsurprisingly denied Appellants' appeal again and explained its decision-making as follows:

> On the matter of standing, the Board voted determine the appellants do have standing to bring the appeal forward because some of the appellants have properties that border on the same estuary as the project borders on; estuaries are complex and delicate ecosystems, and this project involves activity within the 100-ft wetland setback, so it has the potential to damage or alter the state of the estuary, and because of this potential, the appellants have standing. It was conceded by the appellants that the issuance of a Wetland Conditional Use Permit was not properly before the Zoning Board, therefore Count #2 was removed from the appeal. A motion to grant the appeal for Count #1 and Count #3 failed on a 3-4 vote, therefore the appeal was denied. Board members in opposition stated they didn't believe that the Planning Board erred in applying Sections 10.5A46. 10 and 1 0.5A46.20 and it was clear that the zoning ordinance allows for the overlay district to apply to the entire lot by virtue of Section 10.5A46.21.

Thus, the only bases upon which Appellants' motion for rehearing was denied were identical to two of the three reasons their original appeal failed. The ZBA rejected Appellants' arguments about building footprint and height in both the original appeal and upon rehearing.

Appellants' current motion for rehearing, their second motion for rehearing, should be denied because the ZBA rejected those same arguments in Appellants' original appeal. It is inarguable that an appeal to the superior court or the Housing Appeals Board must be preceded by a motion for rehearing that provides every argument the appealing party seeks to advance.[i] "The statutory scheme is based upon the principle that the local board should have the first

opportunity to pass upon any alleged errors in its decisions so that the court may have the benefit of the board's judgment in hearing the appeal."[ii]

Importantly, however, "when the bases for aggrievement do not change following the decision upon rehearing and are set forth in the original motion for rehearing, a second rehearing application is not necessary."[iii] As clarified by the Supreme Court, a second motion for rehearing is necessary only when there is a change in either the party who originally was denied the relief it requested or the substantive reasons for the denial of relief.[iv] Stated affirmatively, a second motion for rehearing is superfluous when the same party is denied relief for the same reasons. The reasoning is simple. As explained by the Supreme Court: to avoid "boards of adjustment [being] forced to consider an endless series of rehearing applications ... *it is only when the board reverses itself at a rehearing—thus creating new aggrieved parties [or new reasoning for denying the same aggrieved parties]—that the [statutory requirement for a motion for rehearing] comes into play.*"[v]

Here, the ZBA reached the same conclusion related to the building footprint and height at the rehearing as it did on the original appeal. Appellants' claim for relief from the denial upon rehearing is to appeal to the superior court or the Housing Appeals Board because the denial upon rehearing neither created a different aggrieved party nor relied upon a different reasoning for the denial of their appeal. There is no basis for jurisdiction over Appellants' second motion for rehearing.

II. The ZBA Lacks Jurisdiction Over Appellants' Challenge to the Composition of the Planning Board.

The New Hampshire Supreme Court has held that ZBAs "are created by statute, *see* RSA 673:1, IV (Supp. 2013), and have only those powers that are expressly conferred upon them by

statute or are necessarily implied by those statutory grants."[vi] Pursuant to RSA 674:33, the ZBA has jurisdiction to:

a. "[h]ear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance," and "reverse or affirm, wholly or in part, or ... modify the order, requirement, decision, or determination appealed from and... make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken";

b. (2) grant variances under certain statutorily-described conditions; and

c. (3) if authorized by the zoning ordinance, "make special exceptions to the terms of the ordinance" under certain statutorily-prescribed conditions.[vii]

"Additionally, RSA 674:33-a authorizes a zoning board to grant an 'equitable waiver' from a 'dimensional requirement imposed by a zoning ordinance.'"[viii]

However, the Supreme Court also has held that "[t]he plain language of the pertinent statutes does not confer equitable jurisdiction upon a zoning board."[ix] Instead, "a zoning board has the authority to grant equitable relief from a zoning ordinance *only* when the statutory prerequisites for an equitable waiver, a variance, or a special exception are satisfied."[x] Because the ZBA is limited to the authority bestowed upon it by the Legislature, it lacks jurisdiction to grant relief outside its prescribed jurisdiction or requiring an "equitable" decision. For example, "[t]he applicable statutes do not confer upon a zoning board of adjustment the power to grant relief under the equitable doctrine of municipal estoppel."[xi]

It is immaterial whether the claim requires statutory authority or equitable power. Like a claim of municipal estoppel, there is no statutory authority for the ZBA to adjudicate a claim about the composition of the Planning Board and the ZBA lacks equitable power. Consequently, the ZBA lacks jurisdiction over Appellants' claim about the composition of the Planning Board.

III. The ZBA's Decision Upon Rehearing Was Not Unlawful or Unreasonable.

RSA 677:3 states the standard for a ZBA to grant a motion for rehearing. To grant a motion for rehearing, the ZBA must find that its original decision was "unlawful or unreasonable." RSA 677:3; *Town of Plaistow Board of Selectmen v. Town of Plaistow Board of Adjustment*, 146 N.H. 263, 266 (2001).

Stone Creek incorporates by reference all the arguments set forth in its prior pleadings regarding Appellants' appeal. In particular, Stone Creek reasserts its arguments regarding Appellants' claims about building height and the building footprint. Four members of the ZBA properly rejected Appellants' misunderstanding or misinterpretation of multiple sections of the Zoning Ordinance. The rejection—for the second time—was not unlawful or unreasonable.

WHEREFORE, Intervenor Stone Creek respectfully requests that the Portsmouth Zoning Board of Adjustment deny Appellants' Motion for Rehearing.

Respectfully submitted,

Stone Creek Realty, LLC's

By its counsel,

Dated: December 12, 2022

By /s/ Michael D. Ramsdell

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CERTIFICATE OF SERVICE

On December 12, 2022, this Objection to Appellants' Second Motion for Rehearing was forwarded via email and first-class mail to City Principal Planner Peter Stith, City Staff Attorney Trevor P. McCourt and Duncan J. MacCallum, Esq.

By: /s/ Michael D. Ramsdell
Michael D. Ramsdell

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[i] *Dziama v. City of Portsmouth*, 140 N.H. 542, 543-44 (1995) (citing RSA 677:2; RSA 677:3).
[ii] *Id.* at 544.
[iii] *Id.* at 545; *Shaw v. City of Manchester*, 118 N.H. 158, 160 (1978).
[iv] *Id.*
[v] *Id.* at 544-45 (quoting *Shaw*, 118 N.H. at 160 (emphasis in original).
[vi] *Dembiec v. Town of Holderness*, 167 N.H. 130, 134 (2014).
[vii] *Id.* at 135 (citing RSA 674:33).
[viii] *Id.*
[ix] *Id.*
[x] *Id.* (citing RSA 674:33, :33-a).
[xi] *Id.*