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April 30, 2018

By Hand

Ed Ramsdell, Chair
Zoning Board of Appeals
City of Newburyport
City Hall
60 Pleasant Street
Newburyport, Massachusetts 01950

Re: Port Valley LLC, ("Port Valley") 10 Ashland Street, No. 2018-008

Dear Chair and Members of the Board;

Reference is made to the above captioned matter and the April 10th meeting of the Board. I am writing to address two matters that arose during that meeting. As you will recall, Port Valley's application was continued from April 10, 2018 to May 8, 2018 at our request because only four members of the Board were present. In allowing that continuance however, the suggestion was made that the matter may not be continued again even if the full board is again not present to hear the application at that time. Also, at the April 10, 2018 meeting another application substantially similar to Port Valley's application was heard and granted. I am writing therefore to address both Port Valley's right to be heard by the full, five-member Board and to address whether the Board should treat its decision in the 31 Johnson Street Development, LLC, No. 2018-013, matter as an important precedent as to Port Valley's application.

As discussed below, we respectfully submit that Port Valley has a right to be heard by the full, five-member Board. We also submit that Port Valley's application is substantially similar to the 31 Johnson Street Development, LLC application which the Board heard and granted on April 10, 2018. Accordingly, we respectfully urge this Board to ultimately grant my client's application, not only on its own merits, but for the additional reason that a board has a duty to treat similar applications similarly.

Port Valley has a right to be heard by the full, five-member Board.

As you know, the general rule for a collective body is that a majority of that body constitutes a quorum and a majority of the quorum may act. Clark v. City Council of Waltham, 328 Mass. 40 (1951) (in the absence of a contrary statutory provision, a simple majority of a collective body is empowered to act for that body). Generally, therefore, a public hearing will satisfy the general requirement that a governmental body act after notice and hearing when a hearing is held by a quorum of the governmental body.

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However, as you also know, this general rule, does *not* apply to zoning relief under the Massachusetts Zoning Act, G.L. c. 40A. The Zoning Act contains explicit, statutory provisions superseding the general rule. See G.L. c. 40A, §§ 9, 9A & 15; see also Real Properties, Inc. v. Board of Appeals of Boston, 311 Mass. 430 (1942). As in this case four affirmative votes are required to grant relief, it is a routine and common practice that if there are only four members present, a board will invite an applicant to choose between continuing the hearing or electing to proceed with only four members. The question therefore is whether the Board can lawfully require an applicant to proceed, over an applicant's objection, with only four members or whether an applicant has a right to be heard by the full Board.

An applicant has a right to be heard by the full Board. As a preliminary matter, a Zoning Board acting in the case of a special permit application acts in a quasi-judicial capacity because an application for a special permit directly affects the rights of an applicant. Milton Commons Assoc. v. Board of Appeals of Milton, 14 Mass. App. Ct. 111, 114 (1982). Accordingly, an applicant has a substantial right to certain process. While a board may have an interest in advancing its docket and recognizing the concerns of the public, those interests do not supersede a property owner's rights.

In this case, 40A, § 9 requires that a "special permit issued by a special permit granting authority shall require a two-thirds vote of boards with more than five members, a vote of at least four members of a five member board, and a unanimous vote of a three member board." The statute does not contemplate a unanimous vote of the remaining four members of a five-member board with a vacancy or absence. Compare Gamache v. Acushnet, 14 Mass. App. Ct. 215 (1982) (a temporary vacancy on a board does not transform a five-member board to a four member board). The vote of a five-member board need not be unanimous. The statute explicitly allows an application to succeed even if one vote is against it. The vote therefore must by necessity be a vote of all five members.

This is further illustrated by the fact that alternate members are required to be designated members of the five-member board in the absence of a regular member. If only four members constituted a lawful quorum to act, the statutory requirement of alternate members would be superfluous. In other words, all members must have an opportunity to be present and take part in a decision of a board even though action by a less than the full membership is fully adequate. Reilly v. Board of Selectmen of Framingham, 345 Mass. 363 (1963). The Supreme Judicial Court considered this particular issue in Real Properties, Inc., 311 Mass. at 435-436 and reasoned:

[The statute] provides for a board of appeal of five persons. The obvious purpose of other provisions of this section is to preclude the application of the principle that a 'majority of a board is a quorum and a majority of the quorum can act.' The mandatory statutory requirement that every 'decision of the board shall require the assent of at least three members' precludes decision by a majority of a quorum that consists of less than five members. This requirement, however, of itself, does not fix the quorum of the board for the purpose of making decisions at more than three members, the ordinary quorum of a board of five members. But the further provision of the section, 'No member shall act in any case in which he is interested, and in case any member is so disqualified, or is absent from illness or other cause, the remaining members shall designate a substitute,' shows a legislative intention that a quorum of the board for the purpose of making decisions shall consist of five persons, either appointed members or substitutes duly designated as such. The obvious purpose of this provision is to insure that five persons shall participate in every case before the board, but that the disqualification or absence of an appointed member shall not render the board incapable of hearing and considering a case within its jurisdiction. The natural construction of the provision, therefore, is that, when a tribunal of five persons has been duly constituted for a particular case, a

substitute designated in the manner prescribed by the statute shall be, in truth, a 'substitute' for the appointed member for whom he is substituted with all the powers with respect to the particular case that the appointed member, if present and not disqualified, would have had, including the power to vote with the right to have his vote counted.

See also Sesnovich v. Board of Appeals of Boston, 313 Mass. 393 (1943).

The Rules and Regulations of this Board mirror the principle articulated in Real Properties, Inc. Those rules provide that “[t]he Zoning Board of Appeals shall consist of five regular and two associate members appointed by the Mayor,” Section 1.1, “[a]ssociate members shall sit on the Board in case of the absence, inability to act, or apparent conflict of interest on the part of any Board member, or as part of a regularly scheduled alternating rotation among the regular and/or associate members. Associate members shall attend all meetings regardless of rotation,” Section 1.6, “[a]ssociate members may participate in all deliberations. However, they may not make motions or vote on any application before the Board when five (5) regular members are in attendance,” Section 1.6, “[t]he concurring vote of four members of the Board shall be necessary to reverse any order or decision of any administrative official under Chapter 40A MGLA or to affect any Variance or Special Permit. The Chair shall make known to the applicant when the minimum requirement of members are present for a hearing and he/she shall give the applicant the option of proceeding with the hearing or continuing.” Section 5.2.

We therefore respectfully submit that Port Valley has a right to be heard by the full, five-member Board, if it so chooses.

This Board should treat its decision in the 31 Johnson Street Development, LLC matter as controlling precedent as to Port Valley LLC's application.

Generally speaking, zoning applications must be addressed individually and not in comparison to other applications. See Reynolds v. Board of Appeals of Springfield, 335 Mass. 464, 469–470 (1957); Spalke v. Board of Appeals of Plymouth, 7 Mass. App. Ct. 683, 686–687 (1979). However, inconsistency among a zoning board's decisions may be an indicator of discrimination or arbitrary decision-making, and in particular a Court can find that a board acted arbitrarily or abused its discretion by treating substantially similar plans differently. See Lakeside Builders, Inc. v. Planning Bd. of Franklin, 56 Mass. App. Ct. 842, 847–848 (2002) (citing Musto v. Planning Bd. of Medfield, 54 Mass. App. Ct. 831, 837 (2002)) (planning board in Musto acted arbitrarily because, among other reasons, the planning board had just approved a substantially similar waiver). In Colangelo v. Board of Appeals of Lexington, 407 Mass. 242 (1990) the Supreme Judicial Court determined that a zoning board had abused its discretion because, around the same time it had denied the plaintiff's variance request, it had approved similar variances for other nearby sites, within only one-half mile or less of the plaintiff's site, that had greater impacts on traffic than the plaintiff's site would have had. The Court in that case determined that for the Board “to base its exercise of discretion on an imperceptible increase in traffic congestion which had existed for years, while approving, immediately before and after denying the plaintiffs' request, projects which added significantly more traffic is inexplicable and, therefore, an abuse of discretion.” Id. at 246. Prior board decisions are, therefore, competent evidence to show what conclusions were reached on those occasions and the reasons that were formally stated for those conclusions. Building Inspector of Chatham v. Kendrick, 17 Mass. App. Ct. 928, 931 (1983). This can be particularly important where a Court finds that the facts relevant to the decisions being examined are identical but the decisions repeatedly come out one way (affirmative grants) when the boards apply permissible criteria, and only come out the other (a denial) when the board considers an impermissible factor. See Scalli v. Wiberg, 2009 WL 1554397 at *6 (Mass. Land Court, June 4, 2009) (finding Board's decision to be arbitrary and capricious when decision on identical facts differed only due to reasons not cognizable under the Zoning Act).

Here, Port Valley's application and 31 Johnson Street Development, LLC's application, which was granted by this Board on April 10, 2018, are in many respects similar. However, like the property in Coangelo the 10 Ashland Street proposal will have a significantly lower impact in several respects than the 31 Johnson Street proposal. See 407 Mass. at 246. The 31 Johnson Street Property is arguably a less appropriate location for a 2-family structure than 10 Ashland Street because of the predominantly single-family nature of the surrounding area. All properties across the street, all abutters, and all abutters to abutters of 31 Johnson Street are single-family houses—contrast this with 10 Ashland Street which abuts only undeveloped property and is across the street on Ashland Court from a 2-family use and a multifamily use, and across Ashland Street from 2 Units on one lot. Furthermore, the 31 Johnson Street Property involves a much greater increase in square footage of living space than 10 Ashland Street. 31 Johnson Street involves a complete teardown of the existing house and the construction of a much larger structure, whereas there will be limited changes to the exterior of the structure now standing on 10 Ashland Street because the work involves only interior renovations. Ashland Street and Ashland Court together have a mix of single-family, 2-family, multifamily, rental, and commercial properties in the immediately surrounding area. Johnson Street has a few 2-family structures but otherwise has only single-family houses. Both projects will have a limited impact on the City sewer and water system, but the impact by 31 Johnson Street is three times greater than the impact of 10 Ashland Street.

Putting aside the differences between 31 Johnson Street and 10 Ashland street, all of which demonstrate that the proposal for 10 Ashland Street is less impactful on surrounding properties, the projects are substantially similar. Both properties are in the R-2 Zoning District. Both projects involve a change of use from single-family to 2-family use. Both projects involve a moderate increase in traffic impacts of approximately 10 vehicle trips per day. Both projects will increase the diversity of housing stock in Newburyport. Both projects are across the street from single-family structures, but 10 Ashland Street is also across the street from a multifamily structure and a 2-family structure. Both properties include adequate lot area but have non-conforming front yard setbacks.

In every way the proposal for 10 Ashland Street either has a substantially similar or lower impact on the City and the surrounding area than 31 Johnson Street. We therefore respectfully urge this Board to ultimately grant Port Valley's application, not only on its own merits, but for the additional reason that a board has a duty to treat similar applications similarly.

Kindly confirm the above at your earliest convenience. Should you have any questions or concerns, please contact me at (978) 463-7700.

Respectfully submitted
Port Valley LLC
By Its Attorney,



Lisa L. Mead
Attachment
cc: Client

31 Johnson Street	10 Ashland Street
R2 Zoning District	R2 Zoning District
Special Permit for Use Bylaw V(D) - Use 102	Special Permit for Use Bylaw V(D) - Use 102
Essential and/or Desirable to Public Convenience or Welfare? - Master Plan encourages a diverse mix of housing.	Essential and/or Desirable to Public Convenience or Welfare? - Master Plan encourages a diverse mix of housing.
Traffic Congestion? - Additional 10 Trips Per Day	Traffic Congestion? - Additional 10 Trips Per Day
Overload of Water and Sewer? - <u>No</u> Data provided. - Addition of Four Bedrooms [This will be <u>440 gpd.</u>] - <u>Statement during hearing:</u> <i>"Only adding one unit, the City can handle that"</i>	Overload of Water and Sewer? - Data Provided. Each Bedroom Adds Approximately 110 gpd. - Addition of One Bedroom Adds <u>110 gpd.</u>
No Special Regulations in Ordinance for 2-Family Use	No Special Regulations in Ordinance for 2-Family Use
Impairment to Integrity or Character of District or Adjoining Districts? - All Abutters, Abutters to Abutters, and Parcels Across the Street are Single-Family Homes. - Some 2-Family Homes on One Side of Johnson Street; One Side of Johnson Street is <u>Only</u> Single-Family Homes. - No Multifamily or Apartment Buildings on Johnson Street; No Commercial on Johnson Street. - <u>Statements during hearing:</u> <i>"Eclectic mix of single and 2 family up and down the street"</i> <i>"Once you get up to 25 Johnson it is 2 Family homes."</i>	Impairment to Integrity or Character of District or Adjoining Districts? - Abuts Only Undeveloped Parcels. - One Abutter to Abutter Is Commercial Use, Other Is A Single-Family Home. - Across Ashland Court from 10 Ashland: 2-Family Use and Multifamily Use. - Across Ashland Street: Single-Family Homes. - Several Multifamily and 2-Family Structures Nearby; Commercial Use Nearby; Five Unit Apartment Building Nearby.
No Harm to Health or Welfare	No Harm to Health or Welfare
Use Is In Harmony With Purpose And Intent Of Ordinance	Use Is In Harmony With Purpose And Intent Of Ordinance
Use Will Emit Noxious, Injurious, Or Objectionable Noise, Vibration, Substance, Or Pollution? - Complete Teardown and Reconstruction.	Use Will Emit Noxious, Injurious, Or Objectionable Noise, Vibration, Substance, Or Pollution? - Construction Will Be Limited to Interior Renovations
Present Gross Square Footage - 3,604 sq. ft. Final Gross Square Footage - 6,637 sq. ft.	Present Gross Square Footage - 6,786 sq. ft. Final Gross Square Footage - 6,786 sq. ft.
Present Livable Square Footage - 1,808 sq. ft. Final Livable Square Footage - 5,309 sq. ft.	Present Livable Square Footage - 3,600 sq. ft. Final Livable Square Footage - 3,885 sq. ft.