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PRESENT: Pelczar, Vice-Chairman, Flanders, Thorpe, Clark, Goodheart, Edney, Code Enforcement Officer, Tivnan, Clerk

Alternate: Reichlen

Thorpe moved, Clark seconded, THAT WE APPROVE THE MINUTES OF April 14, 2011. Voted unanimously.

PUBLIC HEARING

2946: HIDDEN GREEN PROPERTIES: An appeal for a VARIANCE (ARTICLE V, SECTION D-5B) to allow a maximum height of 48', 45' allowed, Tax Map S23, Lot 26, located at 50 Reservoir Road in the Business and Industry District.

Neil Pankhurst- This property is a long distance from the road and can't be seen from neighboring properties or from the road. The height increase would not be noticeable. A portion of the building, in comparison to the trees surrounding it, would not be above the tree line. This will be a theater in the woods as was Annalee's factory in the woods. As the public approaches the theater, they will not see a building more than 45'. They will see a building 40' tall. We have a basement which is about 8' that is only accessible from the rear of the building. Theaters are complex buildings. They have needs and desires that can't necessarily be accommodated like most other buildings. There are buildings in this town that are taller than 45'. To accommodate what we need inside the building, the 45' did not fit. We would have people bumping their heads on steel girders, or head clearance not to code. We are looking at three different options but none of them go beyond the 3' higher than what the ordinance allows. We are waiting to see which one is structurally the best. Sonya Misiaszek – The main reason we are asking for the height increase is the basement is level, the main theater space has a sloped tier, and we have accommodated for balconies on the second level. The reasons for balconies are they absorb sound and they create some excitement in the space having people in the round rather than everyone being at the front of the auditorium space. It's important for it to feel like a theater and not an auditorium. Beyond that we also need a catwalk. All these things have elevated the building. (Presented to the Board pictures of the building at 45' and at 48') We need to not have columns within this structure. People need to move around quickly. The columns would have a negative impact. We are asking for an extra 3' so people can maneuver the catwalks, two rows for balcony seating, and no columns. We wanted to keep the Annalee gambrel structure and remove the structure to the side that is too small to house the stage and auditorium space. Thorpe – Have you had this plan reviewed by the Fire Department? Sonya – No, we did not. We did have the Fire Department out to the site early on in the planning process. As long as we kept access along the front and side of the building that was sufficient. Clark – What about cupola's? Edney – They don't count. Clark – Did you consider lowering the whole thing? Sonya - We did. We are trying to work with the existing elevations of the gambrel barn structure that exists on the site and has established floor levels. The basement is also set at that level. Pankhurst – The basement needs to be accessible to the outside. If we lowered it,

we could put stairs in, but functionally that becomes trickier to work around. We did look at this. Hearing closed at 7:20PM.

DELIBERATIONS

2946: HIDDEN GREEN PROPERTIES:

Clark – Let’s go thru the 5 criteria.

1. Granting the variance would not diminish the values of surrounding properties because: Clark – Looking at this one it doesn’t look to me as though it is going to diminish the values of surrounding properties for the reasons they stated. All agreed.

2. Granting the variance would not be contrary to the public interest because: The Board all agreed it would not. Thorpe – Putting in an extra pair of stairs makes it less accessible for the handicap. This is in the public interest. Flanders - Even if you bring it down, you are still going to be 48’ from the ground.

3. Granting the variance would do substantial justice because: Clark – I don’t see a problem with this. The Board all agreed.

4. Granting the variance would observe the spirit of the ordinance because: Clark – This building is going to be huge. They have done a good job in making the building look good. I don’t see a problem. Pelczar – It’s nice they are trying to incorporate some of the building that is already there. Goodheart- By the nature of theaters, they tend to be huge. Clark – I think this is a kind of facility the town and the ordinance would like to have. All agreed.

5. Literal enforcement of the provisions of the ordinance would result in unnecessary hardship as the property is unique. Clark – There is slope on this property that makes it difficult. They meet this criteria. Board all agreed.

Clark moved, Flanders seconded, IN CASE # 2946, HIDDEN GREEN PROPERTIES, I MOVE THE APPEAL FOR A VARIANCE (ARTICLE V, SECTION D-5B) TO ALLOW A MAXIMUM HEIGHT OF 48’, 45’ ALLOWED, TAX MAP S23, LOT 26, LOCATED AT 50 RESERVOIR ROAD IN THE BUSINESS AND INDUSTRY DISTRICT BE GRANTED, AS IT MEETS THE FIVE CRITERIA. Voted 5-0 in favor.

Pelczar – There is a 30 day appeal period.

PUBLIC HEARING -REHEARING’S

Meredith Board of Selectmen’s Motion for Rehearing Case# 2943: RIGHT ANGLE ENGINEERING FOR FOUNDRY AVENUE REALTY TRUST: An appeal for a VARIANCE (ARTICLE V-D-3A) to allow warehousing, light manufacturing, building trade or repair shop and/or equipment and truck repair facility in the Residential District, Tax Map S23, Lot. No. 46, located on Foundry Ave. in the Residential District.

Laura Spector (Mitchell Municipal Group) – With me tonight is Phil Warren and two of the Selectmen, if you have any questions I may not be able to answer. The burden is on the applicant to prove they have met all five variance criteria. In the Selectmen's opinion, it cannot be done in this case. We ask you to deny the variance. Without knowing exactly what the proposed use is, there is no way the Board can meaningfully evaluate the criteria for a variance. For this reason alone, the Board can and should deny the variance application. Essentially, they are asking the Zoning Board to spot zone this portion of its property as B/I rather than Residential, so they can do whatever they wish in the limited categories they have provided. I will run through each of the criteria so you will understand the Selectmen's position on each one of them. The first two are the variance may not be contrary to the public Interest or contrary to the spirit of the ordinance. The Supreme Court has held that these two criteria are related, so I will speak of them together. To be contrary to the public interest and the spirit of the ordinance, the variance must unduly, and in a marked degree, conflict with the ordinance, such that it violates the ordinance's basic zoning objectives. In this case, the variance would in fact do just that. Section V(C) of the zoning ordinance was amended in 2009 to require properties that are divided by zoning district boundaries develop the various portions of the property in accordance with their respective zoning districts. In this case, that would require the portion of the property in the B/I District to be developed as a B/I property and a portion of the property in the Residential District be developed as a residential property. This language changed from the prior language, which allowed properties to develop in accordance with the majority zoning. In this case, the majority of the property is zoned Residential. The purpose of this zoning ordinance was to prevent what is exactly being done here. It was to prevent zoning creep. The purpose of the amendment was not to permit this Board to allow development of property as it saw fit. The purpose was to require the property be developed in accordance with respective zoning districts unless the variance criteria are met. Granting this variance violates that section of your zoning ordinance. It also violates the section of the ordinance that talks about the purpose of the B/I District. The purpose of the B/I District is to provide a place, separate from residential and commercial uses, which can be developed with light industrial uses. The portion of the property which is zoned Residential (please see attached plan) is bordered on two sides by properties developed with residential uses. Allowing an industrial use in this Residential District is contrary to the public interest and the spirit of this ordinance provision that residential and industrial uses be separate. There was some testimony how this property is accessed through the B/I District so therefore it should be developed as a B/I property. That access issue is an initial matter self created. When these properties were annexed, they could have reserved access to this portion of the property through the residential property, notwithstanding the wetland. They could have got a wetland crossing to deal with that. It is irrelevant to the use of the property itself, and does not in any way render the property unsuitable for residential development. Foundry Ave. is a dead end, low volume, and low speed street well suited for accessing residential properties, particularly on the weekends; which is when children would be out playing and when the industrial businesses wouldn't be open. The third section of the zoning ordinance this conflicts with is the property at issue is within the Lake Waukegan Watershed Overlay District, the purpose of which is to protect and prevent the degradation of Lake Waukegan, the town's sole drinking water supply. The town's Water and Sewer Superintendent recommended against granting the variance because it not only increases the level of risk to the safety of the water supply but also establishes a hazardous precedent to the future preservation of our water source. This is especially true

given the proposed uses of truck or other repair shop, which is likely to involve toxic fluids which have the potential to spill. There was some discussion about how the Planning Board regulates through a storm water management plan. That is true, but compliance with that plan is solely dependent on the applicant and on the town's ability to enforce it. Simply having a plan doesn't protect your water supply. Moreover, Article XIV of the zoning ordinance regarding erosion and sediment control applies to all development, including residential development. There is no reasonable basis for a conclusion that an industrial use will be less harmful to Lake Waukegan than a permitted residential use. The Board may also consider the cumulative impact of granting this variance. What if everyone in the neighborhood came in for a similar variance? What would that impact be? In this case, if you look at your zoning map, there are many properties that border zoning districts. Three of the abutters that signed letters of support could potentially avail themselves of a variance if they were to annex residential zoned property to their industrial zoned property. So for all of those reasons, this variance request is contrary to the public interest and to the spirit of the ordinance. The next criteria are granting the variance will not diminish surrounding property values. There was no evidence that granting the variance would not diminish surrounding property values. Instead, it was suggested that there is a possibility that it would increase the values of the surrounding B/I District properties. That is not the criteria you should be looking at. You should consider what will granting the variance do to the values of the residentially zoned properties that this industrial use is going to abut up against. I think common sense is it will decrease those property values. Substantial justice is not done by the granting of this variance. In determining whether substantial justice is done by the granting of a variance, you look at whether the proposed use is consistent with the present uses in the neighborhood, unless the zoning ordinance was adopted specifically to alter the types of uses in the neighborhood. Section V(C) of the ordinance was adopted to curtail the practice of extending zoning boundaries by annexing adjoining parcels. Yet, this is exactly what Foundry is attempting to do here. Substantial justice is not done simply because the applicant would be allowed to develop its property as it chooses. That is not the test. Finally, we come to the unnecessary hardship criteria. When determining unnecessary hardship, it is whether there is anything unique about this property. There is nothing unique about this property. In order to demonstrate a property is unique, the landowner must show that the hardship is a result of specific conditions of this property and not the area in general and cannot satisfy this burden by demonstrating that the property is uniquely suited for the proposed use. Many properties in town are divided by zoning districts or could annex dissimilarly zoned property. Many residential properties in Meredith are accessed through property in other zones. That fact alone demonstrates the property is not unique. Next you look at whether there is a fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property. Is the restriction on the property necessary in order to give full effect to the purpose of the ordinance, or can relief be granted without frustrating this purpose? Again, the restriction here is necessary to give full effect to at least three purposes of the zoning ordinance: protecting Lake Waukegan, separating industrial and residential uses, and preventing zoning creep. The applicant has to show their proposed use is a reasonable one. This gets us back to the point I made in the very beginning. We don't know what the proposed use is. It is not reasonable to allow an industrial use in a Residential District. It is also unreasonable to allow the uses of building trade or repair shop and equipment and truck repair facility on the property because those uses are not even permitted as of right in the B/I District. They are permitted only by

Special Exception. Finally, any hardship on this property was self created. The applicant's annexed this residentially zoned property to their industrial zoned property. They knew they couldn't use it without a variance. For all of those reasons, the Selectmen ask that you deny the requested variance.

Paula Wanzer, J. Duncan McNeish and Chuck Braxton Motion for a Rehearing Case #2943 RIGHT ANGLE ENGINEERING FOR FOUNDRY AVENUE REALTY TRUST: An appeal for a VARIANCE (ARTICLE V -D-3A) to allow warehousing, light manufacturing, building trade or repair shop and/or equipment and truck repair facility in the Residential District, Tax Map S23, Lot. No.46, located on Foundry Ave. in the Residential District.

Chuck Braxton – (Representing, Paula Wanzer, J. Duncan McNeish and myself) - You have the documents that we provided regarding all of the points on whether or not the variance meet the criteria. I would like to focus on three or four areas in our notes. We feel these are the most important factors. First one is: The proposed variance does not adequately safeguard Lake Waukegan. Attorney Spector addressed the statutory reasons for that. This has been in the Master Plan since 2002 for the town. We feel the variance increases the likelihood of negative impacts and greater risks to the quality of the Meredith drinking water supply. Again, this is a critical matter for the town's economic growth and future. Superintendent of Water and Sewer was against this because of the concern of setting a precedent. We feel that wasn't given sufficient weight in their deliberations. We feel zoning creep is important and Attorney Spector has addressed this adequately. Finally, granting a variance allows an extension of a use that is not consistent with the Residential District or the Waukegan Overlay. For those reasons we request that the variance be denied.

Erin Darrow – (Representing Foundry Avenue Realty Trust) - We are requesting a variance from (ARTICLE V -D-3A) to permit site development on the property that is located within the Residential District for warehousing, building trade or repair shop and/or equipment and truck repair. These uses are all either permitted or allowed by Special Exception in the B/I District. I will present the information again for the rehearing. Carl Johnson will follow my discussion with the technical aspects. Ed Philpot will provide a legal response to the appeals filed by the Board of Selectmen and Wanzer et al. I feel this application meets the five criteria for a use variance for allowing the proposed uses on the subject property as the highest and best use of the property and in conformance with the zoning ordinance. The subject property contains land in the Residential and the B/I Districts. The street access is located off of Foundry Ave. through the B/I District. A site plan rendering has been provided that illustrates the site property and the proposed improvements. This application is very specific in regards to proposed uses. It is not totally open ended. There has been a lot of discussion regarding water quality and sediment and erosion control. We are sensitive to these issues. The purpose of a variance is to take a look at the uses and the five criteria. There are separate reviews that are intended to address these issues on a separate matter. If the variance is granted, we will have to go through site plan review and for a Special Exception for potential wetland impacts with the buffer. The storm water quality and the sediment erosion control will be carefully reviewed. The Planning Board has the right to hire a third party engineer

at the applicant's expense for further review. We are not proposing any sort of storage of toxic chemicals. We are just proposing uses. Item 1. Granting the variance would not diminish the values of surrounding properties. There exists a strong possibility that the values of surrounding properties would increase with the further development of this property in a manner that is consistent with the B/I District. The building will be new construction and will have a higher value than the undeveloped land. If we were to construct a single family residence or a duplex, it is highly likely the value of this property would be less than if it is developed for the variance for what we are requesting. This would be an enhancement to the well established B/I neighborhood that is on Foundry Ave. There are only businesses and industrial uses there. 2. Granting the variance would not be contrary to the public interest because the future development we are proposing we feel will be the best use of the land. The proposed uses for the variance application are consistent with the character of the neighborhood. The most likely use on this site if the variance is not granted would be residential. Residential development would most likely be contrary to the public interest as it would mix residential land uses in an industrial area. The zoning ordinance addresses in the B/I portion that there is a need to protect the B/I District from creep from other land uses. School children play outside during the week between 3:00PM and 5:00 PM. Those are often the most highly traffic times in a commercial neighborhood. There are five letters that were submitted in support of this application. Four of those letters are from abutters. One of the abutters is in the Residential District. Three of the four abutters are also business owners in the neighborhood. 3. Granting the variance would do substantial justice because it would be a benefit to both the public and the applicant. The proposed variance will allow for the highest and best use of this site by preventing the mix of non-complimentary land uses in the neighborhood and abutting property values will not be diminished. 4. Granting the variance would observe the spirit of the ordinance because the proposed uses for this site will allow for land development patterns consistent with the spirit of the zoning ordinance. It will prevent a small pocket of residential development from occurring in a residential neighborhood. As I mentioned before, to quote Article V, Section D-5, paragraph 4 of the Meredith Zoning Ordinance states. "It is intended that the separation of industrial uses from residential and commercial uses will promote a more desirable land use pattern, protects from the influences of other land uses, provide suitable needs for industrial location and expansion, promote stability of industrial and related development and strengthen and protect the Town's net tax base". The proposed variance would result in a separation of industrial uses from residential uses. If the variance is not granted than residential development could likely occur on the site and influence the industrial Foundry Ave. neighborhood by the mixing of these non-complimentary land uses. 5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

A. Owing to special conditions of the property that distinguish it from other properties in the area:

1. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
2. The proposed use is a reasonable use.

The special condition of this site property is it contains an area within the Residential District that is accessible only through a completely industrial neighborhood in the B/I District. The general public purpose of the ordinance is to promote safe and efficient land

use patterns and prevent the mixing of non-complimentary land uses. This variance will prevent a mixing of spot residential development in an industrial neighborhood. The use is reasonable in the location proposed. The uses we are asking for are all permitted or allowed by Special Exception in the B/I District. Yes, this property has a residential zone that is the result of a subdivision and annexation created by the applicant. We are being told that this is a self made situation. If someone purchases property in a zone and requests a variance, that could also be interpreted as a self-made situation. We were aware when the annexation occurred, a variance would be required. A variance is allowed for this very reason. The alternative approach would most likely have a greater impact on water resources and wetlands that we are avoiding with this variance. If there is residential development on this site and the propose area is less than 100,000sf, and the disturbed area is less than 25,000sf, yes, there would be town oversight, however; there is not a requirement for a sediment and erosion plan. What we are proposing will require one and a detailed review by the Planning Board. We are not proposing the storage of toxic chemicals or fuel. We are proposing the consideration of alternate uses that require a variance in the Residential District. Carl Johnson – (Advanced Land Surveying) - A variance use does not require you to go to the Planning Board first. Had this been a Special Exception, we would have been required to go to the Planning Board first. The Planning Board would be looking at detailed site information at that time. With regards to the comments of the change in the zoning ordinance which formerly allowed the Board to possibly consider the larger portion of the zone to guide the zoning. The operative word in that former zoning ordinance was “may”. It did not say “shall”. One of the intents to the change in the zoning ordinance was to curtail the uses of one portion of a piece of property that was zoned in one manner with expanding into a zone of another. That intent was to no longer have that operative word “may” and prevent boards from one time considering one thing and sometimes consider another. It could no longer be handled in a “may” situation. It would require you to go before the Zoning Board for a variance. Clearly that type of change in a regulation can never deny an applicants right to appear before the Zoning Board for a variance. Prior to that change, no residential development was allowed in the B/I District. If the piece of property is bisected by a zoning line and the smaller piece of the land happened to be in the B/I District, it would be the owner’s option to develop that land with a residential unit. It would not have to come before the Zoning Board. That’s called “creep” That’s creeping residential use into the B/I District. In terms of the Waukegan Overlay District, it involves land that goes all the way to Tracy Way. There is only one restriction in the Overlay District. It does not restrict the amount of disturbance you can have, it doesn’t talk about the proximity of any type of alteration of terrain to the lake; it talks about one thing. It says properties within the Waukegan Overlay District shall have a minimum net density of two acres. You could construct a shopping center on the shores of Lake Waukegan and it would not have anything to do with the Waukegan Overlay District because it would not involve the subdivision of the property into residential units of less than 2 acres. The project we are proposing is not a subdivision. When the boundary line adjustment was done we had to make sure the remaining lot that was the result of annexing the property to Mr.Fairbrother’s property was a minimum of 2 acres. If there was a duplex proposed on this property with associated out buildings and garages and the total impact was less than 25,000 sf. and the roadway was less than 500’ in length, it would not require a detailed sediment and erosion control plan. There would be no engineering plan or review at the Planning Board level, the Zoning Board level and no third party review by a hired town engineer. The land disturbance on the proposed development would probably be equal to or less than a potential residential development. So in terms of the alteration of

terrain, there would probably be very little difference. We are going to try and locate this property as close to the existing commercial development as we can and leave as much of a natural woodland buffer as possible. There was concern raised at the last meeting regarding the major drainage that comes down Paula Wanzer's property. There is a major brook that comes down through her property but it is not the drainage coming off this property that is that channel. There is a small drainage that comes from the wetland complex located on the Price property and the property in question. This would be addressed in the erosion control plan. Clark – You keep making the point that because you haven't been to the Planning Board, you somehow couldn't do all this study. Why, does the fact that you haven't been to the Planning Board, prevent you from doing a site plan and analysis and stuff like that. Johnson – The economy of developing a detailed site plan without the benefit of a granted variance prevents that.

Ed Philpot (Attorney for Foundry Ave. Realty Trust) – (Passed to the Board separate responses to the two rehearing requests.) There is more than one side to every story and issue. When you hear the Selectmen's presentation we have somehow violated the law of zoning by not telling you what the exact uses are going to be. That is not the case. The application sufficiently says, we will use the property as is either permitted in the B/I District or as may be permitted if we are required to get a Special Exception. The descriptive use is simply consistent with that use which is allowed in the B/I District. There is nothing here that is asking you to rezone anything. Property owners have a right to ask the Zoning Board to grant a variance with regard to a use on their property. The issue with regard to the voters approving Section V-D has nothing to do with anyone's right to ask for a variance. What this provision does is it changes a presumption. The original presumption was if you joined a larger piece of property to a smaller piece, you could more easily utilize the property consistent with the larger property use. We have to remember there is a question of perspective here because you have to look at it not only from the perspective of the residential property but also from the perspective of the B/I use. If you look at where this property is located, it is more physically connected with the B/I District and more practically connected because to have the reverse creep back through the B/I District is detrimental to the B/I use. Your zoning ordinance encourages this type of zoning. There was a comment about granting a variance violates the zoning ordinance. That is not a possibility. A variance is a matter of right. You can't violate the zoning ordinance by asking for a variance. Access being self created. The fact the purchaser of the property hypothetically attempted to reserve an easement back to Waukegan Street is problematic in two regards. First of all, if the intention was to have a B/I use, it doesn't make sense to have the access to this portion of the property go back to Waukegan Street. Mr. Fairbrothers has been honest and up front about what he was going to do with this property from day one. He has also been honest and straight forward about his concerns with the watershed issues that everyone is rightfully concerned about. The Selectmen say on one hand that they are concerned with the watershed issues and they say the solution to that problem is to seek a driveway through wetlands that may or may not be possible with regards to this property. This would have a much higher impact and a more difficult process than what is being proposed here. If this variance is upheld, the water issues are going to be addressed. They are going to have to be addressed. There would be much less scrutiny if this is turned into a series of duplexes. I have addressed a lot of these issues in the written material that I have given to you and I ask that you incorporate those in the record of this proceeding rather than I go through each and every one of those. After the last hearing

and based on the presentation of the last hearing , this board made a decision and that decision was well founded and should be upheld. The question we would like you to focus on is not if something is going to be built here but the question is what is going to be built here. Clark – You said the applicant admitted from the get go he intended to use this for a B/I purpose. If I go to the Planning Board minutes for the boundary line adjustment I will see in there the intended use of this land was to be a B/I use. Philpot – I can't answer that but I believe so. Erin Darrow – I also was not at the hearing but I do know that Foundry Ave. Realty Trust was advised if we wanted to continue moving forward with development consistent with the B/I District, a variance would be required. Clark – I can chase down the minutes of that meeting. I'm also not sure what difference it makes. You said there was no purposed storage of dangerous chemicals on the property. So no solvents or oils will be stored? Darrow – This application itself is not including the storage of any sort of toxic chemicals. Clark – Would you be willing to have something written that said they can't use any petroleum products outside of a vehicle or something like that? Darrow – I was responding more to Ms. Spector's presentation which asserted that the uses we are proposing would likely include toxic and dangerous chemicals. There could be toxic and dangerous chemicals under kitchen sinks. We don't intend to have fuel storage on site beyond what would be in vehicles. Clark – I'm worried about solvents. Darrow- Any sort of chemical use would be consistent with all environmental regulations. Dave deSousa - I am a grandfather. I would rather have light manufacturing than kids in that area. On those grounds I am in favor of granting this variance. Another reason is, tonight I have heard we have a process in this town that the guy will have to jump through hoops to make sure the water is protected. Laura Spector – You have to apply the facts to the law. The fact is you still don't know what the proposed use is going to be. You would never grant a Special Exception if someone came to you and said, I want a Special Exception to do anyone of the uses that are permitted by Special Exception, in this zone. You couldn't evaluate the Special Exception criteria based on an unknown use. Likewise, you can't evaluate the variance criteria without knowing the use. You have no evidence that granting the variance will not diminish surrounding property values. The burden is on the applicant to provide you with that evidence. Highest and best use of this property is not an issue for you to consider. The question is, what will the development of this property do to the values of surrounding properties? You have to ask if the applicant has met the variance criteria and they have not. Reichlen – You keep mentioning Special Exception. This is a variance request. Spector- It is. Reichlen – And you mention a lack of a plan. The variance is required before they go to the Planning Board and you keep suggesting they need to have the plan to come here. Spector – No I'm sorry if you misunderstood me. That is not what I was intending to suggest. What I was suggesting is they need to have a use. They are telling you we are either going to have a warehouse, truck repair, or one of the other uses. I understand they don't have a site plan. Reichlen – I believe I heard they are asking for a use as an industrial property like it is bordering. Right? They are not yet asking for a Special Exception nor are we granting one. So, they are stipulating a use. Spector- They are stipulating a category of uses. There are fifteen permitted uses in B/I District and nine uses by Special Exception. They are not saying they want them all. They want the option of using one of four of them. That's not telling what the use is going to be. That's telling you what the possible uses might be. Reichlen – Unless I am mistaken, we as a Zoning Board cannot make up a new zone saying it can only be this use. We can only say it's good for the industrial use which includes those fifteen. Spector – What you can say is this proposed use may be permitted because they have

met the criteria for a variance. What you cannot say is this property, which is zoned residential, we're going to say you can use it for any use in the B/I District because that is spot zoning and you are not permitted to do that. Reichlen – I don't see how it is spot zoning. It would be spot zoning if we said you can only use it for this one purpose because we have no use category for a specific purpose. We only have a category for industrial. I will let your counsel speak to you on this but my point is simply that without knowing what the use is going to be, there is no way you can evaluate the variance criteria. Pelczar – Bruce Reichlen is an alternate on this Zoning Board. Reichlen – Just to clarify, I am allowed to ask questions but I am not a voting member tonight. Braxton – I am a realtor with Roche Realty. I have been practicing Real Estate for seven years, both residential and commercial sites. I consulted with an appraiser about the question that keeps coming up that the applicant keeps saying this would be the highest and best use of the property. The appraiser said the standards for highest and best use are the uses to be physically possible, legally permissible without granting a variance and economically feasible. However, the proposed use, vague as it may be, is not legally permissible without the variance. So that argument from the applicant is irrelevant. Attorney Specter pointed out there was a burden of proof from the applicant that granting the variance will not diminish surrounding property values. I believe Foundry Ave. Realty Trust paid a reasonable price for two residential building lots in the location they are with industrial access. What I am particularly disturbed about and believe the Board should disregard the entire turning over the argument and saying this is residential creep. The issue is B/I creep. The five criteria were not met. I believe the variance must be overturned. Philpot- When we talk about economic impact and creep, it is important to recognize five out of eight abutting properties are in the B/I District. We are talking about the economic impact on those properties as well as any other adjacent ones. That is an important consideration here. The principle properties are in the B/I District. While no appraiser came here and said that the B/I properties would be positively impacted by the use of this property as proposed, you are permitted to use your common sense. There is no requirement for an expert to come and tell you that. I have to emphasize the application clearly states the uses will be those permitted if the variance is granted or those required by Special Exception. We are doing it the way it is supposed to be done. Clark – You indicated if the use to which the applicant puts the property is one, were the property in the B/I District, it would require a Special Exception. Philpot – No Clark – You're saying if they did, they would have to come back and apply for a Special Exception. Philpot – They have to. Clark – So what you're asking for in effect is we make this part of the B/I District.? Philpot – That's what the variance would do. Clark – You indicated you are qualified to judge real estate values and the impact of something. I didn't hear you say which properties you think would be impacted? Braxton – These are modest properties here. What Fairbrothers paid is about market value for two residential lots. Tractors trailers coming in would diminish those values. Pelczar-At this time, we have decided as a Board to review with counsel tonight's information and deliberate at our next regular scheduled meeting on June 9th.

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TOWN OF MEREDITH ZONING BOARD OF ADJUSTMENT
Application for Variance - Foundry Avenue Realty Trust

Case No. 2943

Response of Applicant to Rehearing Request
of Meredith Board of Selectmen

Introduction

On or about February 22, 2011, the applicant, Foundry Avenue Realty Trust, filed an application for a variance with respect to its property located at 22 Foundry Avenue, Meredith, New Hampshire (map S23/Lot 46). The original application contained a description of the proposed project and a supporting statement. Included in the original application were several letters from abutting owners in support of the original application (see *Application for Variance* dated February 22, 2011).

The board held a hearing on the application on March 10, 2011. At the hearing the board heard testimony on the proposed use, the basis for the request, and the supporting information. The board also heard from interested community members who both supported and opposed the granting of the variance.

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Discussion

The New Hampshire Supreme Court admonishes us that in furtherance of the finality of decisions by zoning boards, rehearings should not be lightly granted. *Griauzde v. Nashua*, 103 NH 468, 174 A.2d 432 (1961). While a person may have an automatic right to request a rehearing, the board does not have to grant it and must keep in mind that in being fair to a person (or, in this case, the Board of Selectmen), it may be unfair to those opposing the matter who will have to defend their position a second time.' This process can also be at great expense to an applicant who will often, as in this case, employ professionals to help in the application, hearing, and rehearing process.

Rehearings should not be granted unless a petitioner can demonstrate that the board committed a technical error in its original decision, or that there is new, relevant evidence which was not available at the first hearing. The reasons for granting the rehearing should be compelling ones, and the board has no right to reopen a case on the same set fo facts unless it is

'New Hampshire Office of State Planning, the Board of Adjustment in New Hampshire, A Handbook for Local Officials, at 56-57 (1997).
convinced that an injustice would otherwise be created.²

Motions for rehearing must specify every ground that is alleged as a basis for rehearing,³ and must set forth every ground upon which it is claimed that the decision or order complained of

is unlawful or unreasonable.'

The Meredith selectmen argue that the board should rehear this case because the board erred, as a matter of law, in granting the variance (rehearing petition @113), yet it offers no substantial basis for this allegation. The Board of Selectmen's application simply moves from its unsupported allegations of failure of the applicant to meet its burden to prove the five criteria for the granting of a variance, to its own interpretation of the implication of the facts in the case to the law as viewed through its own lense focused on opposition to the ordinance. The Selectmen's application also touches on issues not properly the subject of this hearing, such as the watershed issues, which are properly and rightly subject to the scrutiny of the planning board, should this variance be upheld and the project move to the design phase.

In opposition to the Board of Selectmen's specific assertions regarding the five criteria, the applicant's offer and re-affirm the following:

A. Granting of the variance would not diminish the values of surrounding properties.

The proposed structure is consistent with the character of the Foundry Avenue neighborhood and the use is consistent with those seen in the BI District. In fact, properties in the area could see an increase in value as a result of this development.

The proposed structure and appurtenant development will be of new construction, will be subject to review, regulation in its design and construction by town building, code enforcement, fire, and planning departments.

As abutters to the property have pointed out, the project, when completed, will enhance the current properties and other businesses who are located on Foundry Avenue and provide the opportunity for small businesses to conduct a commercial business in the Town of Meredith.'

Because the property could be currently used for multi-family residential structures which are not in keeping with the character of the neighborhood, this proposal serves to enhance the

³RSA 677:2, *Colla v. Town of Hanover*, 153 NH 206, 890 A.2d 916 (2006).

'RSA 677:3, I

'Letter of Alan Ruel, May 7, 2011. See also correspondence of Hayward and Sandra Price, Stewarts Ambulance Service, John and Dawn Dever, and Richard Comstock. value of surrounding properties rather than diminish it.

The Selectmen seek to focus the inquiry into this criteria on the residential properties surrounding the subject property. Here again, the proposed use is simply less intrusive, less intense, and better overall for the residential property in the area than the high density multi-family uses permitted in the area by the ordinance. The support of surrounding owners for this proposition is evidenced in their correspondence.

B. Granting the variance would not be contrary to the public interest because:

As stated in the original application, the proposed use will ensure that future development on the site will be the highest and best use of the land. Here the selectmen argue that changes to the ordinance in 2009 enacted to prevent "zoning creep" should control the board's decision here. While this may be a factor in the decision, it need not control.

This case presents a perfect example of why, even with the enactment of zoning ordinances, laws and regulations, the decision to grant or deny a variance based on this criteria is still a judgment call on the part of the ZBA and in this case the board made the correct call.

The public interest is not served in this case by the residential portion of the subject property, which is adjacent to and accessed by a business/industrial zoned parcel, being treated as residential for zoning purposes under the circumstances. The current ordinance permits dense multi-family residences with multiple imperious surfaces in an area where they are simply out of character.

In its conclusions, the Board of Selectmen's appeal refers to water quality issues and cites those as being relevant to the public interest analysis. If it is relevant, it is disingenuous to suggest that the limited development suggested in the current application is more harmful to the watershed or water supply than the uses actually permitted in the area.

The applicant submits that these concerns were considered and the concerns of the Town's water and sewer superintendent were presented and considered and that the board's decision reflects the proper consideration of those concerns in the best interest of the public.

The location sought for this project is especially suited for the proposed use, other properties in the area will benefit from the use and the potential impact on residential properties in the area which are similar in nature will see their property values enhanced, not diminished by this development (see *Carter v. Nashua*, 113 NH 21, 25, 287 A.2d 615, 618 (1972)).

C. Granting the variance will do substantial justice.

The granting of this variance benefits the public and the applicant in that it will allow for the highest and best use for this property by safeguarding against a mix of non-complementing land uses in the Foundry Avenue area and by eliminating the development of dense multi-family residences on a portion of the residentially zoned land.

Here again, the Selectmen argue that the prevention of "zoning creep" outweighs the applicant's right to effect a development which meets the highest and best use of this property. The adoption of zoning language intended to correct a perceived deficiency in the prior zoning ordinance is not dispositive of this issue.

The Selectmen allege that "In determining whether substantial justice is done by the grant of a variance, the New Hampshire Supreme Court has considered whether the proposed use is consistent with the present uses in the neighborhood unless the zoning ordinance was adopted specifically to alter the types of uses in the neighborhood" and in support of that proposition they cite *Nine v. Chesterfield*, 157 NH 361, 368. While this is a skillful use of a citation, and a lawyerly parsing of words, there is no support for the Selectmen's argument in this language. the changes in the ordinance were not adopted to alter any uses. The changes in the ordinance were

adopted to change the presumption of how the property was to be used absent a variance.

D. Granting this variance is consistent with the spirit of the ordinance.

The granting of this ordinance will prevent the development of a small residential pocket within an industrial neighborhood (see original variance application, page 3, ¶4).

The Board of Selectmen interpret the zoning changes adopted in 2009 as requiring that properties divided by zoning district boundaries develop the property in accordance with their respective zoning districts. While this is true, it is also true that the specific change cited was intended to shift from the presumption that where two lots are merged, the use permitted on the larger parcel will control, to a presumption that each will be developed on its own absent a variance as requested here.

The Selectmen's assertions regarding access, wetlands, crossing, and other speculations concerning the use of the property simply do not support an allegation that the current request is not aligned with the spirit of the ordinance. It is a stretch to say that because recent clarifications or changes to the zoning ordinance which result in the requirement for a variance in this case exist, the request itself violates the spirit of the ordinance.

Here again, raising the issue of the watershed at this juncture is premature. On one hand, the Selectmen chastise the property owner for not reserving access to his property, over and through wetlands in the watershed, now express concern for the very same watershed in their argument that this request is not within the spirit of the ordinance. These arguments are incongruous.

E. Literal enforcement of the provisions of the ordinance will result in an unnecessary hardship.

Contrary to the Selectmen's assertions, the property in question is unique in that its best, most conservative, economical, and environmentally responsible access is through a business industrial zoned parcel (Foundry Ave. property). The Selectmen also point out in their rehearing request that alternate access would be through a delineated wetland and would be substantially more costly, environmentally invasive (if even permissible) and burdensome to adjacent landowners.

The variance granted here fully addresses the purposes of the ordinance, as discussed in other sections of this response. The proposed use is reasonable; it limits the impact of the use of the subject parcel (as opposed to other permitted uses such as several duplex units).

Conclusion

The selectmen assert "two additional concerns" in their rehearing application. The first is that the Zoning Board did not base its finding on the five criteria for granting a variance. There is no basis in the record for this allegation or the selectmen's admonition about the intent of the voters in adopting the ordinance in question. Variances are permitted by law, and to suggest that the actions of the ZBA in granting a variance is somehow a defacto re-zoning is contrary to zoning law in New Hampshire. The action taken here lies precisely within the scope of authority of this board.

The second complaint centers around the watershed. Here the Selectmen argue that because the board members noted that the planning board could regulate runoff, erosion, sediment control, in this case, they ignored the planning board's authority to do so in a residential development. This ignores the essential fact that, if developed residentially, much more imperious surface would be permitted under the ordinance than is proposed and that the net impact on the watershed is less with this proposal.

When examined, the Selectmen's request raises no genuine issue of fact or law overlooked by this board. The applicant has satisfied the five criteria for granting a use variance and the water quality/watershed issues raised must be addressed in the appropriate forum once the variance is upheld.

The variance requested represents the highest and best use of the property and the board's decision granting that variance should be upheld. Nothing in this request supports a different outcome than the granting of the variance as requested.

TOWN OF MEREDITH ZONING BOARD OF ADJUSTMENT
Application for Variance - Foundry Avenue Realty Trust
Case No. 2943

Response of Applicant to Rehearing, Request
of Paula Wanzer, T. Duncan McNeish, and Chuck Braxton

Introduction

On or about February 22, 2011, the applicant, Foundry Avenue Realty Trust, filed an application for a variance with respect to its property located at 22 Foundry Avenue, Meredith, New Hampshire (map S23/Lot 46). The original application contained a description of the proposed project and a supporting statement. Included in the original application were several letters from abutting owners in support of the original application (see *Application for Variance* dated February 22, 2011).

The board held a hearing on the application on March 10, 2011. At the hearing the board heard testimony on the proposed use, the basis for the request, and the supporting information. The board also heard from interested community members who both supported and opposed the granting of the variance.

Following the hearing, the board carefully deliberated, considered the request and supporting evidence, and granted the request. Notice of the board's decision was issued immediately thereafter (see *Notice of Decision*). The Town of Meredith appeal was filed on or about April 6, 2011. An additional appeal was filed on April 8, 2011. That appeal is the subject of a separate memorandum.

This is the second rehearing request in this case was submitted by three parties, Paula Wanzer, an abutter, J. Duncan McNeish, and Charles Braxton. This appeal, hereinafter referred to as the Wanzer appeal, focuses mainly on the alleged failure of the ZBA to adequately safeguard Lake Waukegan in its decision and its failure to prevent "zoning creep" consistent with the 2009 amendment to the town's zoning ordinance. Other allegations suggest that the ZBA "disregarded letters submitted by two town departments that provide an adequate basis for not granting a variance . . ."

For the reasons set forth in its response to the rehearing request fo the Board of Selectmen (which are restated and incorporated herein for the record), and the specific responses to the Wanzer request, the applicant submits that the granting of the variance request was properly vetted, and the variance was properly granted and should be upheld.

Discussion

The New Hampshire Supreme Court admonishes us that in furtherance of the finality of decisions by zoning boards, rehearings should not be lightly granted. *Griauzde v. Nashua*, 103 NH 468, 174 A.2d 432 (1961). While a person may have an automatic right to request a rehearing, the board does not have to grant it and must keep in mind that in being fair to a person

(or, in this case, the Board of Selectmen), it may be unfair to those opposing the matter who will have to defend their position a second time.' This process can also be at great expense to an applicant who will often, as in this case, employ professionals to help in the application, hearing, and rehearing process.

Rehearings should not be granted unless a petitioner can demonstrate that the board committed a technical error in its original decision, or that there is new, relevant evidence which was not available at the first hearing. The reasons for granting the rehearing should be compelling ones, and the board has no right to reopen a case on the same set of facts unless it is convinced that an injustice would otherwise be created.'

Motions for rehearing must specify every ground that is alleged as a basis for rehearing,' and must set forth every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.

The 13 page Wanzer appeal request raises several arguments which are distinct from those asserted by the Selectmen. First and foremost, the request begins with a section entitled "Background and Facts." There are opinions and unsubstantiated allegations contained throughout the section of the request and they are, as such denied.

Likewise, where the request asserts interpretations of law or the content of documents contained in the public record, such as statutes or ordinances, the documents speak for themselves.

Specific response to the allegations in the rehearing request are as follows:

- 1 The proposed variance does not adequately safeguard Lake Waukegan.

There is no support for this allegation. The question is not if the property is to be developed but how. Either it will be developed as proposed or as a residential development with potentially greater impact on the lake.

Safeguarding the law is of paramount consideration to all parties. Development of this parcel will be required, not only by the owner, but by the Town to comply with good resource, erosion, sediment, and environmental management. The property simply cannot be developed any other way.

'New Hampshire Office of State Planning, the Board of Adjustment in New Hampshire, A Handbook for Local Officials, at 56-57 (1997).

'RSA 677:2, *Colla v. Town of Hanover*, 153 NH 206, 890 A.2d 916 (2006).

2. The variance will result in a diminution in value to surrounding properties.

This is simply not so. It is also an unsupported assertion of opinion. The proposed structure will be in keeping with other structures in the area. This allegation seems to suggest that nothing should be built on the property, yet development on the property will be permitted. The use variance requested here simply seeks to define clearly what will be built.

As suggested in the variance request, and as restated in the response to the Selectmen's request for rehearing, the impact on surrounding properties will be positive.

3. The variance increases the likelihood of negative impacts and greater risks to the quality of the Meredith drinking water supply.

Here again, this is an unsubstantiated assertion. The ZBA heard testimony about runoff issues at the original hearing and considered those issues. The plan for managing runoff will, and must, be addressed as the project moves forward. This is not a basis, under the ordinance or the statute, for denying the variance when it has already been considered.

4. The variance is contrary to the wish of the voters, who in 2009 approved an amendment to the Meredith Zoning Ordinance to prevent zoning creep.

This is not an accurate statement. Regardless of the actions of the voters in approving an ordinance, it still remains for the ZBA, within its authority and subject to the applicable statutory criteria, to grant or deny variances. In this case the ZBA heard the petitioner's case, heard from the opposition, and granted the variance based on its best collective judgment.

5. The variance erroneously asserts "a separation of uses" such that B&I uses would be preferable to residential uses because of "greater control" over such uses.

This issue has been addressed in the response to the Selectmen's request. In addition, whether or not the planning board will oversee the development in a residential use, there will be oversight. This is the point. The Town will control the drainage, erosion, and runoff plans as well as sediment control in either case. The Variance was approved based on errors of fact regarding the likelihood and economic feasibility that other residential development uses might occur or that prior activity and use on the residential portion already enabled subsequent development without accessing the property from Foundry Ave.

As pointed out in the Selectmen's rehearing request, access to this property from other access points would likely impact wetlands and may well not be permitted. The allegations that the board relied on factual errors in any part of its decision are denied.

6. The variance granted allows an extension of a use that is not consistent with the Residential District or the Waukegan Overlay.

The property in this area is uniquely situated. Its use and character suggest a closer affinity to the Foundry Ave industrial area than the residential district in which it lies. The high density residential use permitted on this property would be less in keeping with the residential character of the area.

8. The variance was granted based on "special conditions" that upon finding of fact were created solely by the Applicant rather than being distinguished from other properties by any other reason.

This alone is not a basis for denying the variance. *Harrington v. Town of Warner*, 152 NH 74, 83 (2005). This property is unique and distinguishable from others in the area as stated in the application and as elaborated on in the response to the Selectmen's rehearing request.

9. The variance devalues properties by allowing development that will likely increase runoff into Lake Waukewan, redistribute potentially toxic sediments from Monkey Pond in to the lake, and increase the risk of accidental spills of materials that can have a deleterious affect on water quality and the drinking water supply.

This allegation is pure speculation and is contrary to the legal requirements that will have to be met in order to develop the property. This issue was fully addressed and vetted at the original hearing. Quite simply, unless the applicant can meet the town's reasonable requirements in developing the property it will not be permitted to build until can.

10. The ZBA failed to consider a finding of facts that indicates a "reasonable person" would do in seeking the boundary line adjustment to annex residential property to a parcel in a Business & Industry District or that there are indeed residential uses consistent with the Applicant's annexation.

Denied. This allegation suggest no more than that the parties to the Wanzer appeal do not agree with the board's findings.

Conclusion

When examined, the Wanzer request raises no genuine issue of fact or law overlooked by this board. The applicant has satisfied the five criteria for granting a use variance and the water quality/watershed issues raised must be addressed in the appropriate forum once the variance is upheld. The variance requested represents the highest and best use of the property and the board's decision granting that variance should be upheld. Nothing in this request supports a different outcome than the granting of the variance as requested.

Respectfully submitted
Edward D. Philpot,

Meeting adjourned at 9:30 PM

Respectfully submitted,

Christine Tivnan
Planning/Zoning Clerk

Approved by the Meredith Zoning Board on June 9, 2011

Mike Pelczar -Vice Chairman