

**Town of Milford  
Zoning Board of Adjustment Minutes  
May 17, 2012  
Case #2012-06  
Dakota Partners, Inc. et al  
Request for Rehearing**

Present: Kevin Johnson, Chairman  
Laura Horning  
Len Harten, Alternate

Absent: Steve Winder  
Fletcher Seagroves  
Zach Tripp

Secretary: Peg Ouellette

The applicant, Dakota Partners, Inc. et al are requesting a rehearing of Case #2012-06, filed in accordance with RSA 677:2 and 677:3, and the Rules of Procedure, Rule XIII, of the Town of Milford Zoning Board of Adjustment.

**THE MINUTES FROM MAY 17, 2012 WERE APPROVED ON AUG 16, 2012**

Kevin Johnson, Chairman, opened the meeting by stating that the hearings are held in accordance with the Town of Milford Zoning Ordinance and the applicable New Hampshire Statutes. He continued by informing all of the procedures of the Board; he then introduced the Board. He stated that the authority of the Board to revisit the case on which a determination was already made is granted under NH RSA 677:2 which specifies which parties may request a rehearing. The ZBA is not specified per se; however the NH Supreme Court has ruled that Boards may revisit their decisions. Cited as follows: "We believe that municipal boards, like the court, have the power to reverse themselves at any time prior to final decision if the interests of justice so require. We hold that belief because the statutory scheme established in RSA Chapter 677 is based upon the principle that a local board should have the first opportunity to pass upon any alleged errors in its own decision so that the court may have the benefit of the board's judgment in hearing the appeal." He stated this was rendered in the case of 74 Cox Street LLC vs. City of Nashua cited at 156 NH 228,931.

K. Johnson went on to state that the issues which caused him to present this motion for reconsideration were that, in their discussion of the case he believed the Board as a whole made some inaccurate applications of law. The Board found that the request for variance failed to meet Criterion 1, Public Interest, and Criterion 2, Spirit of the Ordinance, focusing on two issues –public safety is traffic and the fact that residential use is not specified within that district in the ordinance. He stated that in his motion he cited cases for background. The first is Harborside vs. Peret in which the Supreme Court found that the requirement that the variance not be contrary to public interest is related to the requirement that it be consistent with the spirit of the ordinance. "The first step in analyzing whether granting the variance would not be contrary to the public interest and would be consistent with the spirit of the ordinance is to examine the applicable ordinance. " He then skipped some of the cites and read: " As the provisions of the ordinance represent declaration of public interest, any variance would, in some measure, be contrary thereto. Thus, for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance its grant must violate the ordinance's basic zoning objective, in conflict with the terms of the ordinance's imposition. We have recognized two methods for ascertaining whether granting the variance would violate the ordinance's basic zoning objective. One way is to examine whether granting the variance would alter the essential character of the neighborhood. Another approach is to examine whether granting the variance would threaten public health, safety, or welfare. " K. Johnson went on to state that in their discussions the Board found that it did not alter the essential character of the neighborhood, but the Board was concerned about the safety issue. He stated his conclusions on this issue were based on testimony received and the applicants addressed the traffic issue when they testified that, were the building to be completely filled with offices, the number of occupants – and therefore the number of vehicles – would exceed the number of occupants and vehicles if the building were converted to residential use. He stated there was no reason to disregard this testimony. While not cited in the conclusion, the Board was very concerned with the number of parking places to be made available to potential residents. This issue is not within the purview of the Zoning Board, but is an issue for the Planning Board. Also, not cited in the conclusion, the Board was concerned with the placement of bus stops both for public transport and school buses. While the Board can make provision for such stops a condition of granting the variance, the actual placement of such stops are issues given to the Planning Board. In applying the spirit test, the Board failed to consider the basic purpose for the variance and by its very existence it must violate the spirit of the ordinance. "The Board need not wait for voters to approve changes to either the allowed uses in a district or the zoning classification applied to specific parcels. The Board has the variance to accomplish that fact. If the Board finds it is consistently granting the same types of relief within a district it can and should recommend those changes, through the Planning Board, to the voters." He provided an attachment from which he read portions, which had a comparison of uses granted by right, by special exception, and by conditional use permit, in the Commercial zone, the Industrial zone and the applicable zone for this case, the Integrated Commercial/Industrial Zone. There is one use in the ICI zone which is not allowed in the

Commercial or Industrial, which is adult entertainment business. There are no uses in the Industrial district which are not allowed in the ICI district and there are six uses allowed in the Commercial which are not allowed in the ICI district, being funeral home, home occupation, hospice houses, multi-family dwellings, two-family dwellings, and schools.

K. Johnson continued by stating the Board also found the request for variance failed to meet Criterion 5, Hardship. He said in the ruling of Harborside vs. Peret, NH Supreme Court reiterated the conditions necessary to find hardship. It defined hardship as being "owing to the special conditions of the property that distinguish it from other properties in the area, 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 the proposed use is a reasonable one." It also provided if those conditions are not met, an alternate set of conditions which must be considered. He stated that as Chairman he failed to ask the Board members who had found the request for variance did not meet the first set, whether it met the second set of criteria. He stated it was his error and one of the reasons he would wish the Board would reconsider the hearing of this case. Finally, in considering the hardship issue the Board failed to explain its reasoning as to why the conditions of this property failed to meet the specific requirements of RSA 674:33. He had attached to his request a list of current uses of the property in this specific ICI district. There are 13 properties in this district. The first is the property for which the variance was sought. The next two properties are undeveloped land. The fourth is a commercial building occupied by a bank. There is a vacant lot of .188 acre. All the rest of the properties in this ICI district are either single-family or two-family residences. In the districts on the borders of this ICI district, on the north is Residence R, to the east is a Commercial district which allows for single and multi-family residences, to the south is an Industrial district although it is separated from this district by NH Rt. 101, and to the west is the town of Wilton, and he is fairly sure there are all houses down that road. For the above reasons, he requested the Board to reconsider the case 2012-06.

L. Horning asked why this was not on the agenda.

K. Johnson responded that he had contacted the Local Government Center and was told by attorneys there that if this is an internal board member it does not have to be published on the agenda and could be handled as old business.

L. Horning asked how the public gets notified.

K. Johnson said the public does not need notification since this is an internal issue.

L. Horning stated that since the information was just given to her she hasn't had time to review it.

K. Johnson stated he read the content so the Board members could follow along.

L. Horning stated she would like to have more time to research this before considering this motion. Therefore, she would withhold any vote on this issue at this time until she has had time to review it.

L. Harten stated he didn't sit in on the original hearing and didn't believe he was qualified to make a decision. He had just heard this and although the Chairman read through it, he would abstain from voting.

K. Johnson then requested a motion to table consideration of this to a future board meeting.

L. Horning made a motion to table.

L. Harten seconded the motion.

All voted in favor. The motion for reconsideration was tabled.

K. Johnson stated the next item of business is the motion for rehearing from the applicants. Since L. Harten had stated he felt unqualified to hear that motion and would abstain, in fairness to the applicant, the Chair believed that motion should also be tabled to a future meeting.

K. Johnson requested a motion to table the request for rehearing.

L. Horning made a motion to table the request for rehearing.

L. Harten seconded.

All voted in favor. The motion to table the request for rehearing was passed.