

Town of Milford  
Zoning Board of Adjustment  
May 23, 2012  
Public Meeting

Present: Kevin Johnson, Chair  
Laura Horning  
Zach Tripp  
Fletcher Seagroves  
Steve Winder

Absent: Len Harten – Alternate

Secretary: Peg Ouellette

THE MINUTES FROM MAY 23, 2012 WERE APPROVED ON AUG 16, 2012

K. Johnson opened the meeting and stated that the meetings are held in accordance with the Town of Milford Zoning Ordinance and the applicable NH Statutes. He introduced the members of the Board.

**OLD BUSINESS:** K. Johnson and the Board Members present signed the Rules of Procedures which had been voted on and approved at the previous meeting of the Board.

**NEW BUSINESS:**

**Motion for reconsideration – Case #2012-06**

A motion for reconsideration of Case #2012-06 was submitted by K. Johnson as a Member of the Board. He stated that he had read the motion into the record at the previous meeting, so would not reread the entire motion but would read the authority by which the board can consider the motion, cited in 74 Cox St. LLC v. City of Nashua, 156 N.H. 228,931 A.2d 1194 that the Board may revisit their decisions *“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 decisions so that the court may have the benefit of the Board’s judgment in hearing the appeal.”* In his motion K. Johnson pointed out points where he felt the Board did not correctly interpret testimony given on basis of the underlying ordinance. The first was a number of questions and discussions dealing with the public interest criterion and spirit of the ordinance, especially safety due to traffic. Another item that needs to be updated is the potential for a ten unit housing development across the street from the mill which was factored into the the effect on traffic ; however, in his review of the ordinance, the Board has the ability to grant a six-month extension to a variance that was granted, which is good for a year. The board granted the extension in October of last year so the extension expired in April. Therefore that variance has expired and at this point in considering this application the two vacant properties on the opposite side should be considered as vacant properties and therefore not considered.

Z. Tripp asked whether the vacant properties are in the ICI district.

K. Johnson responded that they were.

Z. Tripp asked if they had previously been considered as a variance.

K. Johnson said they had. He did not do research on that for this meeting. In preparing his motion for reconsideration he did a little deeper digging and found that it was a six-month extension, not a year.

K. Johnson opened the floor for discussion for additional consideration of the safety factor and the request and in consideration of the motion he presented.

F. Seagroves asked if K. Johnson is going by what they discussed at the last meeting.

K. Johnson responded that he is going both by questions presented to the petitioner and the reasons the board gave as they polled the board prior to the vote.

F. Seagroves stated that the petitioners address that in their request for rehearing.

K. Johnson said the board will get to that.

F. Seagroves asked why the board should discuss it now.

K. Johnson responded that if they discuss it now they won’t have to do it again.

F. Seagroves responded that the petitioners are presenting new evidence.

L. Horning agreed and wanted to make a motion.

K. Johnson stated that he had advice from the attorney at Local Government Center (LGC) that his motion must be considered first.

L. Horning said, considering both requests, this is of lesser weight and she would rather go with the petitioner’s motion because this motion does not enter any new evidence or new testimony. She understood the motion was to address interpretation of the ordinance and she doesn’t necessarily agree with that position. The way she considered the second motion had nothing to do with anything mentioned in K. Johnson’s motion. For her, his motion was moot. It is a matter of the way you

interpret or understand application of the zoning ordinance; K. Johnson sees it applying to this and she does not.

K. Johnson asked what part of the discussion she disagreed with.

L. Horning responded she agrees they have the right to reverse, but for her this is not going to be a reversal. They have given new evidence and she has more evidence to look at than in the first packet.

K. Johnson said this is not appropriate time for him to comment on information provided in that packet.

L. Horning said she will leave it at that; K. Johnson's motion, for her, does not apply.

K. Johnson asked, had the applicant not submitted a request for rehearing, how would she treat this motion?

L. Horning replied she would still probably say no because the case he is citing says they have the right to correct themselves on any error. She did feel she made an error in viewing the case. She does feel it is an error in the sense that he is referring to in the specific section of the RSA.

Z. Tripp asked if the first motion were to let the board make a motion to reconsider their decision before hearing the request by the applicant.

K. Johnson responded yes.

Z. Tripp asked, if the board were to vote on this motion they would be saying they believed they made an error.

K. Johnson said that the board made an error in the underlying evidence.

Z. Tripp said the only thing that could possibly be error is when the board took into account items that would normally be under the jurisdiction of the Planning Board- parking spaces, traffic safety. That would be the only discussion they had that would lend itself to this. But that doesn't address all of the area so it would not be of value to this point.

F. Seagroves said in going through what K. Johnson had written out it was well written out. He may not have agreed on a couple of things. He had brought up potential parking but it didn't weigh into his decision – he was making a statement. He may have swayed somebody else on the board and was sorry if he did. (others on the board said he did not). If they vote to reconsider all they are doing is going over what the petitioner wants them to go over?

K. Johnson said there may be different issues in each of the motions. So the board needs to consider the materials and discussion in each.

F. Seagroves asked if the Board is going to discuss the answer to the five criteria.

K. Johnson said if they agree it was flawed they will grant a rehearing.

F. Seagroves asked if, basically, all K. Johnson wanted was a rehearing.

K. Johnson replied he can't request a rehearing. Much of this is based on discussion with the LGC.

F. Seagroves said if the Board voted to grant a rehearing and that is all not saying that they agree with everything, he has no problem with that.

K. Johnson said it is saying do these points raise sufficient doubt in the minds of the board to grant a rehearing? Not re-hash. This is the reason we should reconsider. If we should, we grant a rehearing.

S. Winder said he was on board until K. Johnson said if you have any doubt. This is coming from K. Johnson's perspective. He is okay with having a rehearing but there is no doubt in his mind on his perspective on the case even though they talked about parking.

K. Johnson asked if the issues raised are sufficient that they should have addressed them with the applicant. He agrees it was raised and when it came time to address hardship a couple of board members addressed the first criteria and he failed to address the second criteria for hardship. It was the end of a long day and he was tired. That is one of the issues that was driving factor in submitting his motion to the board.

S. Winder said K. Johnson is asking it a different way each time. Whether the information is sufficient; that is subjective.

K. Johnson said everything is subjective. There is no clear objective standard for the intent.

L. Horning stated it weighs heavily on the interpretation. That is why some of these cases end up in Superior Court. That is a problem with some of the difficult cases. This is a complex case.

S. Winder asked what the difference is between having a rehearing based on their review of this case versus other cases they had rehearings on. If they had, would they discussing this?

K. Johnson said no, they would be discussing the applicant's motion. He felt there was enough information not property discussed. He did request that those things be brought out. When he prepared it he didn't know whether the applicant was going to file, or had filed, a request for rehearing. He felt there were sufficient grounds based on how he conducted the meeting. He can't see into their minds; he can only go by their recorded reasons. F. Seagroves may have asked the applicant fifty questions about parking . So he associates that with F. Seagroves saying he didn't think this would work, he infers that it is because of parking.

S. Winder asked what kind of answer K. Johnson needs to let them present the case.

F. Seagroves said they don't present the case.

K. Johnson said when they finish discussion on the issues he has presented, if they have presented sufficient grounds to grant a rehearing, they will grant a rehearing. If not, they will dismiss the motion.

Z. Tripp said when it is rephrased that way-- did Kevin bring up enough items in his motion-- he probably did bring up enough items to reintroduce it.

K. Johnson said based on comments with the LGC the applicant has the right to set everything in his motion he thinks they need to re-address. Based on his reading of the ordinance, statute, court cases, the board is not allowed to bring up any questions that the applicant does not address.

Z. Tripp asked, for consideration?

K. Johnson said yes. They made a gross error

L. Horning asked if he is saying that it is his interpretation in his motion they can only discuss the references made in his motion.

K. Johnson said in his motion that he can talk about anything they want because it is just a motion for reconsideration.

L. Horning expressed concern that it is so broad-based.

K. Johnson said they can only consider those issues raised by the applicant in the request for reconsideration. If he raised an issue in his motion that they don't raise in theirs, they cannot use that for granting a rehearing.

L. Horning said that position is specific to the LGC.

K. Johnson said if the only issue raised in his motion was uniqueness of the property and the applicant didn't raise uniqueness in any of the board's discussion of their motion, they cannot discuss uniqueness.

L. Horning said because it was denied

K. Johnson said if the applicant doesn't raise uniqueness, even if he felt it was important, he cannot bring it up. Their motion is a motion for reconsideration so it is open to everything they want to talk about. So if Z. Tripp felt an issue not properly brought up even if it was not in K. Johnson's motion, he can bring it up. You can only open discussion of whether the board did justice in denying the variance. He did not do a comparison of his motion and theirs. They may have brought up every point he did.

L. Horning read the motion.

K. Johnson asked if the board had any other questions. There were none.

L. Horning asked if this was going to create a barrier to discussion of the criteria.

K. Johnson said when they discuss the applicant's motion they look at each of the points in that motion and determine if they are sufficient to grant a rehearing. If they leave something off that and the board thinks if they had asked that we would have said yes, the board is not supposed to consider that.

L. Horning asked if it won't impede ability to discuss the criteria.

K. Johnson said they are not supposed to discuss the criteria at all at this meeting.

L. Horning asked if it is going to impede in either motion it's not going to impede their ability to discuss the criteria based on the evidence received in the motion.

K. Johnson said they do not discuss the criteria for a variance tonight .

L. Horning said if they pass either motion and they get a re-hearing.

K. Johnson said then they start with a blank slate and give us everything they want.

L. Horning asked if he was talking about this meeting.

K. Johnson said yes, if they grant the rehearing it is completely clean slate and if they want to they can come up with entirely different proposal or modify it any way.

L. Horning asked if either motion gives them the ability to do that.

K. Johnson said yes, with this motion they can discuss anything; with their (applicant's) motion they can only discuss what they bring up.

L. Horning asked if that is tonight.

K. Johnson said at the rehearing they can go through the whole thing.

L. Horning said that answered her concern.

Z. Tripp made a motion that the board reconsiders Case #2012-06.

S. Winder seconded the motion for reconsideration and granting the applicant a rehearing.

All voted in favor.

K. Johnson said by law they must go over the points the applicants have made in their motion for rehearing so it is fully in the record and they have discussed them.

K. Johnson read into the record a hand-delivered letter to the Office of Community Development, addressed to Kevin Johnson, dated May 10, 2012. He stated he would only read their application into the record: *"Re: Request for Rehearing, Case No. 2012-06, Dakota Partners, Inc, et al ("Dakota") – Dear Mr. Johnson and Members of the Board: On behalf of the applicant and the property owners, please accept this request for rehearing of Case No. 2012-06. This request is being filed in accordance with RSA 677:2 and 677:3, and your Rules of Procedure, Rule XIII. Given the time constraints involving certain financing and approval deadlines, we respectfully request you take this matter up at your May 17, 2012 meeting."*

K. Johnson explained that at the May 17 meeting there was a minimum quorum and certain board members stated their intent to abstain, so it was tabled to tonight's meeting. He continued reading from the letter: *"At the May 3, 2012 hearing, Board members expressed their concerns about public safety issues as it relates to the zoning variance. We have tried to address those concerns with the additional information below. Further, we believe that there may be legal considerations about the discussion last week. For these reasons, we ask the case be reheard."*

Site Observations *Following the hearing, our engineer went back to the Pine Valley Mill to simply re-observe the area with respect to traffic and pedestrian safety concerns. General, empiric observations: Wilton Road is posted at 25 mph, but the speed limit sign is hidden by other signs and difficult to see. Westbound signs only. **The Dakota project would replace and move this sign in a prominent location, and add a like sign in the eastbound direction.***

*There is an existing crosswalk. At approximately mid-building, there is a very faded green and white cross walk across Wilton Road, barely visible, worn out by traffic, plows, etc. Old "yield" signs in both directions are faded, turned and tilted away from the road. The signs are approximately 5' high and red and black – not the street level, bright yellow and black sign used today (used just down the road in Wilton). As required by the Planning Board, **the project would update this crosswalk and install proper, current pedestrian walkway signs.***

*Turning improvements in and out of the Mill are random and haphazard. Turning movements on to the property occur anywhere and everywhere along the length of the Mill. Likewise for people exiting the Mill. I did the same as I'm sure most people do without any control of traffic movement. **The project will vastly improve this entire stretch of Wilton Road with limited curb cuts and controlled traffic flow.***

Stephen G. Pernaw & Company, Inc. Attached Exhibit A is the May 9, 2012 Traffic Projections Memorandum from Stephen Pernaw. Most of you should be familiar with Steve's work – he's done a lot of traffic analysis over the years in Town and for the Town. His Memorandum compares trip generations, and shows the project will have less peak hour traffic than allowed industrial or manufacturing uses. He concludes: As a professional Traffic Operations Engineer (#399), it is my opinion that post-development conditions with the access improvements described above is far superior to the existing conditions case without the 50 apartments.

Fieldstone Land Consultants, PLLC Attached as Exhibit B is Chad Branon's May 8, 2012 Engineering Analysis. Fieldstone Land Consultants are the civil engineers for the project and we asked Chad to weigh in with respect to safety concerns. You can see that the report speaks to how the significant site improvements, including a sidewalk, will address both traffic and pedestrian safety issues. In addition, Dakota would consider additional traffic calming and traffic control measures. We expect the planning process will include analysis of road striping, curb bump outs, road width reduction, or other current design standards for traffic control.

Wilton Road and North River Road Intersection Attached as Exhibit C is the portion of the Falcon Ridge plan applicable to the Wilton Road and North River Road intersection. The Falcon Ridge project was approved by the Milford Planning Board in 2006, and the plan was recorded at the Hillsborough County Registry of Deeds as Plan No. 34931 on August 11, 2006. Part of the approval requires off site improvements such as this intersection. Meridian's Sheet P-07 (Sheet 21) is attached, and I've enlarged the drawing showing the improvements to this intersection itself. You can see the intersection is to be widened, with a better turning radius, new stop bars and signs, with ample sight distance both east and west bound.

Bus Stop Easement Agreement Attached as Exhibit D is the last draft of the Bus Stop Easement Agreement. This Easement Agreement was part of the Milford Planning Board's June 21, 2011 approval of the 10 lot residential subdivision on the south side of Wilton Road. While approved, this subdivision project may not ever be built because of certain land and financial constraints. Nonetheless, since public transportation remains a good idea, and we have the same property owners, **we propose the Bus Stop Easement Agreement become part of this case**, such that it would be incorporated into the pending application and part of planning board approval.

Parking In Dakota's experience, the parking as shown on the plan is ample for the mix of apartments and the commercial/retail users. It wouldn't make sense for Dakota to propose an apartment complex that didn't work for its customers. Further, good site planning practices provide sufficient parking while minimizing imperious asphalt to allow more green space, natural pervious areas, groundwater recharge areas, etc. Notwithstanding these concerns, there is an area at the end of the residential parking lot that can be reserved for ten additional parking spaces and labeled as 'future parking as needed.'

Variance Criteria With all due respect to the Board members, upon further review of the five points of law for a variance, we believe that there may have been issues with the legal analysis at the hearing. This is not done to be critical of the Board, but to raise issues for your further deliberation. We submit that in certain instances the Board applied an incorrect legal standard. We ask that the Board consider whether **this** application, with **this** proposed use, meets the five points of law for a variance as follows:

1. "[M]y advice to ZBA members is not to be procedural sticklers when it comes to the **"public interest"** criterion." OEP Handbook, p. II-8. The neighborhood today is a mix of homes, the mill, and vacant land. This project will not change these characteristics of this neighborhood. The only significant change to the neighborhood will be better traffic management and safety with the Wilton Road and North River Road improvements. There are no threats to public safety, health, or welfare which would be contrary to the public interest.
2. As Bill Parker said, the **spirit and intent** of the ICI district was to provide for a flexibility of uses from the older industrial zoning that was historically tied to the Pine Valley Mill. NH Case law states: to be contrary to the public interest ... the variance must unduly, and in a marked

*degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives. One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality... Another approach to [determine] whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare. Malachy Glen Associates, Inc. v. Town of Chichester, 155 NH 102, 106 (2007), OEP Handbook, p II-10.*

*The proposed renovation of the mill does not unduly conflict with this area of the ICI district, does not alter the essential character of this locality, and does not threaten Milford's public health, safety or welfare. 3. On **substantial justice**, the OEP handbook suggests a guiding rule that 'any loss to the individual that is not outweighed by a gain to the general public is an injustice.' OEP Handbook, p II-10. Essentially, the substantial justice element is a balancing test – do the scales tip in favor of the application or not? In favor, we have a \$12,000,000 renovation of one of the last remaining mills in Town, to provide low cost housing, keeping 25,000 square feet of jobs and employees, improving the Wilton Road streetscape, with no abutters or neighbors voicing any opposition or concern. Whatever issues can be raised against the project are outweighed by all the positive gains to the general public.*

*4. As all Board members agreed there would be **no diminution of value** based on the letter by the appraiser Jon Franks, which was submitted at the hearing. 5. Today, the standard for **unnecessary hardship** is spelled right out in the statute. We no longer apply hardship tests based on the Simplex Technologies case, Boccia v. Portsmouth, or other case law. And the law does not consider the other allowed uses in the district. Today, RSA 674:33,1(b)(5) requires the following standard:*

*For purposes of this subparagraph 'unnecessary hardship' means that, owing to special conditions of the property that distinguish it from other properties in the area: (i) No fair and substantial relationship exists between the general public purposes of the ordinance provisions and the specific application of that provision to the property [the Relationship Test] and (ii) the proposed use is a reasonable one [the Reasonable Use Test].*

*We first question whether the site provides special and unique conditions. The mill itself is unique not only to the ICI district, but also to this neighborhood but to the entire Town. Especially a mill with mostly residential and small commercial buildings as its neighbors. Further, this little pocket of the ICI district is an anomaly from the other ICI areas. Unlike the ICI districts found on Nashua Street, Elm Street, or Route 13, this small ICI district does not have direct access on a major road in Town, and is largely invisible from high volume traffic on Route 101. Historically this industrial zoning was tied to the mill operations. Today, the mill and the zoning present unique and special circumstances, which distinguish the property from all others in the area.*

*Applying the Reasonable Use Test, we respectfully submit the mixed use proposal easily passes. The neighborhood is mostly residential—especially by the upper, residential parking lot. Appraiser Jon Franks commented that the mixed use approach will provide a good transition from the retail/commercial areas on Route 101. When we consider that senior housing is allowed in the ICI (at a much higher density than this project), it is hard to say our mixed use proposal is not reasonable. If we have unique and special circumstances of the site, and the proposed use is reasonable, we then turn to the Relationship Test—is there a fair and substantial reason to prohibit the mixed use project at this site? We submit the answer is no. Owing to its special and unique conditions in terms of size (i.e. a property that is many times larger than any other property in this ICI district) and location (i.e. lack of access that are afforded to the other ICI districts in Milford), the property is at a unique disadvantage because it cannot attract occupants of an industrial and commercial nature, which require space, visibility, and easy access to major roadways. Again, Bill Parker testified about the intended flexibility of the ICI district. Further, the West Elm Street Gateway District, which 'implements the Master Plan vision for Milford's gateway corridor,' states that the overlay district encourages 'mixed use development sensitive to Milford's ...architectural and historic heritage by preserving and enhancing the streetscape...' Allowing the residential use at this site will help*

*accomplish these goals. Dakota seeks to make a significant investment in Milford which will preserve to historic standards a unique part of the Town, and provide low cost housing. This will all be done with respect and in conformance with the character of the neighborhood. At this site, for this proposal, we respectfully submit there is no fair and substantial reason to prohibit the residential use.*

*For the foregoing reasons, Dakota Partners, Inc. 37 Wilton Road Milford, LLC, and 282 Route 101, LLC respectfully request the Board rehear this case at your June 7, 2012 hearing. Thank you. Sincerely, Andrew A. Prolman.”*

K. Johnson opened the motion for rehearing to the Board for discussion.

L. Horning inquired whether there was anything preventing the board from either denying or approving both motions.

K. Johnson said if she feels this motion lacks necessary information to convince her to grant a rehearing she could vote no on that request. If she feels the applicants provided sufficient information that the board should reconsider its decision then she should say yes to the motion for rehearing.

L. Horning said she will wait for the other board members to see if they have any discussion.

K. Johnson said he has information he normally gives regarding re-hearing and what they consider and don't consider. The first is from the Rules of Procedure – “Motions for Rehearing: Any motion for rehearing must be filed during the normal business hours in the office of the board (that was done). Any member of the board may request that the Board reconsider its decision provided it is done within the statutory 30-day period from the decision. “

K. Johnson stated he wanted to mention that this is a public meeting where the board is available to the public and they are taking minutes and they will be recorded; however, it is not a public hearing and therefore they will be accepting no testimony from anyone outside the board.

K. Johnson continued reading “In considering a motion for rehearing the board shall first determine if the party requesting the hearing has standing as specified in RSA 677:2.” He said to his recollection the people specified in 677:2 are the applicant, the abutters, the Board of Selectmen, and anyone directly affected by it, whether an abutter or not. The applicants are the petitioners for this motion and clearly have standing. He continued “A board meeting to consider a motion for rehearing shall be considered a public meeting subject to the minimal posting requirements of the Right to Know Law and no formal notice is required to the applicant, petitioner or abutters. It shall not be considered a public hearing and no testimony shall be taken. All the board is acting upon is the motion in front of it, what has been submitted, and shall not involve comments by the applicant, petitioner or abutters. If possible, the same board members from the original hearing should be present at the rehearing. {there are here, except for Len Harten}. The board will make every effort to ensure a full five member board is present in consideration of an appeal. Alternates appointed in the absence of a regular member while participating in a public hearing on appeal shall retain the seat of the regular member when board discussions pertaining to that appeal take place. “

Z. Tripp inquired about criteria that it has to be new evidence.

K. Johnson said he was looking for that to read.

L. Horning read a paragraph from OEP Handbook, page IV-4, *“The coming to light of new evidence is not a requirement for the granting of a rehearing. The reasons for granting a rehearing should be compelling ones; the board has no right to reopen a case based on the same set of fact unless it is convinced that an injustice would otherwise be created, but a rehearing should be seriously considered if the moving party is persuasive that the board has made a mistake. Don't reject a motion for rehearing out of hand merely because there is no new evidence. To routinely grant all rehearing requests would mean that the first hearing of any case would lose all importance and no decision of the board would be final until two hearings had been held. The rehearing process is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals are filed with the Court. It is*

*geared to the proposition that the board shall have a first opportunity to correct any action take, if correction is necessary, before an appeal to the Court is filed.”*

K. Johnson also read from the paragraph previous to that on page IV-4: *“It is assumed that every case will be decided, originally, only after careful consideration of all the evidence on hand and on the best possible judgment of the individual members. Therefore, no purpose is served by granting a rehearing unless the petitioner claims a technical error has been made to his detriment or he can produce new evidence that was not available to him at the time of the first hearing. The evidence might reflect a change in conditions that took place since the first hearing or information that was unobtainable because of the absence of key people, or for other valid reasons. The board, and those in opposition to the appeal, should not be penalized because the petitioner has not adequately prepared his original case and did not take the trouble to determine sufficient grounds and provide facts to support them.”*

K. Johnson asked Z. Tripp if that is what he was looking for.

Z. Tripp said yes.

K. Johnson said, going back to the petition, it appears the applicant has done both – in this motion for rehearing they have presented additional information and that the board made technical errors. The petition is based on both criteria.

F. Seagroves mentioned that in their last statement they stated they will replace and move the signs to a proper location – that can only be done by the Town. Those are put in by ordinance. They will have to go in front of the Traffic Committee or something to move the signs. He sees no problem with that; he just wanted to bring it up. Also, regarding the crosswalk painting, that is also done by the Town and is actually in process of being repainted. He checked on this because he thought it was a Town responsibility, and the Town is taking care of one of those items, anyway.

S. Winder said he heard discussion of the property across the street, and the board should not be taking that into consideration?

K. Johnson said that is correct.

S. Winder said that now it says they want it taken into consideration.

K. Johnson said he did not read it that way.

S. Winder said indirectly.

K. Johnson said the bus stop easement – he reads that as in the previous application for 10 residences they offered to do a bus stop. They are not doing 10 residences but will offer the bus stop.

S. Winder said he gets that, but if they are talking about the exact same bus stop there’s no way to do that; the property is across the street.

K. Johnson agreed, but that is a Planning Board issue.

L. Horning added that the permitting process for those particular units has gone by.

K. Johnson said it has expired. That is correct.

S. Winder said that is why they are not considering it.

K. Johnson said basically the applicants are clearly willing to provide whatever may be necessary for a public transit stop. The board could make that a condition of the variance when they rehear – that they provide public transit easement. It is up to the Planning Board to decide what side of the street it should be on. He feels if the mill is on the north side it would make more sense to put it on the north side. That is something the board can say they need to do, but the Planning Board figures out where.

Z. Tripp said applicant has standing and filed within the time period. For the two criteria they supplied new evidence – traffic studies, and other evidence from civil engineers not there before. In response to the board’s lengthy conversation re parking, traffic patterns and safety, he believes most of those are up to the Planning Board at the end of the day. But since they did discuss them, he doesn’t know how much of that information ... while that came out he did not believe any of that applied to this property.

L. Horning asked which property he was referring to.

Z. Tripp said the ten houses. With regard to giving the Board an opportunity to correct any possible errors in judgment and review facts in the first case, he believes the applicant brought up some aspects with regard to substantial justice. Any benefit not granted giving more benefit to the public than the applicant. In reviewing the minutes he would agree the public was not going to gain anything. It came to whether the public will lose more than the applicant will gain. The fact that all the board members agreed there is no diminishing of property values, that would be the largest loss to the abutter. Since no diminution of value to the abutters, they may want to re-examine substantial justice.

L. Horning disagreed. It is the board's responsibility outlined in the zoning ordinance to consider the general health, welfare and safety of the public and she felt the board attempted to address those issues given the information in front of them at the time. In light of new evidence, it is only fair to the applicants to take a look at that a second time. She personally took exception to the fact that the board is not to consider certain aspects of the zoning ordinance or criteria that the zoning ordinance says they are taking a look at.

K. Johnson asked her to explain because she may have misinterpreted or he may have stated incorrectly.

L. Horning said she is talking about the statements made in there about the general health, welfare and safety of the public.

K. Johnson said they made that statement, so she could discuss it.

L. Horning said she feels that in considering the traffic patterns and the influx of population density in that area and while it is allowed for senior housing, not all seniors drive or have access to vehicles. She didn't think eradicating one part of the ordinance in order to substantiate another part has to be considered, as stated in the zoning ordinance, a balancing act. There has to be equal gravity given to each criteria. This is substantial. She made an error in considering the ten house development, barring that the permit had expired. That bore a great deal of weight with her in looking at the residential property there and proposed to be there along with this development – it concerned her. The narrowness of the road and turning in and out of there concerns her. She understands the Planning Board addresses those and there is safety valve in place for this board to attach conditions. This is a place where she made an error in not approaching those safety valves and saying the applicants couldn't do this or that. Those safety valves are in place to give the board some flexibility as a board when weighing these matters. Applicants have made some very good points in other areas, as the Chair did. She appreciates the broad spectrum of both motions because it gives so much room to take a long look at the evidence that will be coming in front of them. She would like to approve this motion. She prefers the motion (of the applicants) in the way it is constructed but she would certainly move to approve this motion. However, she completely disagrees with the fact that they are only supposed to consider one portion of the ordinance.

K. Johnson stated that because they brought it up, she can consider it.

L. Horning said the spirit and intent of the ordinance is to manage traffic flow and density. That is why we have a zoning ordinance. For her, they did not fail the hardship test. It is a unique property. The topography of the lot alone makes it unique. So that is a moot point for her. There is a lot of new evidence with the traffic studies they have provided. She would pass this motion.

K. Johnson said he agrees it is sometimes difficult to keep straight what they can and cannot do and disagrees in that none of this is new information. There was nothing stopping them from getting traffic studies done when they submitted the application. They had the criteria of health, safety, and welfare, so he thinks they failed that test. On the other hand, where they believe technical errors were made regarding the hardship test, he agrees. It was late at night, he did not address things correctly. They should have done a better job of clarifying their reasoning why the property was not unique and why it didn't meet the criteria in both A & B of the hardship.

L. Horning said she felt they met the hardship standard.

K. Johnson said he wanted it said. He did the research and typically office space allows 150 to 200 SF per occupant. If they were converted to businesses they could have 225 cars in there.

L. Horning said for her parking is not the issue.

K. Johnson said not parking, but the number of vehicles.

L. Horning said whatever they put in there, the health, welfare and safety are paramount in the sense that the lot is constructed with Falcon Ridge being above with 4.3 people per household and 2.3 pets and however many bikes. It is not the parking and where the overflow will go; that has been addressed.

K. Johnson asked if it was the amount of vehicles and traffic generated?

L. Horning said density.

K. Johnson asked, density of the traffic? He stated that she is saying 75 cars are too many but using a legal existing use you could have put in 250 cars.

L. Horning said it would still concern her. She would have gone to the Planning Board and found a way to stop it.

F. Seagroves said, going back to #1, talking about how they could put offices in and have 200 cars. The board has no control over that. But since this is a variance, they now have control.

K. Johnson said just because they grant a variance, does that mean they hold the applicant to a higher standard than the ordinance? That is the way he is looking at it.

L. Horning said the zoning ordinance makes a clear difference. If this is a business there will be a traffic pattern when cars go in and out. Residences are different. Her point is that there are two separate uses for two separate determinations for two separate reasons, children being one of them. They could put a school in and the petition is not the same as residential. If it was residential and would be considered there. She didn't have a problem with that. The problems was the way she was perceiving the given evidence. She didn't ask all the questions she wanted to at the last hearing.

K. Johnson said he wanted to say that when they go around the table prior to the vote that is a discussion. If that makes someone else think of something, they can ask to speak. Only until the point where he is reading the official vote questions.... He wanted to bring that out.

K. Johnson brought the discussion back to the motion.. He understands Laura's point.

L. Horning said that is all she is saying

K. Johnson asked for any further discussion from the Board.

K. Johnson then stated: After reviewing the information set forth in the motion for rehearing and reviewing all of the evidence and taking into consideration personal knowledge of the property in question this Board has determined the following findings of fact:"

**1. Was the Motion for Rehearing filed within 30 days?**

F. Seagroves – yes, S. Winder – yes, L. Horning – yes, Z. Tripp – yes, K. Johnson – yes

**2. Does the petitioner have standing to file a motion for rehearing?**

L. Horning – yes, F. Seagroves – yes, Z. Tripp – yes, S. Winder – yes, K. Johnson – yes

**3. Has the petitioner shown that the Board has made a technical error or has petitioner provided new evidence that was not available to the petitioner at the time of hearing on the underlying action or would an injustice be created if the motion for rehearing is denied?**

S. Winder – yes, Z. Tripp – yes, L. Horning – yes, F. Seagroves – yes, K. Johnson – yes

K. Johnson requested a motion to approve the motion for rehearing.

L Horning made a motion to approve the motion for rehearing Case #2012-06.

Z. Tripp seconded the motion.

K. Johnson stated it had been moved and seconded and called for a vote:

**Final vote:**

F. Seagroves – yes, Z. Tripp – yes, S. Winder – yes, L. Horning – yes, K. Johnson – yes

**Motion for Rehearing on Case #2012-06 was unanimously approved.**

Since there was no other business before the Board, the meeting was adjourned at 8:20 p.m.