Town of Milford
Zoning Board of Adjustment
Case #2016-03
Sherwood & Rochelle Wolcott, Co-Trustees
Rehearing - Variance
August 18, 2016

Present: Kevin Johnson, Chair
Michael Thornton
Jason Plourde
Joan Dargie, Alternate
Rob Costantino

Absent: Len Harten
Katherine Bauer – Board of Selectmen's representative

Secretary: Peg Ouellette

The applicant, Sherwood and Rochelle Wolcott, as Co-Trustees, for the property at 362 Federal Hill Road, Tax Map 56, Lot 44-4, in the Residence R District, a **Rehearing** of a Variance request from the Milford Zoning Ordinances Article V, Section 5.04.4 to allow the subdivision of the property into two (2) lots with approximately 25 feet and 75 feet of frontage where 200 feet is required.

APPROVED MINUTES 2/16/17

K. 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.
K. Johnson clarified that this was a rehearing. He was going to mention it before the last deliberation, and had mentioned it at last meeting, that he had said several times they were rehearing the previous case. That wasn't his intent. In reviewing the tape he did say it was a new hearing a couple of times. That was a new hearing where all evidence needed to be presented. This case is a rehearing. All testimony and materials received from the original case hearing of the case were still valid and in effect. Now, only interested in additional information relevant to the request for rehearing.
Robert Woolfson raised a question about the abutter list.
Atty. Michael Klass, representing the applicants, asked if that was a point of order.

K. Johnson stated that Mr. Woolfson was actually making a public comment.
R. Woolfson said it went to the validity of the rehearing.
K. Johnson said the Bd voted to grant the rehearing and Mr. Woolfson had 30 days from their decision to appeal.
R. Woolfson said it was a legal technicality.
K. Johnson said that was correct; that was all that was necessary to grant the rehearing.
R. Woolfson said he had legal precedent.
K. Johnson said they granted it. Regardless of reason for granting, Mr. Woolfson had 30 days to appeal that.
R. Woolfson said it was tabled for two weeks.
K. Johnson said that didn't matter. When they granted request for rehearing that created 30 day window in which anyone affected could appeal and say the Bd. made an incorrect decision when granting rehearing.
R. Woolfson said he was not saying that.
K. Johnson said they would proceed. This was rehearing. They could go back to day one and go through the entire process all over. Make everyone re-present information. Not necessary because all that was still valid. They were hearing new information. If Mr. Woolfson disagreed he could make that point during public comment. This was a rehearing and all prior submissions, applications, exhibits, etc. were still valid and still considered in deliberation of the case. It was all still on the table for deliberation. Applicant felt they made an incorrect decision and had additional information. They will listen to that as well as any comments from anyone else affected.
M. Klass said, at last hearing R. Costantino had benefit of looking at it. He appreciated the comments. Felt it was not necessary to get into terribly detailed back and forth. He might respond to what was said. Will not get into detailed rebuttal. Variance being requested for 362 Federal Hill Rd. Plan shows that property currently nine acres. Proposed to divide into two parcels. New lot just over 2 acres, Lot A. With 75 ft. frontage on road. The old parent lot, with existing house on existing nine acres currently only uses 25 ft. 75 ft. practically separated from that. In the initial hearing there were questions touching on what everyone acknowledged were planning-like issues. He felt Bd would still be interested. He went to DPW and Fire Dept. and at last meeting he presented it. He numbered the pages. Correspondence with DPW and Fire Dept on pages 5 through 7. He asked for any comments or concerns and both town departments said they had none. Another aspect whether the driveway for the proposed lot would be used on 75 ft. or use 25 ft as possible common drive. They were open to both should Bd decide that was condition they would be in favor of. He picked out pieces of the five prongs he thought were new. Re contrary to the public interest, to be contrary to the public interest the variance *"must unduly and to a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives."* He since found case law on purpose of frontage which was cited in his memo (in the packet), Sanderson v. Town of Candia said the fundamental purpose of frontage was to insure appropriate access to lots. They were there for frontage variance. Didn't need variance for anything else. A lot of neighbors' concerns were regarding the additional structure. Applicants requesting variance and setback. Fire Dept. and DPW had no comments or concerns. One of the comments at last meeting was defining scope of the neighborhood. Is it immediate abutters? He submitted survey last time to show how immediate lots were developed over time. It was his understanding the Bd determined the neighborhood in context of character of the neighborhood is limited to the immediate abutting lots but just lots that are part of this 45-acre development. He researched on it. One of the reasons for rehearing request was that the neighborhood as a matter of law is more than just certain selected and abutting lots. He cited Nestor v. Town of Meredith ZBA the Court looked at the dictionary definition and found that the term "neighborhood" was commonly defined as "a number of people forming a loosely cohesive community within a larger unit." It rejected the argument that "neighborhood" should be narrowly defined only to include only owners or occupants of adjacent property. This was in context of a special exception but applied to this hearing also. Handbook cites that case also and says ZBA is not limited to consider the effects only on owners of

immediate adjacent property. He felt "community" included more than just abutting owners. He referred to GIS shot on page 9 of document in file of small lots as part of Wallingford Rd subdivision, smaller older lots on Federal Hill and Foster Rd. There were various shapes there. Rd was not a grid pattern. That was one theme through the hearing last time. Believed scope of neighborhood was more than what Bd found. Noted that since then, neighbor at 304 Federal Hill Rd – fifth house on the right down the hill – testified they didn't see any negative affect and they always considered their house to be in same neighborhood as Wolcotts. There was testimony – and he tried to avoid getting into this. With respect to neighbor's use of property as a bed and breakfast. Focus of hearing not on that house; didn't want to get into a back and forth. It goes to actions speak louder than words. When neighbors operate a bed and breakfast that is a more intensive use than another residential home on a residential lot that complies with zoning is really consistent with the neighborhood. It goes to whether it alters essential character. He didn't believe another lot would. Second reason, from evidentiary standpoint. It highlights some of the emotions involved, rather than facts. He didn't cite Harborside Assoc. v. Parade Residence Hotel last time. Relevant to character of the neighborhood. It said mere conflict with the ordinance is not sufficient to constitute violation of ordinance's basic zoning objectives. They were there for a variance. There was materially some conflict but that was not grounds to deny. As to public interest, this did not conflict with basic zoning objectives to a marked degree and not contrary to public interest. At last hearing they spoke about spirit of ordinance. Noted the fundamental purpose of zoning was health and safety. DPW and Fire Dept. signed off. Access to common driveway terms could be fleshed out. Substantial justice is whether or not justice is done when loss in denying outweighs gain to the general public. Reminded Bd of "general public." Not whether justice to the immediate abutter, but general public. Loss in denying greatly exceeds any public gain. Re unnecessary hardship, that is driven by unique feature of property. Facts reveal it is a unique piece. It is large lot. Record shows larger than any other in the area. Page 9, shows some: 446, some of the lots to the south are a little bigger but many are smaller to the north, east and west. Subject lot unique shape and orientation. Only lot with 2 points of frontage on Federal Hill Rd. Abutting lot has point of access on Foster and Federal, but this is only one with two on Federal Hill. House is on the back portion which allows for subdivision up front. Topography is unique. Views are unique. They have nice clearing behind house. Vegetation pattern shown on page 9 serves as buffer between structures. Some of the historic plans show survey of 155 Foster Rd. No wetlands they are aware of. There is an existing hardcourt. Not a structure but shows use and development as other than natural trees. They believe it has safe access from either point compared to 155 you start getting closer to Foster Rd and house at 346.

Believed facts show this is unique piece of property. Hardship links to the particular request, which is frontage. Primary concern for frontage is safe access – that is confirmed by DPW and Fire Dept. Re hypothetical question, if Lot A had 200 ft. frontage with same orientation, what would that fix that they were hearing objection about? Would not need a variance. Wouldn't make abutters feel any better about this project. That showed disconnect between applicability of the ordinance and what applicants were requesting. Referred to prior submissions and narrative that was slightly revised.

K. Johnson asked for any questions from the Bd.

J. Plourde read from the information in June 3 letter to ZBA touches on some of the same points. At bottom of page 4 re public interest. He read the last line of the fourth paragraph stating the proposed would contain adequate and safe access to and from Federal Hill Rd. He asked M. Klass if he had done a traffic study, studied speed of drivers going by, measured sight lines? Measured potential distances between driveways? Those all come into play in safe access. He is questioning without adequate support.

M. Klass said the record showed it was a straight stretch. DPW and Fire Dept. signed off on it.

J. Plourde said they looked at it.

M. Klass they had not done a traffic study. believed it was fairly straight stretch. Residential nature. Speed limit 25 to 30 mph.

J. Plourde said there was a crest.

M. Klass agreed there was a crest on Foster. Didn't have an engineer. Believed it was safe and adequate access. Planning Bd would get into details more. Police and Fire didn't either. But they looked at it. Knew this was a concern of the Bd.
J. Plourde said they were looking at variance, not special exception. Pretty much asking to break our ordinance for this particular piece. They have 200 ft frontage for a reason, for safety.
K. Johnson stressed that was **one**.
J. Plourde said correct. Also as part of town driveway permit regulations you need to have 100 ft between driveways. Not just on your property but also with abutting properties. Didn't see any of that information.
M. Klass said re 100 ft. and look at the little lot, you could do the math.
J. Plourde said driveways weren't shown.
M. Klass said based on lawyer's view there appeared to be safe access. If this was allowed and planning person said there was a problem, he thought this proposal allowed independent access or a common drive. There were several common driveways in that area. Didn't have engineer to tell they had done a study on it. Acknowledged that.
J. Plourde said he kept bringing up Planning Bd. To go to Planning Bd he needed the variance. Part of decision wasn't just frontage. It was matter of determining where driveways would be. Zoning Bd needs to look at was, by granting variance, they would potentially allowed to have two driveways. Didn't feel there was enough information to make that decision.
M Klass said proposed solution would be a condition that it was conditioned upon review and approval by either traffic engineer or Planning Bd. If they get into those details and realize this wouldn't work and inconsistent with local or DOT regulations, that would undercut the variance.
J. Plourde understood, but he for one of the Bd members would like to have that information before making a decision.
M Kloss appreciated that. Remembered J. Plourde's traffic background and that was why he went to DPW and Fire. Referred to expense, if variance or Planning Bd denied. He needs to provide Bd with credible information.
J. Plourde said a full blown traffic study not necessary. It was a matter of where existing drives were and where proposed ones would be. Show on map and show distances between them and also sight distances. Have engineer in his car drive and someone follow to find out how fast he was going. Not expensive.
M. Klass said he'd thought about some of those. It shows existing drive. Not as precise as Jason looking for. If the Bd wanted more information he wanted to make sure they had what they need.
J. Plourde said he was not speaking for rest of the Bd members.
M. Klass said they were valid concerns. If that were something the Bd wanted to request, he would request reasonable time to do that.
K. Johnson asked for any further questions. None.
M. Klass asked J. Plourde what he wanted.
J. Plourdes said sight distance; pretend you are in your car looking right and left. Stopping sight distance – if you are in car on Federal Hill can see a car pulling out. Measure from intersection looking out and out looking in. Second would be approximate location between where a potential drive could be on both 75 ft. and 25 ft. frontage as compared with existing drives out there. Could be by aerial image and put in leaders with dimensions. Third is the speed. There are so many types of ways to measure vehicle speeds. Radar, tubes on the roadway. Simplest and cheapest is floating car, where someone sits in car and follows another car to find out how fast other people are driving.
K. Johnson said as far as he could tell there were three documents received on this case.
R. Lunn said Chair was in receipt of latest one.
K Johnson had some dated 8/3, 8/4 and 8/12. Since one of them was large document he would give exhibit numbers. They are in record for review.

He read Exhibit 1 – e-mail from Heather Bierschenk of 358 Federal Hill Rd.

Exhibit 2 – 13-pages from Alan Woolfson dated 8/4/16. He gave a brief summary.

Exhibit 3 – e-mail to Robin Lunn from Mildred & Peter Snider dated 8/13/16.

K. Johnson opened hearing for public comment.

R. Costantino mentioned something he received this week. After discussion it was determined everyone on the Bd had a copy.

Alan Woolfson of 360 Federal Hill Rd came forward. He said other abutters, the Lyttles couldn't be there.

He felt reason for rehearing was a technicality.

K. Johnson said for the rehearing they followed the Court format in that if the applicant gave them 10 reasons why they should have a rehearing, if the Bd found any one as justification for it they should grant. rehearing. First was technical deficiency of the notice. That one issue was sufficient justification to grant the rehearing because the notice was deficient per current court guidelines.

A. Woolfson read from the Handbook and Court case that said *"if the motion for rehearing cited the reason for the request the failure of the Board to adequately explain its decision, i.e. not address all five criteria for a variance, the Board could use the rehearing process to complete its records."* He said legally they didn't need to hear anything else. They could have used this hearing just to complete the Board's information. He also cited court case Fisher v. Boscawen quote in Handbook that said the Board could use rehearing to correct its own mistakes.

He said he received a copy of the abutters list and ran into a neighbor, Sharon Bouchard of 44-8 who was unaware of this case. He asked why she wasn't on the abutter list. He wanted to present a letter from her. Also another on the list that he felt was in the same situation.

After discussion and checking, it was determined that neither of them were abutters according to the strict legal definition. K. Johnson explained who are the legal abutters. Some properties may be affected, but not legally required to receive notice.

In response to Mr. Woolfson's question, K. Johnson said the notice is posted in the office and published in the newspaper.

A. Woolfson stated that as of 8/17 the existing house on the lot was up for sale. The applicants were trying to sell it and move. What would happen to the variance?

K. Johnson said the variance went with the land and not the owner. If granted and owners of the property changed the next day the variance would be valid on the property unless there was a condition, tough to get, that would preclude that. That would be a rare case. They can add conditions but change of ownership would be tough sell.

A. Woolfson said depending on how long this would go on, they may sell it before this is done. He handed out a rebuttal to arguments put forth by the attorney. Wanted to be sure all had them in their possession.

K. Johnson said yes.

A. Woolfson read this rebuttal which are included in the case file. (Summary of responses to some of his comments/questions follows) He referenced self-imposed hardship. K. Johnson said those are nondispository; can't make a decision on that one fact. It was noted the property could be sold. K. Johnson said the sale was irrelevant. If they sold tomorrow then case is over. A. Woolfson felt it went to hardship.

In response to A. Wollfson's remark about location of the proposed house, K. Johnson said it was impossible at this point to state exactly where a house would be located. A. Woolfson said he mentioned it because it was stated that would be a perfect location of the house because it was flat, etc. He referred to comment about the B &B. He said it was permitted in residential area. Allowed by special exception; didn't realize he had to get a special exception. Operation has been suspended. Neighbors complaining about it were running a food business out of their home with more people going down their drive to go to cooking demonstrations than were ever at the B&B. Only reason it was mentioned was his wife told abutter that was what they were going to be doing. All agreed, except Mrs. Wolcott said they'd support it if Mr. Woolfson supported her variance. He mentioned another property that was almost a mirror image of this one. If this variance granted, and then those neighbors want to do the same thing they'd be denied

because of not enough distances between driveways. He pointed out other properties that also had two driveways – not unique. Also referred to other large lots in the area.
K. Johnson asked for anyone else who wished to speak. None. He closed public comment.
K. Johnson read into record an additional correspondence, Exhibit 4, received this evening, signed by Sharon Bouchard, 346 Federal Hill Rd. Opposed to this subdivision. K. Johnson placed in the case file. He said she believe she was an abutter. Technically whether she is or not, it was a comment from an affected member of the public. That was why he was accepting.
A Woolfson said she put in opinion as to the Wolcotts down the road.
K. Johnson said the law states that to be affected by variance, special exception, etc. you do not need to be a technical abutter. Therefore, you can come to the public meeting and submit a letter. About the only requirement is to be a resident of Milford, unless you live on the border of another town. If you are on other town line, you would be affected and they would accept that.
A.Wollfson had additional information. K. Johnson reopened the public comment.
A. Woolfson said applicants put in a Google picture to support the case. He provided aerial picture, saying the characteristic of neighborhood going south you could see that creating a property that starts with cluster housing was not characteristic of the neighborhood. He had marked direction of South and X where proposed house was. Also on Wallingford Rd subdivision and Foster and Federal Hill Rd. Showed property referred to, old tennis court and where road narrows and speed limit changes. Asked Bd to refer to map lots attached to handout to see how big properties are in area.
K. Johnson asked for any further comments. None. He closed the public comment. He had read other document into the record.
M. Klass thought the law contained in Mr. Woolfson's memo was outdated and incorrect, especially re variance standards. It is body of law that is constantly changing.
K. Johnson said on that one particular case, the Court quoted it when they ruled last year.
M. Klass said when reading this memo, believed they were not supported by current state of the law.
The neighbor at 346 Federal Hill was not an abutter. She has every right to participate in the public process. He believed ZBA rules require public submittal of letters three days out. Rules require that "*any correspondence not received as specified in Paragraph A will not be considered by the Board."* Minor, but wanted to note the objection for the record.
K. Johnson said it was presented this evening.
M. Kloss said it was not presented by the abutter.
K. Johnson said he could accept the signature.
M Kloss repeated she was not an abutter. He said there have been applications over the past ten or twelve years about this property over the years. Didn't believe those were relevant
K. Johnson said they were all irrelevant. All prior cases, CC&Rs which existed prior to and have since expired, and whatever plan was made for that property whether an additional house there or not, all irrelevant. They were moving from the current state today. If they had original plan for ten houses but only seven, they are going from basis there were seven. Regardless of reasons for all prior cases. Town attorney provided legal opinion that the Court and legislature changed requirements for variance to such a degree it was appropriate to allow application again. Therefore, they were starting at ground zero and anything that was before and expired and was before and ruled on, were all irrelevant.
M. Kloss agreed. Re self-created hardship, Chair quoted that it was nondispositive. He reiterated the court case cited by the Chair.
K. Johnson said it was an element that could be considered.
M. Kloss agreed it could be considered, but was nondispositive. Also that case law talks about good faith. Abutters might not appreciate process, but his clients had always gone before the Bd. in good faith. Re scope of the neighborhood, felt that Mr. Woolfson was going both ways and wanted to focus only on ones close, but then wanted to go to the south to focus on some bigger lots. M. Kloss felt appropriate scope of neighborhood was various size lots in all directions.
K. Johnson said that was an issue for Bd. to determine-what constituted neighborhood in this case.

M. Kloss said there were larger lots to north, and also smaller to the south. Not fair to go in one direction because that direction supports your case. There were plenty of photos.
K. Johnson said in M. Kloss' rebuttal he stated it was the largest of the property. That is one of the factors of its uniqueness. But it was not.
M. Kloss said, of the abutting properties. He was not saying it was bigger than the lots to the south. Saying as to the abutting lots
K. Johnson agreed, but said they were talking neighborhood. Abutting lots don't constitute the neighborhood.
M. Kloss didn't disagree. He stated that when he said earlier it was the largest lot he didn't clarify it was the largest in the 45-acre subdivision. Record spoke for itself. Re assertion there were no other back lots of this size, pointed out Tax Map J6 Lots 33- 35, (11 Stone Ct.) which is a 1.75-acre back lot with long drive.
K. Johnson said one of provisions of the ordinance was to eliminate creation of back lots. This comes before the Bd. from time to time, where to draw the line in the sand. Do you get to say, we know there are twenty of them out there but don't want a twenty-first?
M. Kloss said Mr. Woolfson made allegation there were no undersize back lots in the neighborhood.
K. Johnson said it still circled to what constituted a neighborhood. Wanted to avoid that issue at this point.
M. Kloss said he was pointing to specific Tax Map and specific lot shown in proportion and proximity to the subject lot.
K. Johnson asked if they were now saying that Tax Map J 6 was the neighborhood.
M. Kloss said all he was saying was Lot 53-35-7 also known as 11 Stone Ct. was 1.75 acres, which was undersized as to the current zoning with long drive to the back land. They could argue over scope of the neighborhood, but he wasn't trying to go there.
K. Johnson stated he heard Mr. Woolfson say that didn't exist in the neighborhood. Not that it didn't exist in town. Going back and forth about what is the neighborhood.
M. Kloss said he was pointing out that lot. He had spoken about primary purpose of frontage was access. Didn't want to dismiss testimony that Chair spoke to eliminate those long lots. He believed those issues were talked about at prior hearings. He didn't want them to think he selectively ignored; went through those issues at last hearing. He believed this variance was not inconsistent with any of those purposes. Re shared driveway, Mr. Woolfson never had a shared driveway. They asked if they could have a shared drive and the Wolcotts preferred a drive that serviced their own lot. These lots not created with shared driveway. Chair had stated the CCRs not relevant but there was concept of spirit of the covenant which was why he brought up the B&B. It might be allowed by special exception, but that special exception was not issued.
K. Johnson asked Robin if Wolcotts had special exception for home occupation.
M. Kloss said he could get there. As to spirit. Covenant doesn't exist. Didn't think it was in spirit to operate an impermissible B&B. When here last time, he specifically didn't want to go back and forth between neighbors. It was allowed by special exception. He understood Mr. Woolfson didn't get a special exception. Never used any derogatory terms about the B&B. His clients run a small business of blending spices. All done off site. They do some office work at home. Not a food business or food demonstrations there. Sometimes they have friends there, like all of us do. Alleged with no evidence. Allegations the Wolcotts were using the property reasonably and thus no hardship, he believed that went to the second part of the hardship element. But they were focused on the second element, connecting hardship to applicability of the frontage ordinance. Focusing on Part A. Disagreed that Birkett property, the portion of the land that was split, was the same. He spoke to reasons he believed Wolcott property was unique. One can choose different aspects from different properties, but clear that Wolcott property was unique. Chair had spoken about not knowing location and size of proposed structure. Only there for a variance. Re diminution of value, he requested the Bd read the quotes.

K. Johnson said to let him know, which he has stated in other cases, he was loath to accept testimony from persons who were not there, or who declined to provide a name and address.
M. Klass agreed. Said the paragraphs didn't actually say it would reduce value. First one went to the size of the house and second to the interesting neighborhood. Then expectations of owners. Last one to hardship. And the very last on next page said once it was there it would be like it was always there and not affect value greatly. Supported his position that it fit with the character of neighborhood. Re current use tax, that was irrelevant.
K Johnson agreed that was irrelevant.
K. Johnson asked Mr. Woolfson if he need to reopen the public comment. He did. K. Johnson reopened public comment.
J. Dargie said it was mentioned that Wolcotts putting house on the market. Was that the whole piece of land, or just the piece with the house on it?
M. Kloss was not privy to details. Acknowledged it was for sale. Under contract meant different things. In this market, it could fall apart. If they sold they would no longer be applicants. Whether these rights transferred to the new owners. Right now whole. They needed variance to subdivide and subdivision being allowed to convey a different lot. Didn't believe that it was on the market was relevant.
K. Johnson said only if in time between his presentation and Bd. decision it was sold, that would bring them back to square one.
K. Johnson reopened public comment. In interest of justice and fair play, as Mr. Woolfson had one further thing.
M. Kloss objected, saying it had to end at some point. Understood Chair had discretion to reopen, but objected.
A. Woolfson thought that a really big deal was being made about the B&B.
K. Johnson said he was pretty confident he knew how the Bd would answer and was not an issue for the Bd.
K. Johnson closed public comment.
K. Johnson asked M. Kloss if he had finished his presentation. He said unless there were questions.
No other questions from the Bd.
M. Kloss had questions about more detailed traffic studies. If Bd. wanted, they would be willing to do.
K. Johnson said it would be determined during deliberative session.
K. Johnson, due to late hour, asked for a motion to continue the deliberative session to the next regularly scheduled meeting (Sept. 1.)
J. Dargie made motion to continue to next regularly scheduled meeting. J. Plourde seconded.
J. Dargie, J. Plourde, M. Thornton and K. Johnson voted in favor. R. Costantino voted no.
Case continued to Sept. 1, 2016.
M. Kloss asked for point of order. Public hearing was closed. Was this going two weeks?
K. Johnson said will go two weeks, to Sept. 1.
M. Kloss asked if applicant could attend.
K. Johnson said attorney and applicants could attend; can't speak unless the Bd. asks them something.
M. Kloss concerned that public comment had been opened & reopened. Hesitant to not appear, but.
K Johnson repeated that during deliberations, unless an issue arose for which the Bd had specific questions for applicant or abutter, they would not reopen public comment. That next meeting will be Sept. 1.
M. Kloss asked if that motion (to continue) had been acted on.
K. Johnson said yes, 4 to 1.