TOWN OF DURHAM
ZONING BOARD OF ADJUSTMENT
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DURHAM, NH 03824
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www.ci.durham.nh.us
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Town of Durham
APR 15 2021
Planning, Assessing
and Zoning

REQUEST FOR REHEARING

A Request for Rehearing must be filed with the office of Planning and Zoning at the Durham Town Hall within thirty calendar days of the decision date of the Zoning Board of Adjustment. According to RSA 677:3, a request for rehearing "shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." The Zoning Board of Adjustment has thirty (45) calendar days to either grant or deny the application for rehearing once it has been filed.

Name of Applicant: Thomas J. Daly and Erin L. Daly, Trustees of the Thomas J. Daly Revocable Trust, and Erin L. Daly and Thomas J. Daly, Trustees of the Erin L. Daly Revocable Trust

Address: 5 Jasper Lane, Nashua, NH 03063

Phone # (603) 361 - 5033 Email: tjd@q7.io

Owner of Property Concerned: Same
(If same as above, write "Same")

Address: Same
(If same as above, write "Same")

Location of Property: 190 Piscataqua Road
(Street & Number)

Tax Map & Lot number: Map 12, Lot 7

Date of Zoning Board Decision: March 18, 2021

Reason for Request for Rehearing: (feel free to use a separate piece of paper)

See attached.

This document serves as Mr. and Mrs. Daly's Request for Rehearing of the Durham Zoning Board of Adjustment's ("the Board") denial of two variances pursuant to N.H. RSA 677:2. Mr. and Mrs. Daly respectfully submit that the Board acted unlawfully and/or unreasonably when it found that the application for a variance from the Durham Zoning Ordinance 175-62 ("Ordinance 175-62") that the Dalys presented at the March 16, 2021 Board hearing did not meet the statutory requirements for a variance. Mr. and Mrs. Daly also respectfully submit that the Board acted unlawfully and/or unreasonably when it denied a variance from Durham Zoning Ordinance 175-59(A)(2)(d) ("Ordinance 175-59(A)(2)(d)") as the Dalys did not present that request for a variance at the hearing on March 16, 2021, and withdrew that request at the hearing which the Board's Chair accepted. Thus, the Daly's request for a variance from Ordinance 175-59(A)(2)(d) was never heard by the Board and therefore should not have been denied.

Introduction

Mr. and Mrs. Daly sought two variances in order to proceed with their proposed building plan for their home on 190 Piscataqua Road: (1) a variance from Ordinance 175-62 which prohibits any uses in the Wetland Conservation Overlay District ("WCOD") that are not explicitly identified in Ordinances 175-60 or 175-61; and (2) a variance from Ordinance 175-59(A)(2)(d) which requires an upland buffer strip of 100 feet from the reference line of adjacent wetlands. By letter dated February 25, 2021, Mr. and Mrs. Daly, through their attorney, submitted a thirty-four page application, including attachments, reviewing each element of the five part variance test required for each variance being requested by Mr. and Mrs. Daly. A hearing of the Board to review the requested variances was held on March 16, 2021 ("the Hearing"). At the end of the Hearing the Board voted 4 to 0 to deny the Ordinance 175-62 variance request. On March 19, 2021, the Board issued a one-page written decision documenting its denial of both requested variances (the "Notice

of Decision"). Importantly, one of the Dalys' assertions in support of their Request for Rehearing is that the Board only heard one request—the request for a variance from Ordinance 176-62. For brevity and clarity, the Dalys will refer to both requests for variances when discussing their Request for Rehearing, but in doing so the Board should keep in mind that the Dalys' request for a variance from Ordinance 175-59(A)(2)(d) was never presented and was withdrawn by agreement at the end of the Hearing. This is discussed in greater detail in section II, page 3 of this Request for Rehearing.

This Request for Rehearing will not restate Mr. and Mrs. Daly's February 25, 2021 application that addresses each element of the five part statutory test required for a variance approval, but that submission is incorporated by reference in this Request for Rehearing as though set forth in full.

I. The Board's Notice of Decision was unlawful and/or unreasonable as it did not comply with N.H. RSA 676:3, I.

As an initial matter, Mr. and Mrs. Daly request a rehearing on their application for variances from Ordinances 175-59(A)(2)(d) and 175-62 as the Board's issuance of its decision was insufficient as a matter of law under N.H. RSA 676:3, I. Under this statute, if an application for a variance is not approved, "the board shall provide the applicant with written reasons for the disapproval." See N.H. RSA 676:3, I (amended 2009).

Here, the Board's Notice of Decision is one sentence long. There is no "written reason for disapproval" in this sentence, but rather, just a notice of the disapproval itself. The Board's Notice of Decision, therefore, is insufficient under N.H. RSA 676:3, I, as the Dalys have not been provided with a written reason or reasons for the disapproval of their requests, as statutorily required, and therefore a rehearing should be allowed.

II. **The Board's Notice of Decision was unlawful and/or unreasonable as New Hampshire courts have strongly recommended, and often required, that specific findings be stated in a decision.**

The Board's Notice of Decision is also unlawful and/or unreasonable because it is inadequate for the Dalys to pursue meaningful judicial review. The 2020 edition of the New Hampshire Office of Strategic Initiatives' "Zoning Board of Adjustment Handbook for Local Officials," states "[t]he [N.H. Supreme] court has strongly recommended, and has required in many instances, that specific findings be stated" in a zoning board of adjustment's decision. See New Hampshire Office of Strategic Initiatives, Zoning Board of Adjustment in New Hampshire, 2020, at p. 56 (III-13) attached hereto as "Exhibit A." Thus, even where specific findings of fact are not required by statute, the New Hampshire Supreme Court has held that the findings which disclose the basis for the Board's decision are necessary for the applicant to pursue judicial review. See Alcorn v. Rochester, 114 N.H. 491, 495 (1974). ("The failure of this board to disclose the real basis of its decision prevented the plaintiffs from making the requisite specification and thus denied them meaningful judicial review.").

Here, the Board's decision was a one-sentence denial of the requests for variances. The Board provided no basis for its decision, nor did it include any specifications as to its findings. As a result, the Board is preventing Mr. and Mrs. Daly from meaningful review because the Board provided no basis upon which it relied in making its decision and a request for a rehearing should be allowed.

III. **The Board acted unlawfully and/or unreasonably when it denied the Dalys' request for a variance from Ordinance 175-59(A)(2)(d) as the Dalys, through their attorney, did not have the opportunity to present their request for said variance at all.**

The minutes from the Board's Hearing on March 16, 2021 (the "Minutes"), indicate that the public hearing was called into session on the Dalys' applications for variances. The Daly's attorney, Suzanne Brunelle, specifically noted that, "there were two variance requests [], which were *related*." See Minutes, March 16, 2021 Board Hearing, at p. 2, lines 3-5. Although the Minutes indicate that, "Chair Sterndale said [the two variance requests] could be treated as one[,]" the video recording of the March 16, 2021 Hearing clearly shows that Attorney Brunelle did not hear Chair Sterndale's suggestion, because Attorney Brunelle had already begun her presentation as to the first variance request from Ordinance 175-62. See Video Recording, March 16, 2021 Board Hearing, at 05:17. As a result, Attorney Brunelle only presented an evaluation of the five variance factors as to the request for a variance from Ordinance 175-62 and not Ordinance 175-59(A)(2)(d).

The Minutes further support the Dalys' request for rehearing due to the fact that the second variance request was not presented. After the public session was closed, and after Board Member Mark Morong moved that the Board deny the application of Mr. and Mrs. Daly, and after other Board members passed the motion, Attorney Brunelle withdrew the request for a variance from Ordinance 175-59(A)(2)(d). See Minutes, March 16, 2021 Board Hearing, at p. 10, lines 21-22. The Minutes show that although Chair Sterndale said the Board, "had kind of addressed both [requests] . . . Attorney Brunelle [sic] said she didn't present both." See Minutes, March 16, 2021 Board Hearing, at p. 10, lines 22-23. Thus, as evidenced by the Minutes, "Chair Sterndale said they would therefore stick with 175-59(A)(2)(d) [sic], and 175-62 [sic] would be withdrawn."[1] Further, a review of the Dalys' application will show that the five criteria for the two variances,

[1] The Minutes are inaccurate in that Attorney Brunelle presented only the application for a variance from Ordinance 175-62, and did not present the request for a variance from Ordinance 175-59(A)(2)(d). As a result, the Minutes should state that the request for a variance from Ordinance 175-59(A)(2)(d), *not Ordinance 175-62*, was withdrawn.

although similar, are not identical and therefore, the withdrawal of Ordinance 175-59(A)(2)(d) by Attorney Brunelle as acknowledged in the Minutes by Chair Sterndale should be upheld with the ability of the Dalys to present an application for a variance from Ordinance 175-59(A)(2)(d) at a later date.

Regardless of the error in the Minutes about which of the Dalys' requests was withdrawn, what is relevant here is the fact that the Minutes explicitly state that one of the requests was withdrawn. As the Board acknowledged that the Dalys' request for one of their variances was not presented, it was unlawful and/or unreasonable for the Board to deny *both* requests in their Notice of Decision dated March 19, 2021. The Dalys respectfully request a hearing on their request for a variance from Ordinance 175-59(A)(2)(d) so that they may present their application therefor to the Board for a fair and meaningful evaluation.

IV. Mr. and Mrs. Daly request a rehearing on their request for a variance from Ordinance 175-62 as the Board unlawfully and/or unreasonably denied the request based on irrelevant information unrelated to the required five-part variance test.

The Board acted unlawfully and/or unreasonably when they denied the Dalys' request for a variance from Ordinance 175-62 as the Board discussed irrelevant matters, never discussed the five-part variance test, and imposed a higher burden on the Dalys than allowed by statute.

a. Irrelevant Factors

The Board's reliance on irrelevant information for its denial of the request for a variance from Ordinance 175-62 is expressly apparent from the fact that at the Hearing, in the Minutes, and in the Notice of Decision, the Dalys are given no information as to which of the five variance factors caused the Board to deny the Dalys' request. The New Hampshire Supreme Court has held

that in a motion to reconsider, a variance applicant need not raise conditions that were not specifically denied by the Zoning Board of Adjustment. Robinson v. Town of Hudson, 149 N.H. 255, 258 (2003). In Robinson, the Court held that an applicant's request for reconsideration was sufficient even though it only addressed two conditions of the five-part variance test. Id. The Court held that because the Hudson ZBA specifically relied upon those two factors in support of its denial, it was unnecessary for the applicant to address all five conditions in her request for reconsideration. Id. Here, the Dalys' Notice of Decision did not state any of the five factors upon which the Board relied in its decision to deny the Dalys' request.

The Dalys recognize that the Board's failure to make explicit findings in their Notice of Decision is not, in and of itself, unreasonable or unlawful. See Kalil v. Town of Dummer Zoning Bd. of Adjustment, 155 N.H. 307, 310 (2007) ("Although disclosure of specific findings of fact by a board of adjustment may often facilitate judicial review, the absence of finding, at least where there is no request therefor, is not in and of itself error.") However, the Notice of Decision, the Minutes, and video recording of the Hearing are not simply devoid of *specific findings* as to the five variance factors, they are actually devoid of *any discussion* of the five variance factors by the Board. In other words, the Minutes and the video recording document that the Board did not consider the five variance factors in reaching their decision to deny the variance request, but instead relied upon other, irrelevant information. See Rochester City Council v. Rochester Zoning Board of Adjustment, 171 N.H. 271, 276 (2018) (holding that the ZBA did not explicitly address the variance factors in its written decision *but* the minutes from the hearing showed that the ZBA discussed whether the applicants had demonstrated the factor of unnecessary hardship, i.e., it was evident from the minutes that the ZBA felt that the applicants had failed to show one of the variance criteria).

Here, unlike in Robinson, the Board did not discuss any of the necessary five-part variance test in reaching its decision to deny the Dalys' request for a variance from Ordinance 175-62. Unlike in Rochester City Council, the Minutes and video recording of the Hearing *do not* indicate which factor or factors the Board relied upon in its decision to deny the variance request. Instead, the Board's deliberation focused almost exclusively on irrelevant factors—most notably the size of the Dalys' proposed house. As a result, the Board's decision was unlawful and must be reversed.

In further support of the argument that the Board relied on irrelevant factors, the Dalys raise the following points. From the very outset of the Hearing on March 16, 2021, it was evident that the Board was not focused on the five-part variance test when it considered the Dalys' request for a variance from Ordinance 175-62. As the Board is aware, in order to receive a variance, an applicant must meet five factors: (A) the variance will not be contrary to the public interest; (B) the spirit of the ordinance is observed; (C) substantial justice is done; (D) the value of surrounding properties are not diminished; and (E) literal enforcement of the provisions of the ordinance would result in unnecessary hardship. See N.H. RSA 674:33, I(b). See also Vigeant v. Town of Hudson, 151 N.H. 747, 751 (2005). The applicant for a variance bears the burden of proving that it meets the five variance factors, and where one or more of the five variance factors are not met, the board of adjustment may deny a request. See Saviano v. Town of Atkinson, No. 2012-0818, 2013 N.H. LEXIS 117, at *4 (Oct. 25, 2013).

The Board's Rules of Procedure also require the Board to, "review all statutory criteria before granting any approval, and specifically state the reason for any denial." Id. at p. 4, Sec. 5, Decisions.

Here, the Minutes and video recording of the Hearing show that, after Mr. and Mrs. Daly presented on the five variance criteria through their attorney, the very first question from the Board

was, "How big is the house?" See Minutes, March 16, 2021 Board Hearing, at p. 6, lines 22-23; see also Video Recording, March 16, 2021 Board Hearing, at 24:28. In fact, throughout the duration of the Hearing and the Board's deliberation, there were repeatedly comments made by all Board members about the square footage of the Dalys' proposed home, and the "size" and "magnitude" of the home. See generally Video Recording, March 16, 2021 Board Hearing, at 28:11; 28:43; 32:30; 49:04; and 50:03 (Mr. Morong stating that 8,000 square feet was not a standard size for a home; Mr. Morong describing his 2,000 square foot home in comparison to the Daly's request; Chair Sterndale asking whether an 8,000 square foot home was a, "reasonable thing to try and accommodate with a variance;" Mr. Warnock stating that he, "come[s] back to the size and the magnitude of this structure in comparison to a modern day home" and noting "this is substantial;" and Ms. Lawson stating, "this is a large home . . . a very large home.")

The Dalys recognize that the square footage of a home may be relevant, but only as to the variance factor regarding the value of surrounding properties. See Nine A, LLC v. Town of Chesterfield, 157 N.H. 361, 365 (2008) (affirming the Superior Court's finding, "that the ZBA could have reasonably found that seven, two-story, 3,000 square foot homes on lots ranging from approximately 0.75 acres to 0.95 acres would negatively affect the views to and from the lake."). However, unlike Nine A, LLC, the discussion surrounding the square footage of the Dalys' proposed home was not related to the value of surrounding properties. In fact, the Board indicated as much when it acknowledged that the Dalys' proposed home would not be visible from the road. In response to Mr. Morong's question about what the challenge was in building a triangular home, Attorney Brunelle explained that a triangular home was not in keeping with the neighborhood. See Video Recording, March 16, 2021 Board Hearing, at 26:14. In response to Attorney Brunelle, Mr. Morong said "But nobody can see it [the house]." See Video Recording, March 16, 2021 Board

Hearing, at 24:16. Mr. Morong then went on to say that "one of the requirements here isn't with keeping in the neighborhood," (See Video Recording, March 16, 2021 Board Hearing, at 26:41), and then, not two minutes later, stated that, "8,000 square feet is not a standard size and not in keeping with the neighborhood." See Video Recording, March 16, 2021 Board Hearing, at 28:12. It is evident through Mr. Morong's contradictory statements, and the other Board members' singular focus on the proposed home's square footage, size, and magnitude, that the Board's discussion regarding the proposed home's size were entirely unrelated to any of the five variance factors.

For example, "Chair Sterndale said the question probably boiled down to whether [the] size [of the home] was reasonable in th[e] location and should be accommodated with a variance[.]" See Minutes, Board Hearing on March 16, 2021, at p. 7, lines 18-19. Chair Sterndale's statement here is illustrative of the very reason why a rehearing is necessary; the size of the proposed home and whether the size is reasonable in the location is *not* a factor set out in N.H. RSA 674:33, I(b), and therefore is irrelevant to the Board's consideration as to whether the Daly's are entitled to this variance.

Another Board member, Mr. Warnock, stated that, "it came down to the size that was proposed [by the Dalys], compared to a modern-day home." See Minutes, March 16, 2021 Board Hearing, at p. 9, lines 11-12. Like Chair Sterndale's comment, the size of the proposed home, "compared to a modern-day home" is not a factor set out in N.H. RSA 674:33, I(b), nor is it a tool to help in the Board's analysis of one of the five factors. Other commentary by the Board indicative of its focus on the size of the home include Ms. Lawson's comment that, "[it] would be a very large home" and Mr. Morong's comment that, "the applicants were asking for too much, and . . .

it wasn't a good deal for the Town." See Minutes, March 16, 2021 Board Hearing, at p. 9, lines 15-16; 33-34.

Mr. Morong also focused on the size of the house when he noted that he, "could see [the Board granting a variance for] a 6000 or 7000 [square foot] house," but not an 8,000 square foot house. See Minutes, March 16, 2021 Board Hearing, at p. 9, lines 31-33. Both Ms. Lawson and Mr. Warnock commented on the, "possible square footage the ZBA would accept" if Mr. and Mrs. Daly returned with a new request, but Chair Sterndale indicated that it, "wasn't the ZBA's place to do that[.]" See Minutes, March 16, 2021 Board Hearing, at p. 9, lines 35-39; P. 10, lines 2-3. Although Chair Sterndale directed the Board back to its role as the zoning board of adjustment and not the planning board, the Minutes are still telling as to the Board's unlawful and/or unreasonable focus on the square footage and size of the Dalys' proposed home, i.e., the Board was entirely too distracted by the size of the proposed building instead of whether the Dalys met their burden as to the five variance factors.

Size was not the only irrelevant factor on the Board's mind. For example, there was discussion regarding the, "challenge . . . of building a triangular house[.]" See Minutes, March 16, 2021 Board Hearing, at p. 6, lines 27-28. Similarly, there was inquiry into whether Mr. and Mrs. Daly were aware of the, "setback and buildable area at the time of purchase." See Minutes, March 16, 2021 Board Hearing, at p. 7, lines 1-2. Ms. Lawson, commented that "she would have expected that due diligence would have been done on where the applicants could and couldn't build, and the restrictions on the property." See Durham ZBA Meeting Minutes from Hearing on March 16, 2021, at P. 9, lines 16-18. The potential to build a triangular home and the inquiry into the Dalys' knowledge about zoning and land use restrictions on the property before or after purchase are not contemplated by the five factor variance test and thus are not proper matters of inquiry and reliance

by the Board. In the absence of discussion about the five-factor test in the Minutes or the video recording of the Hearing, the Board was relying on irrelevant factors in its decision to deny the request. This reliance on irrelevant factors is unlawful and/or unreasonable.

The Board's lack of discussion regarding the five variance factors in the Hearing—and instead its' focus on the size of the Dalys' proposed home—is similar to the facts in Thomas v. Town of Hooksett, 153 N.H. 717, 724-25 (2006). In Thomas the Supreme Court remanded the Town of Hooksett Zoning Board of Adjustment's variance decision because of an incomplete record. Id. There, the Hooksett ZBA granted a variance request, but only after a very brief discussion of the request. Id. at 724. The Supreme Court noted that, "[a]lthough disclosure of specific findings of facts" was not necessarily required, "the ZBA minutes reflect[ed] that the ZBA gave only *cursory consideration* to the variance issue[.]" Id. In fact, there, the Court found that the Hooksett ZBA was focused almost entirely on something else—a building permit issue. Id.; see also Husnander v. Town of Barnstead, 139 N.H. 476, 479 (1995) ("The trial court properly based its decision on a review of all five variance requirements."); Labrecque v. Salem, 128 N.H. 455, 458 (1986) ("The board heard testimony concerning all five [variance] requirements.")

Similar to Thomas, the present Board gave no consideration to the required five part variance test. Instead the Board based its denial on its irrelevant discussion regarding the size of the proposed home, the potential for a triangular shaped home, and the inquiry into whether Mr. and Mrs. Daly were aware of the zoning restrictions before they purchased the property. The Board's consideration of the variance request based on irrelevant factors was unlawful and/or unreasonable, and therefore the Dalys respectfully request a rehearing.

b. Higher Burden

In Gray v. Seidel, 143 N.H. 327, 328-29 (1999), the New Hampshire Supreme Court held that the trial court erred as a matter of law when it affirmed the Meredith ZBA's denial of a variance request because the Meredith ZBA imposed a higher burden on the applicants than statutorily required. There, the Meredith ZBA denied the applicants' request for a variance because the applicants failed to show that, "granting the variance would benefit the public interest." Id. at 329. The Court held that the statute, "plainly states that a variance should be granted when it will not be contrary to the public interest." Id. (internal quotations omitted). The Court found that the Meredith ZBA's requirement that the applicants show a benefit to the public, versus the statutory requirement to show how the variance would not be contrary to public interest, was a higher burden than statutorily required and therefore unreasonable. Id.

Similarly, in Chester Rod & Gun Club, Inc. v. Town of Chester, 152 N.H. 577, 582 (2005), the Supreme Court held that the Chester ZBA applied an incorrect legal standard when it relied upon the, "effect the variance would have upon the Town's incipient plan to build a telecommunications tower elsewhere." There, the Court noted that the town should have examined whether the variance would, "unduly conflict with basic zoning objectives by altering the essential character of the neighborhood, or by threating the public health, safety and welfare[.]" Id. Thus, because the Court found that the Chester ZBA considered a standard beyond that which is statutorily required, the Court held the variance decision was in error. Id.

Like the Boards in Gray and Chester Rod & Gun Club, Inc., the Board here imposed a higher burden on the Dalys than statutorily required. Throughout the Hearing, as demonstrated in both the Minutes and the video recording, the Board noted that, in considering the Daly's request, it must grant the "minimal amount of relief necessary" and the "least variance necessary." See

Durham ZBA Meeting Minutes from Hearing on March 16, 2021, at p. 7, lines 21-22; p. 9, line 12. These two standards that the Board referenced—minimal amount of relief necessary and/or the least variance necessary—are not statutorily recognized standards in the variance context. As these standards are higher than the statutorily required standard, the Board's reliance on these standards was unreasonable and unlawful. Similarly, and likely related, any deliberation as to the amount of square footage the Board would "accept," and whether the proposed home is "a good deal for the Town" is beyond what is statutorily required, and is an unreasonable burden that the Dalys are not required to prove. See Minutes, March 16, 2021 Board Hearing, at p. 9, lines 15-16; 33-34.

Request for Rehearing and Relief

Based on the above detailed review of the record in this matter, it is apparent that the Board denied only one of the Daly's requested variances, that is to Ordinance 175-62. That ordinance is titled "Prohibited Uses in the WCOD" and cross-references Ordinances 175-60 and 175-61, which set forth permitted uses and uses allowed by conditional use permit in the WCOD. Residential uses are not listed in either such ordinance provision, although Ordinance 175-61 does allow, "the construction of a non-residential building within the upland buffer strip in a core commercial or research/industry zoning district" by a conditional use permit from the planning board.

The Minutes and the video recording of the Board's March 16, 2021 Hearing demonstrate that every Board member supported the concept that a residential building should be allowed to intrude into the WCOD. See p. 10 above and Minutes, at p. 7, lines 20-24.[2] The Board's issues

[2] See also Minutes, March 16, 2021 Board Hearing, at p. 7, lines 20-21; p. 9, lines 12-14; 35-39 (Chair Sterndale noting "there could be a nice house with some relief;" Mr. Warnock and Ms. Lawson explaining that a residential building could be allowed with "the least variance necessary;" and Ms. Lawson and Mr. Warnock discussing "possible square footage the ZBA would accept" indicating that a residential building should be allowed to intrude into the WCOD); Video Recording, March 16, 2021 Board Hearing, at 27:13; 33:16; and 55:48 (Mr. Morong stating

were with how much such intrusion should be allowed. The latter is the subject only of the second variance request that Attorney Brunelle withdrew at the close of the Hearing. That request for a variance from Ordinance 175-59(A)(2)(d) should be heard at a future ZBA hearing. However, as to the variance request the Board did hear for Ordinance 175-62, the Board has already effectively found that it should be granted, because all Board members spoke in favor of the concept of allowing some part of the Dalys' proposed residence to intrude into the WCOD. This Board has recently granted multiple variance applications to intrude into the WCOD.[3]

On rehearing, this Board should formalize that finding by reviewing the five variance factors and granting the requested variance from Ordinance 175-62 to allow the proposed residential building to intrude into the WCOD. The amount of that intrusion is not implicated by Ordinance 175-62. It is implicated by the Dalys' second variance request, from Ordinance 175-59(A)(2)(d), which has yet to be presented by the Dalys to the ZBA. The Dalys' request that their application for a variance from Ordinance 175-59(A)(2)(d) be heard following the rehearing and at such time as the variance request to Ordinance 175-62 is reheard.

"I'm not saying there is a problem with this proposal;" Chair Sterndale inquiring into "less encroachment" thereby indicating that encroachment was permissible and Mr. Morong agreeing; and Mr. Morong describing square footage sizes "[he] could see" intruding).

[3] See records at:

-- https://www.ci.durham.nh.us/boc_zoning/variance-application-18-garrison-avenue
-- https://www.ci.durham.nh.us/boc_zoning/variance-application-266-newmarket-road.
-- https://www.ci.durham.nh.us/boc_zoning/variance-request-11-cedar-point-road

Respectfully submitted,

THOMAS J. AND ERIN L. H. DALY

By their attorneys,

DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION

Dated: April 14, 2021

/s/ Suzanne Brunelle, Esq.

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EXHIBIT A

2020

The Zoning Board of Adjustment in New Hampshire

A Handbook for Local Officials

NH Office of Strategic Initiatives

Johnson Hall
107 Pleasant Street
Concord, NH 03301

Phone: 603-271-2155
Website: www.nh.gov/osi

RSA 500-A:12 Examination

I. Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:

(a) Expects to gain or lose upon the disposition of the case;
(b) Is related to either party;
(c) Has advised or assisted either party;
(d) Has directly or indirectly given his opinion or has formed an opinion;
(e) Is employed by or employs any party in the case;
(f) Is prejudiced to any degree regarding the case; or
(g) Employs any of the counsel appearing in the case in any action then pending in the court.

II. If it appears that any juror is not indifferent, he shall be set aside on that trial.

4. Findings of Facts

At the conclusion of public testimony but before the public hearing is closed, the board should begin to deliberate, in public, and in a manner such that all discussions can be heard by the public on the essential facts that the testimony has established. This practice is helpful should the board have any additional questions for the applicant or if they need clarification about any evidence or testimony presented while establishing the facts of the case. An example of fact finding would be if a variance has been requested and conflicting evidence has been received about whether the proposed use will diminish property values in the neighborhood. The board should vote to find, as a fact, that values either will or will not be diminished and why (because of increased density, noise, congestion, traffic, or what have you). The court has strongly recommended, and has required in many instances, that specific findings be stated.

In the case of *Alcorn v. Rochester*, 114 N.H. 491 (1974), the supreme court remanded a decision of the board of adjustment stating that "... the failure of this board to disclose the real basis of its decision prevented the plaintiffs from making the requisite specification and thus denied them meaningful judicial review."

In that decision, the supreme court cited, as authority, Anderson, American Law of Zoning where it is stated at 20.41 (1977): "In general, a board of adjustment must, in each case, make findings which disclose the basis for its decision. Absent findings which reveal at least this much of the process of decision, the reviewing court may remand the case to the board for further proceedings. Thus a bare denial of relief without a statement of the grounds for such denial will be remitted to the board for further action. A decision granting a variance will be remanded if the board fails to make findings which disclose a basis for its determination."

Since the Alcorn case, the New Hampshire Supreme Court has specifically required that findings of fact be made by other administrative bodies. In each case the findings were not required by statute, but the court indicated that there could be no meaningful review without them. In the case of *Trustees of Lexington Realty Trust v. Concord*, 115 N.H. 131 (1975), the court pointed out that the requirement to make findings of fact is part of the common law even though the board of taxation is not required by statute to do so. In *Society for the Protection of NH Forests v. Site Evaluation Committee*, 115 N.H. 163 (1975), the court again indicated that findings of fact were necessary in order for decisions to be made by a state board. The supreme court in *Foote v. State Personnel Commission*, 116 N.H. 145 (1976) stated that findings of fact must be made even though not required by the Administrative Procedure Act, RSA 541-A:36, because the "...reviewing court needs findings of basic facts so as to ascertain whether the conclusions reached by it (the administrative board) were proper."