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 **FILE COPY**

TELEPHONE
603-527-1440

August 28, 2015

RECEIVED
AUG 28 2015

SELECTMEN'S OFFICE

Via Hand-Delivery

Ms. Xann Horn, Board Secretary
Zoning Board of Adjustment
1 Moultonville Road
Center Ossipee NH 03814

Re: Case No: 15-4-V; Four Long Pond Realty Trust

Dear Xann:

Enclosed herewith for filing with the Zoning Board of Adjustment please find the within Objection of Four Long Pond Realty Trust to the "Appeal" of Whittier Coalition, LLC.

I understand the within Objection will be distributed by your office to the board members prior to the next meeting scheduled for 09/08/15.

I hereby certify that on this 28th day of August, 2015, a copy of foregoing Objection of Four Long Pond Realty Trust to the "Appeal" of Whittier Coalition, LLC was forwarded to Whittier Coalition, LLC, c/o Mark E. McConkey, member.

Very truly yours,


Marshall D. Hickok

MDH/me

Enclosure

cc: Four Long Pond Realty Trust
Whittier Coalition, LLC
C/o Mark E. McConkey
10 Clover Ln.
Freedom NH 03836-4205

RECEIVED

AUG 28 2015

THE STATE OF NEW HAMPSHIRE

TOWN OF OSS�PEE
Case No: 15-4-V

SELECTMEN'S OFFICE
ZONING BOARD OF ADJUSTMENT

Objection of
Four Long Pond Realty Trust
to the "Appeal" of Whittier Coalition, LLC

NOW COMES Four Long Pond Realty Trust ("FLPRT"), through its counsel, Marshall D Hickok Esq., and hereby respectfully objects to the "Application for Zoning Board of Adjustment Appeal" ("Appeal") filed by the Whittier Coalition, LLC ("Whittier") on 08/14/15.

In support whereof, FLPRT respectfully represents as follows:

1. On 07/14/15 the ZBA granted FLPRT a variance from Ossipee Zoning Ordinance Articles XX 2.1 f and 2.2 a, subject to the stated conditions "that all state and local regulations will be met."

2. On 08/14/15 Whittier filed its "Appeal" of this decision with the Town of Ossipee Selectmen's Office.

3. Whittier's Appeal is not the proper procedural vehicle to obtain review of the ZBA's 07/14/15 decision. Rather, the Whittier Appeal appears to rely on RSA 676:5, which statute is for the limited purpose of appealing a decision of an administrative officer to the ZBA, not for appealing a decision of the ZBA.¹

¹ "I. The zoning board of adjustment shall have the power to: (a) Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16." RSA 674:33 And, "I. Appeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA 674:33 may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer." RSA 676:5

4. The Whittier "Appeal" is untimely. The ZBA decision was issued on 07/14/15 (and the minutes reflect, Whittier, through its member Mark E. McConkey, was present). Accordingly, to be timely, a Motion for Rehearing must have been filed by 08/13/15.

5. RSA 677:2 requires that "any person" who is "directly affected" by a ZBA decision must timely move for rehearing within 30 days of the decision to first allow the ZBA an opportunity to address issues raised in the Motion for Rehearing as a precondition of the affected person being able to appeal the ZBA decision to the Superior Court.

6. Per RSA 677:2:

"Motion for Rehearing of Board of Adjustment, Board of Appeals, and Local Legislative Body Decisions. Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefore; and the board of adjustment, a board of appeals, or the local legislative body, may grant such rehearing if in its opinion good reason therefor is stated in the motion. This 30-day time period shall be counted in calendar days beginning with the date following the date upon which the board voted to approve or disapprove the application in accordance with RSA 21:35; provided however, that if the moving party shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the person applying for the rehearing shall have the right to amend the motion for rehearing, including the grounds therefor, within 30 days after the date on which the written decision was actually filed..."

7. The minutes of the meeting at which the subject vote was taken were duly filed within five business days pursuant to RSA 676:3, II, and Whittier has not suggested or shown otherwise.

8. Failure to move for rehearing within 30 days divests the Superior Court of subject matter jurisdiction with respect to further consideration of the ZBA decision. Several cases have found that, as the 30 day timeframe is jurisdictional, the ZBA is without authority to waive filing lateness of even 1 day:

"A timely motion for rehearing is a precondition to appealing a zoning board of adjustment decision to the superior court. Thus, compliance with the deadline is a necessary prerequisite to establishing jurisdiction, and failure to timely move for rehearing divests the superior court of subject matter jurisdiction. RSA 677:3, I. Cardinal Development Corporation v. Town of Winchester ZBA 157 N.H. 710 (2008). See also Dipietro v. Nashua, 109 N.H. 174; Keene v. Zoning Board of Adjustment 114 N.H. 744 (1974) (variance was granted on February 23, 1973 and motion for rehearing was not filed until March 23, 1973; the superior court was thus without jurisdiction, as the failure to comply could not be waived by the board). See also Daniel v. B & J Realty, 134 N.H. 174 (1991) (ZBA found to have no jurisdiction to hear appeal which was filed one day late).

9. The New Hampshire Supreme Court has made it clear that the 30 day filing deadline runs from the time of the decision, even if the decision is oral:

[T]he statute is clear: a motion for rehearing may be filed "within 30 days after any order or decision" and the "30-day time period shall be counted in calendar days beginning with the date following the date upon which the [ZBA] voted to approve or disapprove the application." RSA 677:2. "Any order or decision" is not limited to a written order or decision, and a "vote to approve or disapprove the application" is not limited to a memorialization of a vote which provides reasoning for the decision. Thus, pursuant to the plain

language of RSA 677:2, the thirty-day period began to run the day after the ZBA disapproved the application by a vote on an oral motion on August 10, 2009. Accordingly, to meet the deadline, the petitioner had to file his motion for rehearing within thirty days of August 11, 2009. Because the petitioner filed his motion on September 14, 2009, the trial court correctly ruled that the petitioner's motion for rehearing was untimely." Bosonetto v. Town of Richmond, 163 N.H. 736 (2012)

10. Whittier raises no new issues that were not specifically addressed in the original variance request appeal and supporting documents and has failed to specifically and fully set forth any newly discovered evidence that justifies a rehearing, how it would change the result, and why it was not presented before.

11. Whittier has not demonstrated that apart from potential economic loss through the competition that FLPRT's gas station may pose to Whittier, that the LLC will suffer a specific and concrete harm. Whittier asserts speculative harm that may arise from unknown contaminants that may possibly be released into the environment during construction, but cites no new evidence in support of such.

12. This issue is already addressed in the conditions placed by the ZBA on the variance: That all state and local regulations will be met. This includes no contamination will occur.

13. Without evidence of more concrete harm or impact, Whittier lacks standing:

"An appeal from the ZBA's decision on the motion for rehearing may then be brought in the superior court within thirty days by "[a]ny person aggrieved" by the order or decision of the ZBA.

RSA 677:4 (Supp. 2006). The same statute defines "person aggrieved" as "any party entitled to request a rehearing under RSA 677:2."

To demonstrate that he is a "person aggrieved," the plaintiff must show some "direct definite interest in the outcome of the proceedings." Caspersen v. Town of Lyme, 139 N.H. 637, 640, (1995). "[S]tanding will not be extended to all persons in the community who might feel that they are hurt by" a local administrator's decision. Nautilus of Exeter v. Town of Exeter, 139 N.H. 450, 452, 656 A.2d 407 (1995) (quotation and ellipsis omitted). "Whether a party has a sufficient interest in the outcome of a planning board or zoning board proceeding to have standing is a factual determination in each case." Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541, 544-45, 404 A.2d 294 (1979). Goldstein v. Town of Bedford, 154 N.H. 393 (N.H. 2006)

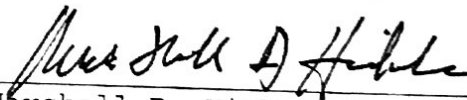
14. In the interest of finality of decisions by zoning boards, rehearings are not to be lightly granted. See Griauzde v. Nashua, 103 N.H. 468 (1961). (Decided under prior law.)

WHEREFORE, Four Long Pond Realty Trust prays as follows:

A. The filing of Whittier Coalition, LLC captioned "Application for Zoning Board of Adjustment Appeal" be denied.

Respectfully submitted,

FOUR LONG POND REALTY TRUST
By its attorney,



Marshall D. Hickok, Esquire
NHB #1151
25 Country Club Road Unit 608
Gilford, NH 03249-6977
Telephone: (603) 527-1440

Dated: 08/28/15

Marshall D. Hickok, Esq
25 Country Club Rd.
Unit 608
Gilford, NH 03249-6977
(603) 527-1440

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2015, a copy of foregoing Objection of Four Long Pond Realty Trust to the "Appeal" of Whittier Coalition, LLC was forwarded to Whittier Coalition, LLC, c/o Mark E. McConkey, member.


Marshall D. Hickok, Esquire



APPLICATION FOR ZONING BOARD OF ADJUSTMENT APPEAL

Fees: \$75.00 Hearing
\$50 ~~\$15.00~~ Public Notice
\$ 6.00 per Abutter or
\$5.00 per Abutter with certified mail forms and envelopes filled out

NAME OF APPLICANT Whittier Coalition CASE NUMBER 15-4-V

ADDRESS P.O. Box 822 DATE FILED 8/14/2015

West Ossipee NH 03890
TAX MAP 8 - Lot 23

OWNER MARK McAnaney member
(if not the same as applicant)

LOCATION OF PROPERTY (That The Appeal Concerns) Four Long Pond Realty Trust, 2400 RTE 16 (7-11) W. Ossipee NH
(Street, Number, Subdivision Name, Tax Map Number, Lot Number, Zoning District)
Commercial 1002

NOTE: Select section 1, 2, or 3 below as appropriate. All required statements must be filled in.

SECTION 1- APPEAL FROM ADMINISTRATIVE DECISION

Decision of the enforcement officer to be reviewed: Case 15-4-V

Article and Section Number of the Zoning Ordinance in question Variance Granted
question from Article 20 Section 2.1, F and 2.2a

SECTION 2- APPLICATION FOR A SPECIAL EXCEPTION

A Special Exception is requested as specified in the Ossipee Zoning Ordinance, Article#
Section# to permit:

2. Granting the Variance would be of benefit to the public interest because _____

3. Denial of the Variance would result in unnecessary hardship because of the following special circumstances of the property that distinguish it from other properties similarly zoned _____

4. Granting the Variance would do substantial justice because _____

5. The use is not contrary to the spirit of the ordinance because _____

Attached is a copy of the ZBA instructions to applicants.

I will represent myself at the public hearing or I will be represented by TO Be determined
will include a list of abutters (anyone within two hundred feet of the property) and their current mailing addresses (at \$6.00 each) or a list of the abutters, their current mailing addresses and the envelope and forms filled out for certified mail (for \$5.00 each). I will include a check for the total amount due addressed to the Town of Ossipee-ZBA. I will include a plan of my property showing all setbacks and a sketch of any buildings.

The above statements are true to the best of my knowledge
Applicant _____

Witness _____

Witness _____

Member Whitier Co. / H&H

1. Granting the variance will be contrary to the public interest because:

The applicant relies on the The Board of Adjustment in New Hampshire – A Handbook for Local Officials Dated November 2014 in his application and the following is from that handbook;

For the variance to be contrary to the public interest, it must unduly and to a marked degree violate the basic zoning objectives of the zoning ordinance. To determine this, does the variance alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public?

The property in question is listed on the NHDES one stop site as an active Leaking Underground Storage Tank (LUST) location. To date six underground storage tanks have been removed from this site and the 2003 tank closure (removal) report from Shevenell-Gallen dated July 17, 2003 states **that gasoline-contaminated soils encountered during the removal of the underground storage tanks (UST) was not removed from the excavation due to potential undermining of the adjacent Route 41 roadbed.** That material still remains there today and presents a possibility for furthered contaminates to migrate across the roadway to surrounding properties, located adjacent to this property. The enclosed plot provided by Shevenell-Gallen supports my conclusion noting the possibility of petroleum contamination is most likely to travel across route 41 to George Zavas (7-31), Gary Colassi (7-30) and or the Whittier Coalition (8-23) property lot evidenced by the monitoring wells put in place on these properties. The applicant further intends to build a new entrance to his facility over the area where five tanks have been removed in the past. The Ossipee zoning Ordinance adopted in 1988 and amended in 1989 to include. ARTICLE XX - WATER RESOURCE PROTECTION DISTRICTS: **The purpose of the Water Resource Protection Districts is to protect public health by preventing contamination of both current and future ground and surface water resources capable of providing water to the Town of Ossipee, New Hampshire.** The applicant proposes a major excavation in an environmentally dirty site that is presently under the active review of NHDES Waste Management Division to install new underground storage tanks (UST). My concern voiced at the initial hearing was that further disturbance of this site could potentially release undetected gasoline plums to adjacent property owners. Now further to my concern is the fact that I have been made aware that contaminates underlay Rte 41 presently that have not been removed.

The purpose of the Water Resource Protection District is to protect public health by preventing contamination, clearly installing new UST's in a contaminated site before the site has been remediated makes no sense and is in direct violation of the public interest of this ordinance

2. The spirit of the ordinance is not observed. As previously stated the Granting of the variance is a violation of the WATER RESOURCE PROTECTION DISTRICT and was identified in the ordinance as a primary concern. The Water Resource Management Plan was incorporated into the Zoning Ordinance in 1989. The Water Resource Protection Districts were established to protect the Aquifer, the Watershed Recharge Area and the Community water source at that time.

The Applicant stated for a variance to be inconsistent with the spirit of the ordinance, it must violate the ordinance basic zoning objectives. The spirit of the ordinance is to protect the groundwater not to permit new installations in the protected areas. Test 2 presented by the applicant in his arguments was if the variance threatens the public health, safety or welfare then it should be denied. The ordinance clearly states that this use is not permitted in this zone. If the site excavation reveals yet more undetected UST's

or more underground contamination or if presently undetected fuel plums migrate off site, that will threaten the public health, safety or welfare of the surrounding properties.

3. Substantial justice is done:

The Board of Adjustment In New Hampshire – A Handbook for local Officials dated Nov. 2014 offers the following guiding rule: that any loss to the individual that is not outweighed by a gain to the general public is an injustice and a board of adjustment cannot alleviate an injustice by granting an illegal variance.

The applicant went to great lengths to speak of the historical use of this property and that gasoline was dispensed here from 1920 to 1993 when the first UST's were removed. Unfortunately the applicant's recollection differs from the record. The property was a car dealership in the 20's again between 1971-1983 (Battle Ford) and for a short period of time as an Isuzu dealership till 1984. In-fact the owners of the property, Bradford Hasting Realty Trust, in a letter dated 7/28/1992 informed NHDES that they purchased the property in 1986 and the tanks (UST) were not utilized or even known of. While the property had a colorful history of car dealerships the assertion that it was a fuel dispensing gas station is a stretch. In a letter from NHDES (1992) to Bradford Hasting Realty Trust the state had no records of any UST's that have been registered with their department.

Knowing that six unregistered UST have been removed from this property and no gas had not been dispensed from this property for more than thirty years demonstrates that the applicants claim is unfounded. The last use of this facility (1990) was for the bulk distribution of propane from an above ground tank and that use is not consistent with what the applicant proposes. The prospective buyer knows that underground storage tanks are not permitted and that this property lies in the Water Resource District. Two reasons stand out why the buyer does not want to abide by the ordinance and both are financial: setback requirements for an above ground hazardous waste container and the added cost to install above ground tanks. This is a dirty site that has not completed remediation, asking the ZBA to grant a variance and in doing so will knowingly risk the health, safety, or general welfare of my neighborhood and is not prudent in my opinion. I close by reminding the Board that the Board of Adjustment cannot alleviate an injustice by granting an illegal variance.

4. The Values of the surrounding properties will be diminished because:

The applicant again sited flawed historical uses as the basis for permitting a non-permitted use in this zone. The argument could be made that this area has a long history of retail service and a convenience store is a reasonable use but permitting the instillation of UST's for gas distribution is unfounded. The truth is that owners from 1986 forward had no knowledge of there being UST's on this property and had no intentions of dispensing gasoline from this property. Thirty years of non-activity does not constitute a grandfathered use. In fact for thirty years owners of that property have paid to clean up the damage done by those unregistered UST's and the site, is still not fully remediated.

The applicant also boasts that improvements in access to the site will improve the safety of the Rte 16/41 intersection and improve the values of the surrounding properties. Once again I must disagree. The proposed new entrance off Rte 41 passes directly over the site of the removed UST tank farm. Any disturbance to this area threatens the release of contamination to our ground water (see the above note Shevenell-Gallen dated July 17, 2003, were gasoline-contaminated soils encountered during the removal

of the UST removal activities were not removed from the excavation due to potential undermining of the adjacent Route 41 roadbed). Additionally the Rte 16/41 intersection routinely backs up to the railroad tracks every weekend in the summer and on holidays. The addition of a new entrance only benefits the new owner and serves no benefit to our neighborhood.

Ongoing groundwater remediation has suppressed both sales and resale values to date. Knowing that:

- Groundwater impacts may occur, when this site undergoes major excavation.
- Increased risk of oil and fuel spills from patrons and delivery trucks
- Increased noise and light pollution to the neighborhood

For all of these reasons I state, property values will be diminished.

5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because of the "Special Conditions" of this property that distinguish it from other properties in the area as follows:

There are two parts to this condition that must be satisfactorily answered to receive a variance:

I disagree with the applicants first hardship claim. This property had a colorful history of being an auto dealership. Dispensing of gas was a secondary use in the beginning, became an ancillary function for a while and was abandoned for more than thirty years. In fact no owner of this property was ever a licensed gas operation with the state and most owners for the past thirty years hid the existence of those dispensaries fearing that one day they might have to pay for past owners environmental neglect. The present owner has had to bear the lion share of remediation to date and should be commended for his efforts.

The property to the north is a cemetery and there is also a retail store, in front and behind the building are residential units (village) and to the south are two restaurants and more residential units. The prospective buyer is welcome to open a retail store, restaurant or even the proposed convenience store. Granting a variance to permit Underground Storage tanks in the Water Resource protection District that is knowingly contaminated and still undergoing remediation does not warrant a hardship variance.

Part two of this onerous hardship test is no fair and substantial relationship exist between the purposes of the ordinance and the specific application of that provision to the property:

Once again the applicant favors a distorted historical use of this property, hangs his hat on the preamble to the zoning ordinance and once again this was not worthy of consideration.

If there are two items that this town has an abundance of is gas stations and restaurants. I don't believe the founding fathers of our zoning ordinances were considering the proliferation of gas stations to be the most appropriate use of land in order to conserve its natural resources and the ordinance.

The ordinance was amended in 1989 to include, ARTICLE XX - WATER RESOURCE PROTECTION DISTRICTS and the purpose of the Water Resource Protection Districts is to protect public health by preventing

contamination of both current and future ground and surface water resources capable of providing water to the Town of Ossipee, New Hampshire.

I specifically ask you to turn your attention to 20.2 USE REGULATIONS. Within the Water Resource Protection Districts and the permitted uses in Table 1 and dimension requirements of Table 2 of the underlying districts continue to apply. Underground storage of hazardous materials, fuel oil, or gasoline is a non-permitted use. Since the enactment of the zoning ordinance I know that two new gas facilities built in Ossipee (CN Brown and Westward Shores) were built with above ground storage tanks.

This new owner purchased the property aware of the zoning ordinance and should adhere to those standards if they wish to be a Conscientious Steward of the environment and conduct business in this district. The only hardship to the new owner has is financial and that is not an acceptable reason to grant him a variance

It is my position that the applicant has not meet the criteria necessary to grant a variance issued on July 18, 2015, and the ZBA should reverse their decision.

Respectfully

Mark E. McConkey

Member the Whittier Coalition
