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August 16, 2021

VIA Overnight Mail and Electronic Mail

Nottingham Zoning Board of Adjustment
P.O. Box 114
Nottingham, NH 03290

RE: ZBA Rehearing of June 15, 2021 Meeting, Granting Variance Request Tami Lee Defrancesco and James George for property at 214 Raymond Road, Tax Map 69, Lot 8 and Lot 10, to allow "Watercross events with incident camping three weekends per year"

Dear Zoning Board Members:

This office represents Tami Lee Defrancesco and James George (the "Applicant") and will be appearing at the upcoming ZBA Public Meeting on August 17, 2021 on the Applicant's behalf. This letter is not intended to supersede the variance application filed by Attorney Bret Allard on or about April 26, 2021 or the supplemental information recently filed by the Applicant. Rather the purpose of this letter is to address principal questions that arose during the June 15, 2021 hearing—pollution, noise, and diminution of value—and to address a procedural infirmity regarding the Motion for Rehearing filed by so-called "abutters" of the Subject Property. Each matter is addressed in turn below—starting with the procedural dispute. I look forward to working with the Board on Tuesday evening. Our hope is that this letter, by addressing the Board's prior questions, will help facilitate approval of the Applicant's variance request, which this body previously approved.

A. PROCEDURAL INFIRMITIES ON REHEARING REQUEST

Through no fault of its own, the Board's decision to rehear the Applicant's request for a variance was procedurally infirm. That is because the individuals who filed the Motion for Rehearing—Laurent, LaPointe, Bartsch, and Colvard (hereinafter and collectively the "Individuals")—lacked standing to request rehearing. RSA 677:2 limits who may request a rehearing to: (1) "any party to the action or proceedings" or "any person directly affected thereby." The Individuals certainly were not parties to the June 15, 2021 proceeding, and they are not "directly affected" by the ZBA's decision as that term has been interpreted.

The "directly affected" standard requires "some direct, definite interest in the outcome of the action or proceeding." Golf Course Investors of NH v. Town of Jaffrey, 161 N.H. 675, 680, 20 A.3d 846 (2011). Factors to consider include: "(1) the proximity of the [individual's] property to the site for which approval is sought, (2) the type of change proposed, (3) the immediacy of the injury claimed, and (4) the [individual's] participation in the administrative hearings." Weeks Restaurant Corp. v. Dover, 119 N.H. 541, 545 (1979). The Individuals here do not have an interest appertaining to the variance request sufficient to confer standing.

LaPointe is the closest abutter, living at the condos approximately 1,048 feet from the pond (just shy of a quarter mile). LaPointe, however, does not own the condo unit. Upon information and belief, she is a tenant, which is insufficient for standing as she does not bear a "definitive interest" in the outcome of the variance proceedings or its effect on the larger locale. Respectfully, tenants generally lack agency to speak for the property owner and do not have a vested interest in real property except such rights that exist between the landlord and tenant. The relative ease of mobility and the defined duration of a tenancy further militant against a tenant having a defined interest for standing.

Laurent, Bartsch, and Colvard lack standing for other reasons. First, their properties are not proximate to the Subject Property. Laurent's property on 12 Indian Run and Bartsch and Colvard's property at 14 Indian Run are both approximately one mile from the Subject Property's pond. Compare Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 767 (2013) (finding no proximity when the plaintiff was located 3.8 miles away), with Golf Course Investors, 161 N.H. at 682 (2011) (finding proximity when plaintiffs lived between 450 feet and 2400 feet from the subject property). Second and with respect to the second Weeks factor, the type of change being proposed is not substantial given their distance from the Subject Property. See Hannaford Bros. Co., 164 N.H. at 767 (finding the development of an 78,332 square foot building on a lot limited to 40,000 square foot buildings to be a "substantial" change such that it would satisfy the second Weeks factor). The Applicant is proposing to host three Watercross events a year, with incidental camping, and is not proposing any development. The property will otherwise remain in its current configuration. People will come in for the events, and people will leave thereafter. There will be no structures, bleachers, paving, or other development done as part of the events, and after the events the Subject Property will revert to its extant state. Third, the Individuals have failed to identify an immediate injury. Immediacy of injury requires a party to identify an "injury that [its] particular propert[y] would incur" as a result of the ZBA's decision. Hannaford Bros. Co., 164 N.H. 764, 769 (2013). Here, the individuals identify "noise" generated by the watercross events but that "injury" is not immediate. Sound recordings conducted by the applicant demonstrate that the snowmobiles either cannot be heard or are barely audible at Indian Run. Respectfully, their properties are too far removed and too screened for an immediate injury to affect their specific properties. What's more, the properties on Indian Run abut Patuckway Lake where the noise from boats, jet skis, and other watercraft travel across open water unimpeded all summer. As such, Laurent, Bartsch, and Colvard cannot legitimately claim a unique injury particular to their property when other, more immediate noise exists. Finally, Laurent, Bartsch, and Colvard are not residents of Nottingham. Upon information and belief, Laurent lives in Newmarket, while Bartsch and Colvard live in North Hampton. Claiming an immediacy of injury under these circumstances is disingenuous.

Based on the foregoing, the Individuals are not "directly affected" and therefore lacked standing to petition the ZBA for rehearing of the June 15, 2021 decision. The Applicant therefore requests that the ZBA reinstate its decision from June 15, 2021, granting the Applicant's variance application.

B. PRINCIPAL QUESTIONS FROM THE JUNE 15, 2021

Barring reinstatement of the Board's June 15, 2021 decision, the Applicant wishes to address principal questions raised during the previous hearing: pollution, noise, and diminution of value.

i. The Proposed Use Will Not Endanger the Aquifer

On August 11, 2021, the Applicant submitted a hydrogeological study from Aries Engineering ("AE"). AE reached three pivotal conclusions. In answer to the Board's prior question, it found that, due to site geology, there is "limited communication with the overlying and gravel aquifer." AE Report, p. 3. It further analyzed the Applicant's pollution response plan (Applicant submission, part 3), and concluded that the plan—along with best management practices for equipment fueling—"will provide sufficient spill prevention and spill countermeasures that will limit the impact of petroleum releases to the environment" consistent with EPA standards. Id., pp. 3-4, 6. Finally, AE concluded that the Applicant's proposed use complies with Nottingham's Aquifer Protection District because the use is not prohibited and the use is "not anticipated to result in groundwater quality impacts within the APD beyond those associated with the allowed uses in the APD." Id., p. 6.

In sum, AE has concluded that the proposed use is not anticipated to present an environmental hazard or otherwise affect the aquifer. If, however, the unexpected happens and there is an unmitigated contamination which is highly unlikely, the Applicant will be obligated to report the matter to the New Hampshire Department of Environmental Services and comply all remedial orders. Contrary to one individual's comments, NHDES is not a traffic officer; it is administrative agency with true and far reaching powers.

ii. Noise from the Proposed Use Will Not Affect the Locality.

During the June 15, 2021 public meeting, the Board asked many insightful questions about snowmobile noise, crowd noise, and decibel levels. The Board also discussed—both during the original meeting and on the rehearing consideration—the prospect of conducting a test to measure decibel levels on neighboring properties during a mock watercross event. The Applicant is willing to conduct such a test, if requested by the Board. I would submit, however, that such a test is desultory to the point of creating due process concerns and unnecessary in light of the Board's scope of review for a variance.

Nottingham has not adopted a noise ordinance. Because of this, it is unclear what the Board is testing towards if such a test were to transpire. There are no defined testing parameters

in Nottingham; nor is there a standard for what constitutes acceptable noise. By way of example only, the Town of Hudson has adopted a comprehensive noise ordinance that affects all properties. See Town of Hudson, Ordinance, § 249-1. The ordinance defines various noise types, such as ambient, continuous, impulsive; establishes decibel limits on receptor property for each noise type and each type of receptor property (i.e. residentially ; and outlines meticulous testing standards for noise emissions, including the instrumentation used, calibrations, and how the test must be performed. Nottingham, respectfully, lacks a similar ordinance. While Nottingham may certainly enact one, the Board cannot create one *ad hac* vis-à-vis noise testing of the Applicant's proposed use. Nor is testing to an unknown standard fair to the Applicant.

That is not to say, of course, that the Board cannot consider noise emissions. Our Courts has established that ZBAs may consider noise emission when evaluating whether a variance would be "contrary to the public interest" or injure the public rights of others. See Mackin v. Town of Durham, 2010 N.H. Super. LEXIS 117, doc. no. 10-CV-00318, *8 (N.H. Super. Ct. Oct. 19, 2010); Hiller v. Town of Durham, 2010 N.H. Lexis Super. 106, docket no. 09-CV-0516, *7-8 (N.H. Super. Ct. March 26, 2010). that ZBAs. Those inquires, however, are principally circumscribed to whether the proposed use and appurtenant noise would "alter the essential character of the locality" or threaten the "public health, safety or welfare. See Hiller, 2010 N.H. Lexis Super. 106 at *7; Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 106 (2007).

Here, the noise associated with the proposed use will not alter the essential character of the locality or threaten the "public health, safety or welfare." See id. Taking the locality question first, the Subject Property is basically a locality unto itself. Lots 8 and 10 of Tax Map 69 are 88.15 acres combined. For perspective, that is 66.55 football fields (with end zones). Expanding beyond the enormity of the Subject Property, there is unoccupied conservation land owed by SELT, a busy thoroughfare in Route 158, and a popular lake with boats, jet skis, and other watercraft. While there are abutting residences, the Subject Property is not situated near a residential enclave (such as a quarter acre lot development). Many—if not all—of the residences were built around or proximate to an active gravel pit that has been operating continuously on the Subject Property for over 41 years. Gravel excavation is noisy, dusty, and obstreperous operation. Thus, while there are abutting residences, this part of the Route 158 corridor cannot be truly be considered "residential." It is steeped in commercial and industrial use. Further, the vast majority of the residential abutters support the variance and the proposed use.

Nor will the proposed use threaten the public health, safety, and welfare. The Applicant conducted an amateur noise test on or about June 8, 2021 and recorded the results. The snowmobiles either could not be heard or were barely audible from Indian Run.[1] While the noise is heavier on the southeast side of the condos given the proximity to the pond, it dissipates dramatically on the north and northwest areas of the condo property. The noise is also mitigated by the Applicant's proposal to host only three events a year and none on holiday weekends. See Hiller, 2010 N.H. Lexis Super. 106, at *7-8 (finding that a condition of a fewer events mitigated concerns over noise and traffic). The mitigation proposed is not dissimilar to the New England Dragway in Epping (which is approximately 3,400 feet from a residential enclave) or the Lee

[1] Hyberlink is located here: https://www.youtube.com/watch?v=jjqCbeNIIkUg

USA Speedway (which is approximately 628 feet from the nearest residential enclave). Trucks on Route 158 generate the same noise, if not more than the proposed use on the Subject Property. Heavy machinery operates constantly from the gavel pit on the Subject Property which is in the backyard of the condos. Further, nearly all of the direct abutters who would hear noise from the three proposed events support the variance and Northeast Watercross Championships. They include: Arthur Jenks of 214 R Raymond Rd, Kristin Sterns of 220 Raymond Rd, Eric and Erin Harkins of 226 Raymond Road, the Hunter Family of 218 Raymond Road, the Fittons of 214 Raymond Rd, Sue and Chris Montigny of 212 Raymond Rd (the Condos).[2] The only direct abutters who oppose the variance are LaPointe and her daughter, who upon information and belief, are tenants in the condos and Kathie Morris who again, upon information and belief, is a tenant.

For these reasons, the Applicant submits that, while it would of course perform a mock test of noise emissions, such a test is unnecessary and would lack the defined parameters needed to ensure due process. The proposed use will not charge the essential character of the locality but rather would align with it.

iii. The Proposed Use Will Not Diminish Property Values

Significant discussion ensued at the prior public hearing over property values. To address that subject, the Applicant retained a residential property appraiser (Jack Lavoie) to opine on whether the proposed use, including noise from the events, would diminish surrounding property values. He concluded that the proposed use would not. Specifically, he found that "there would be no negative or adverse effect on surrounding property values." Valuation Report, p. 1. This is in part because current obsolescence from Route 158 and the existing gravel pit operation would "mitigate any (if any) potential noise, traffic, or other temporary nuisance due to the water cross." Id. Lavoie's expert report is uncontested; in that neither the ZBA nor an abutter has submitted a competing expert report.

Unless contested or discredited, expert reports generally require deference from the ZBA. It bears repeating that ZBA members are, of course, free to consider "their own knowledge concerning such factors as traffic conditions, surrounding uses, etc., resulting from their familiarity with the area involved. Continental Paving, Inc. v. Town of Litchfield, 158 N.H. 570, 575 (2009). Lay opinions based on general knowledge, however, are insufficient to counter uncontroverted expert opinions such that the ZBA cannot substitute an expert's declaration for its own opinion. Id. Nor can the Board "simply cho[o]se blatantly to ignore . . . expert advice." Condos East Corp. v. Town of Conway, 132 N.H. 431, 438 (1989).

Because no one else has submitted a property valuation report (or a hydrogeological report for that matter), there is little room or reason for the Board to disregard the findings of those experts as part of its consideration of the Applicant's variance.

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[2] This is to say nothing of the dozens of near abutters and waterfront owners who support the variance.

CONCLUSION

The Applicant looks forward to addressing the Board on Tuesday, August 17, 2021 and requests that the Board grant its variance as it previously done on June 15, 2021.

Sincerely,

/s/ Brian J. Bouchard

Brian J. Bouchard

cc (*email only*) Applicant
Northeast Watercross Championship
Scott Hogan, Esq. (hoganlaw@comcast.net)