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MOTION FOR REHEARING PURSUANT TO RSA 677:2

TO: Nottingham Zoning Board of Adjustment (Zoning Board, Board, or ZBA)

FROM: Michael St. Laurent, 12 Indian Run, Nottingham, NH
Grace LaPointe, 212 Raymond Rd., #3, Nottingham, NH
John Bartsch, 14 Indian Run, Nottingham, NH
Mary Colvard, 14 Indian Run, Nottingham, NH

BY: Scott E. Hogan, Esq.

RE: ZBA Decision of June 15, 2021, Granting Variance Requests of Tami Lee Defrancesco & James George for property at 214 Raymond Road, Tax Map 69, Lots 8 & 10, to allow "Watercross events with incidental camping three weekends per year"

DATE: July 15, 2021

INTRODUCTION

The Moving Parties listed above are owners of residential property who will be directly affected by the proposal referenced above.

Each of them respectfully requests that the Board grant this Motion, and allow another hearing on this matter, for the reasons stated below.

STANDARD OF REVIEW/ ZBA JURISDICTION

RSA 677:2 states,

> "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 therefor; 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**..." (Emphasis added).

On the purpose of Motions for Rehearing, the New Hampshire Supreme Court has stated,

> "By requiring an aggrieved party to first file a motion for rehearing from an adverse zoning board decision before allowing an appeal to the superior court, **RSA 677:2 is designed to give the ZBA an opportunity to correct any errors it may have made**." Mcdonald V. Town of Effingham Zoning Board of Adjustment, 152 N.H. 171, 175 (2005). (Emphasis added).

THE BOARD SHOULD GRANT THIS MOTION FOR REHEARING

Whether or not the Board ultimately changes its decision on the subject Variance application, it should grant rehearing of the application for the following reasons, based on fatal procedural errors, and the lack of evidence to support favorable findings on the five mandatory variance requirements:

Statutory Requirement for Public Hearing

As the Board is aware, the Board's "public hearing" was held on July 15, 2021 *via ZOOM*, although the Emergency Order that previously authorized such format had expired on June 11, 2021. After the June 15, 2021 hearing the Board apparently conducted a subsequent, un-noticed meeting to discuss the Board's lack of authority to conduct the hearing by ZOOM format, and was requested by the Chair to re-hear the matter, which was rejected by a majority of the Board. The Board's procedure, including the after-the-fact un-noticed meeting violates RSA 91-A, and is fatal error. As referenced above, "RSA 677:2 is designed to give the ZBA an opportunity to correct any errors it may have made."

For this reason alone the Board must rehear this matter.

Other Procedural Errors

The letter from the Applicants' legal counsel was not placed on the web site for review before the meeting. Sound-testing evidence was also produced by the Applicants at the last minute. Thus abutters and members of the public had no reasonable opportunity to review this information and present comments or rebuttal to the Board.

This was also legal error, and for this reason as well the Board must rehear this matter.

Further Issues Relating to Sound Testing Evidence

A) No listing of the device type, brand or qualification or calibration listed

B) Devices that were side by side had widely ranging results
C) Testing was for a very limited duration
D) Testing did not include frequency or pitch or duration
E) Testing on Indian Run was done far in the wood and not near the water
F) No independent verification on the 5 snowmobiles:
What brand/ model
Stock 600, Stock 800, Modified 600, Modified 800, Super Modified
G) Different devices can vary widely with respect to noise levels.

The sound test was not objective and professional.

"Nuisance Noise" Issues

The Board heard many arguments about what constitutes nuisance noise. However, it failed to use any formal standard, either technically or legally for its "analysis", and so rendered an unlawful and independently unreasonable decision.

As a legal matter:

New Hampshire law is clear that a private nuisance is an activity which (1) substantially and (2) unreasonably interferes with the use and enjoyment of another's property. See, e.g., Dunlop v. Daigle, 122 N.H. 295 (1982), citing Heston v. Ousler, 119 N.H. at 60, 398 A.2d at 537-38; Robie v. Lillis, 112 N.H. at 495-96, 299 A.2d at 158.

There is no question that the variety of uses proposed by the Applicants and approved by this Board constitute obvious, substantial and unreasonable interferences with the Moving Parties' use and enjoyment of their properties, including but not limited to noise.

As a technical matter:

The standard for nuisance noise is 55 DB by the EPA. The standard for nuisance noise is 50 DB according to the WHO, World Health Organization. The limited and amateur testing by the applicants at the homes adjacent to the property did show the values to be well above the EPA standard. Other criteria by the EPA suggest that random intermittent noise and high pitched noise present themselves as being more of a nuisance.

The Zoning in the Nottingham Master plan clearly states that no business, conforming or non-conforming, nor any activities can produce nuisance noise beyond their boundary, or beyond a public road.

The actual races emit levels of noise far greater than the EPA limits and that is in direct violation of the Towns Zoning ordinances. Further that the presence of this nuisance is in direct violation of the several criteria for granting a variance.

Lack of Evidence to Support a Favorable Decision on Any of the Variance Requirements

New Hampshire law is clear that:

> "...**Our cases interpreting RSA 674:33, I(b) recognize that the applicant bears the burden of proving the following five conditions in order to obtain a variance**: (1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; (4) substantial justice is done; and (5) granting the variance will not diminish the value of surrounding properties..." NINE A, L.L.C. v. Town of Chesterfield, No. 2007-475, 2008, citing Garrison, 154 N.H. at 30, 907 A.2d 948. (Emphasis added).

The Applicants failed to produce evidence sufficient for a favorable finding on any of the five mandatory variance requirements, and the evidence submitted is otherwise inconsistent with established law for granting relief from the requirements of the Zoning Ordinance, as follows:

This is not an exceptional instance of a property owner being denied the use of their property. They have reasonable usage of their property which includes a residence, fully operational gravel pit and an accessory apartment. This is a matter of convenience that they will be allowed to derive more income on a property that they already have a reasonable use of.
The "authority granted to [an] owner to use his property in a manner forbidden by zoning regulations." (Internal quotation marks omitted.) *Reid* v. *Zoning Board of Appeals*, 235 Conn. 850, 857, 670 A.2d 1271 (1996). Our Supreme Court has cautioned that "the power to grant variances from the strict application of zoning ordinances should be carefully and sparingly exercised. . . . The power to authorize a variance is only granted for relief in specific and exceptional instances." (Citations omitted; internal quotation marks omitted.) *Pleasant View Farms Development, Inc.* v. *Zoning Board of Appeals*, 218 Conn. 265, 270-71, 588 A.2d 1372 (1991); see also *Jaser* v. *Zoning Board of Appeals*, 43 Conn. App. 545, 548, 684 A.2d 735 (1996).

The Board has unlawfully and unreasonably approved this variance as it has disregarded the intent and Purpose of its own Town's Master Plan and is contrary to established Supreme Court decisions. The arguments for each criteria are described below.

This Variance is Contrary to the Public Interest

The public interest is defined by the Supreme Court as the spirit and the objectives outlined in the Towns Master Plan and towns zoning ordinances.
It violates to a marked degree the spirit and objectives of the zoning ordinance.

This event is completely different from any and all commercial activities in the area. It is completely inconsistent with the homes and businesses in the area.

Town Master Plan.
Nottingham will be a desirable place to live and work by retaining its rural landscape, historic villages and values of community. Nottingham will also preserve its rural **character through**

preservation of its natural resources as well as its cultural and architectural heritage for current and future generations.

Nottingham will be a vibrant and diverse community by promoting social, cultural, and recreational opportunities for all age groups. Nottingham will maintain the high quality of community facilities and services at a reasonable cost. Nottingham will provide opportunities for **small-scale businesses** and agricultural enterprises that are consistent with our rural landscape and community.

The following definitions describe the characteristics associated with use of these words—rural character, village and sustainable community.

Rural Character—A community with some or all of the following characteristics:
• Open farm fields; farm buildings/barns
• Unfragmented forests • Stone walls • Tree-lined, scenic roadways
• Dark Skies • Slopes and hilly terrain • Ponds, streams and **waterways of high water** quality for fishing and boating • Small, historic villages and crossroads • Historic homes in the New England vernacular

Sustainable Community—A community that:
• Engages in stewardship of natural resources—farmlands, forests, water and wildlife.
• Provides opportunity for economic well being.
• Fosters opportunity for inter- and intra-generational social interaction and fulfillment.

Guiding Goals to maintain these qualities for our community now and in the future, Nottingham will strive to:
1. Preserve the town's rural, small town character by promoting **patterns of development that respect and reinforce the natural landscape** and the traditional New England style of its villages.
2. Provide opportunity for small business activity that is consistent with the rural and village qualities that the town values.
3. Provide a variety of transportation modes that meet the full range of our citizen's needs with well-maintained public roadways while encouraging opportunities for pedestrians, bicyclists and recreational users.
4. **Protect Nottingham's natural environment and rural landscape that provides open space and wildlife habitat, and preserves clean water through well-managed growth that directs development away from sensitive resource areas.**
5. Provide housing choice opportunity for age and income diversity.
6. Support, in a cost effective manner, quality municipal services and facilities.
7. Encourage and support recreational opportunities for all ages.
8. Foster a community that retains its rural qualities and values the long-term sustainability of our social, economic and natural resources.
9. Preserve and protect Nottingham's historic resources.

This is a residential and agricultural neighborhood – as well as a vacation area neighborhood.

Counsel for the Applicants stated that because there are other commercial activities that this event would not be foreign to this district.

The uses proposed by this Variance request are completely different from any and all commercial activities in the area. They are completely inconsistent with the homes and businesses in the area.

The inclusion of yard sales does not change the district from residential to commercial.

This is a residential and agricultural district.

This event will alter the essential character of the neighborhood.

This event will forever negatively affect residents and lake front owners with noise, air and water impacts and a devaluation of property values.

The Zoning ordinances allow for very small home-based businesses.

These businesses attract very few people, very little traffic and make very little if any noise.

The proposed uses are the opposite of that.

No other commercial businesses are allowed – except if grandfathered in.

The Spirit of the Ordinance is Observed

Section G of the General Provisions of the Zoning in Nottingham is very specific about the use of property in the Residential and Agricultural district. (1)

"The purpose of Zoning in this district is to prevent adverse impacts of activities associated with home occupations." The same intent applies to grandfathered businesses,
The Spirit of the Ordinance for non-conforming businesses on the Aquifer was also violated.

The spirit of the ordinance leaves no room for confusion. This is an event or activity that adversely impacts 150 homes during the best months of the year.

Any event with thousands of people is in no way compatible or consistent with the intent of the Master Plan for this area. Haphazard camping is also not compatible with or incidental to Home Business as defined by the Zoning.

Restricting this property from having a race track is a necessary purpose of this ordinance as it clearly violates the spirit of the ordinance. If property owners can have large loud noisy events that disturb their neighbors, poison the air, soil and water and reduce property values, the purpose of the ordinance and the spirit of the ordinance will be diminished. The neighborhood will be changed substantially in a negative way.

Substantial Justice Will Be Done

This variance fails in section A and C of the criteria.

The general public will be harmed by the nuisance noise and the threat of water pollution to the groundwater and their wells.

The present use of this area is homes, farms and small businesses that have at most 1 employee. This event with 700 spectators, an announcer with a loud PS system, Ambulance, Police, camping, a food truck, judges and timers and other multiple workers is complete inconsistent with the surrounding area.

A) Substantial justice is done if granting the variance would not cause a harm to the general public that outweighs the benefit to the property owner.

B) If the proposed use would provide incidental public benefits, that may be considered as well.

C) Granting a variance may also achieve substantial justice if the proposed use is consistent with the present use of the surrounding area.

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A) Significant harm will come to the general public most specifically the abutters on Raymond road and to the lake front properties.

- Property Value Reduction (See diminished value letter)
- Nuisance for three weekends – during important vacation months
- Reduced usage or property by lake front owners.
- Potential pollution to ground water.
- Reduced tax revenue for the town

The benefit to the property owner is minimal. They will earn some extra money, above and beyond what they earn with their gravel business. The cost to the community far outweighs the benefit to the property owner. The incidental benefits to the community are very small.

B) The incidental public benefits to the community are very small.

- Economic: There are few if any lodging business in Nottingham, and few if any restaurants. 99% of the economic benefit will go to Raymond, with all the costs born by Nottingham residents.

- There are many other racing events that are within an easy drive of Nottingham. The ability to see racing events is still an option for any one in town with only a minor inconvenience.

C) The proposed use would not be contrary to the spirt of the ordinance. And contrary to the spirt of the towns master plan.

The new use is not at all consistent with the residential nature of the neighborhood.
This is a race track, a drag way. This property is surrounded by single family homes and condos.
There are no other businesses in the adjacent area. There is no place in the town where this use is consistent.

The zoning for residential currently prohibits Auto repair shops and anything related to a noisy business nature. An argument has been made that since the property already has a noisy Gravel pit, that a different noisy business should be allowed. This is an illogical argument and a rationalization.

Is the proposed use a consistent one?

- For any other event or business in town, is the noise so loud that you can hear it in your home with the windows closed?
- For any other event or home business in town – do they have 700 people at one time?
- For any other event or home business in town would you suggest people to leave their homes if they don't like it.

Granting the Variance Would Do Substantial Justice.

The granting of the variance would do an injustice to the residents surrounding the property.
They already enjoy an exception to operate a noisy business, on environmentally sensitive land. No injustice exists for the Applicants, who can operate the non-conforming gravel pit and generate income therefrom. They can have the daily use and enjoyment of their property. They can enjoy improving the property within the current zoning limits. They can rent their apartment. The can seek to develop the property on a beautiful small lake.

Why should residents endure numerous nuisances and have a reduction in their quality of life and a reduction in their property values?

No Diminution In Value Of Surrounding Properties Would Occur

Quote from the former Appraisal Institute President:

"I've seen situations where living near a known nuisance can lower property values by as much as five to ten percent," said former Appraisal Institute president Richard Borges.

Yes, according to the Appraisal Institute, a "Bad Neighbor" that included one who makes nuisance noise can reduce property values by up to 10% - See (https://www.appraisalinstitute.org/bad-neighbors-can-reduce-property-values-appraisal-institute-warns/)

The criteria is very clear - No diminution in value

So even if the abutters on Raymond Road are the only properties that have a diminished value, then this variance should not be allowed..

Granting the variance would diminish the value of the abutting properties as well as the lake front properties. Lake front properties are taxed according to the value of their lake front property. Any diminishing of this

enjoyment of the property diminishes the value of the lakefront residence or vacation home. Additionally, all appraisers consider and take into account noise factors when making an evaluation of a property.
A race track for three weekends of a year that is just down the street will be a factor in anyone's price consideration for purchasing a property. The contention that this is "Just three weekends" will most certainly cause concern for potential buyers. The analysis that three weekends will not cause issues is inaccurate and misleading.

The applicant argues the following
A) That it is "only" three weekends of the year.
B) That the berm somehow mitigates the noise as a natural barrier
C) That the large parcel of land is a factor
D) That neighbors are already used to inherent excavation noise.
E) That the noise is not enough of a nuisance to bother anyone.

A) The events now proposed are three very nice weekends in the year. There are a limited number of good weekends to enjoy the lake. From late May to September. The event takes away three weekends out of 15 which equates to 20%. The event producer with no thought or concern for the lake residents moved his May event to the third weekend in August – a key vacation weekend.
B) The Berm does little or nothing to attenuate the noise. The Lawyer who stated it did has no first-hand knowledge of the noise level and the event producers have never produced any specific data regarding the noise level from any location.

C) The large land factor is not a factor as the event itself is quite close to the road.

D) Yes, the neighbors may be used to the excavation noise, however you will not find a single noise complaint relating to the Gravel pit from lake homeowners. AND you have abutters that say the noise from the event is 10 times worse than the gravel pit noise.

E) Many lake residents and abutters will speak to this point. This noise for some is just a small nuisance, but to others it is a major nuisance. One comment was that if the noise bothers you – "Just Leave For the DAY." So is it reasonable to ask residents on the lake who pay $10,000 a year in taxes – to leave for the day? To leave for 7 and a half days?

F) Some property owners on the lake only get to use their property one or two weeks of the year. Is it fair and reasonable for an event like this to disturb you for your only opportunity to use your camp?

How loud is the noise from Pawtuckawy Lake?

Owing to the circumstances of the proximity of the property, the argument from the lawyer does not take into account the factors relating to noise over water.

From our properties on Indian Run owners can hear the startup of the machines. Then the actual announcer speaking and then we can hear the race itself. The noise is bothersome for a whole Friday afternoon, ALL day Saturday, and ALL day Sunday. (The PA system is obviously designed to be heard OVER all of the other loud background noises produced by such events).

How far away does the noise travel?
We have a camper from Pawtuckaway that complained about the noise.
The events are a short 4 tenths of a mile from the lake.

There is a valid concern that these events will diminish the enjoyment of lake front properties.

Yes, the noise IS LOUD ENOUGH for many people to not want to put up with it. Yes, many people, in considering to buy a camp, would look elsewhere. This attrition of buyers would reduce the number of potential buyers and negatively affect the sales price.

Yes, property values would diminish to the immediate neighbors on Raymond Road and just as importantly to the lake front owners. The noise factor would certainly be a nuisance that would inhibit the rights of the lake property owners to enjoy peace and quiet on the lake.

How does the town value Lake Front property?

Additionally, the town of Nottingham has just adopted a new tax basis to figure a way to equitably charge lot owners by the amount of frontage and the quality of the frontage. (1)

"For waterfront, private access to the water is the most valuable, but even that may be adjusted for size, topography, usefulness of the waterfront, as well as depth in some areas."

So the town has in essence found a way to tax our ability to enjoy (our usefulness) of the property, based on our lake front property and water frontage. The better your waterfront, the better your beach, the longer your shore frontage, the more you can sell your property for and the higher are your taxes. The converse is true also.

If you cannot enjoy the property for 3 weekends in the summer months, if you cannot sell our property for as much money, then you have the rights to apply for a tax abatement.

How many properties are we talking about?
Properties all the way from Sachs Road, Jampsa, Moors, Lamprey, Indian Run, Tuckaway Shores Rd and more. These are in the same geographic area of the lake where the sound will be prominent. For lake front properties that would be affected by the noise, you can count at least 100 camps or summer homes. With camps ranging in value from 400K to 800K what would a small 5% reduction in value be?

100 camps $500K average = $50 Million in property Value
Taxes = $18.76 per thousand
Taxes paid by Lake front property = $938,000
5% reduction = $46,900

It is reasonable to assume that your vacation lake front property value will go down by 5% if you cannot reasonably enjoy it for three summer or early fall weekends? That is a conservative estimate.

There would also be a larger percentage basis for those homes directly abutting the property.
This tax loss would raise all the other property taxes in town.

Estimate
25 properties - Average valuation: $300,000 = 7.5 million
Taxes = 5400 per home.

Reduction 10% in value
Loss of tax revenue: $540 per home = $13,500

So by allowing this event, the town stands to lose $60,000 a year in taxes.
Who would pay for the reduction in taxes?
Everyone else in town that pays taxes will pay more and make up the difference.

1) Valuation of waterfront by Avitar

Avitar 2020 Evaluation of the Town of Nottingham
April 1, 2020
Cyclical Re Evaluation

Page 84
F. Basic Mass Appraisal Process

F. Basic Mass Appraisal Process While the supervisor is analyzing and developing neighborhoods and local values, building data collectors, approved by New Hampshire Department of Revenue Administration (NH DRA) are going parcel by parcel, door to door measuring all buildings and attempting to complete an interior inspection of each principal building to collect the needed physical data, age and condition of the building. With the land values developed, we now review improved sales, sales that have been developed and improved with buildings or other features, such as well and septic. By deducting the base land value previously established, adjusted by the neighborhood and topography, as well as any other features, such as sheds and barns, a building residual value is estimated. After adjusting for grade and condition, we divide by the effective area of each building to arrive at an indicated square foot cost. This may then be compared to a cost manual, like Marshall & Swift and/or local contractor information to determine if this established square foot cost is reasonable. The effective area of a building is computed by considering all areas of all floors and additions of the building and then adjusting each area by its relative cost. If living space is estimated to be $98.00/SF, the basement area of the house is not worth $98.00/SF, but rather some predictable fraction. As such, each section of the building has an actual area and an effective area which is the actual area times a cost adjustment factor. Each assessment property record card shows the actual area, cost factor and effective area of each section/floor of the building. The cost factor adjustments are consistent through the town.

This is where, using all the previous cost data developed, we begin to extract the value of views and waterfront in the community. Both vary greatly due to personal likes and dislikes of the market, but both have general features that the market clearly values.
For waterfront, private access to the water is the most valuable, but even that may be adjusted for size, topography, usefulness of the waterfront, as well as depth in some areas.

The challenge here is to develop a base value for the average or most common waterfront site and then grade each site in relation to the average based on available sales data. If lacking specific sales data, the search may be expanded to include other bodies of water in other towns. Views are a bit more difficult, as they vary widely as does the value that the market places on them. However, the process is much the same.

Using sales, we extract a range of value the market places on different views by first accounting for the basic land value and improvements.
What value remains is attributed to the view. Views are classified by type, subject matter, closeup versus distant and width of the view. The adjustments for the influence of view are then systematically applied to all other properties in town with views. Also, a view picture catalog is prepared to show the various views. Once the cost

tables are developed, they are used to calculate all values across the municipality. Then the job supervisor and assistant do a parcel by parcel field review to compare what is on each assessment card to what they see in the field and make adjustments to ensure quality

And the Board should again be reminded that *the Applicant bears the burden of proof on each of the five requirements, and failed to provide evidence that the value of surrounding properties would not be diminished.*

Variance Citeria #5 Literal Enforcement of the Provisions of the Ordinance Would Result In An Unnecessary Hardship

> ""unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:
>
> (i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
>
> (ii) The proposed use is a reasonable one.
>
> (B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it." RSA 674:33(I)(b)(5).

There are many issues with the Applicants' argument.

First: The property is not that unique or special
Second: There is no hardship – as they already have reasonable use.

Third: Applying for one specific use is a misconception of the function of a variance. A Variance cannot be granted to use the land for one particular purpose. – See No 78-232

119 N.H. 292 (1979) EDWARD OUIMETTE v. CITY OF SOMERSWORTH AND AGWAY PETROLEUM CORP.
No. 78-232. **Supreme Court of New Hampshire.** May 9, 1979.
The hardship alleged by the defendants is that Agway cannot expand its business if barred from moving to this lot because of the zoning ordinance. Reliance on these factors to support a variance reflects a fundamental misconception of the function of a variance in a comprehensive zoning scheme. Agway's inability to move cannot support a variance from a comprehensive 295*295 zoning scheme. The inability to use land for one particular purpose is irrelevant to whether a variance should be granted.

The applicant's arguments are made as follows:

3 The property is Large

4 No other property has a pond and gravel pit

5 The property has a gravel pit.

6 No other properties can support a large event.

7 The pre-existing gravel pit already makes noise, thus it's a commercial-like use

8 Watercross events would not be possible on other properties in the area.

9 The property is uniquely suited for such events – no other sites.

10 The applicant wants "only" three weekends of the year.

However the applicant argues, the law and Master Plan and Zoning ordinances very clearly demonstrate the opposite conclusion. The applicant neglects to point out many important aspects of the property which are important to the discussion. There is no unnecessary hardship, just the normal hardship that every other resident lives with due to the zoning regulations.

The applicant has failed to demonstrate that the restriction in the zoning ordinance imposed more of a burden on their subject property than on other properties. That is – there are many large lots in Nottingham and many with ponds. ALL of them have the same burden. Additionally we contest the statement that there is ANY burden on the property as it now stands as it has a fully functioning gravel pit that is already a non-conforming business grandfathered in, and a highly valued residence.

Additionally, these events that will be made permanent by this variance will adversely affect the neighborhood, and a wide area within at least a mile of the events. We will be known as that part of the Lake with "those races". This property with the proposed variance is only 4 tenths of a mile from the Lake. Within a 1 mile radius on the lake you have residents who pay a million dollars in property taxes. The noise disturbance is a significant nuisance which will cause a devaluation in property values. The variance will result in lost tax revenue for the town, will result in property owners being forced to go away for long weekends to avoid the noise, and will cause physical distress for those that stay. Residents will forgo having family and friends over, due to the nuisance. All of these things will occur so that a non-resident, non-tax payer can make further, additional profit from their property at the expense of others.

Is this property really that special?

The applicant has failed to demonstrate the "special conditions" of the land that distinguished it from other properties, so that the restriction in the zoning ordinance imposed more of a burden on the subject property than on other properties.

Point 1: The property is large, 88 acres, 63 in lot 10, plus the 25 acres of Lot 8.
This statement misleads the argument.

When reviewing the property you will notice it is shaped like a twisted kite. The tail end of the kite is the right-of-way leading out to Raymond Road. These lots (8 & 10) are both "Back Lots." The pond and area where the event takes place is at the narrow bottom section of the kite shape. The area used for the event is as close to the road as possible.
One would be led to believe that this event is in the middle of a huge 88 acre lot. It is not by any means or fashion. The beach part of the pond where the event takes place is a short distance, approximately 369 feet from the road. The statement of the applicant would lead you to believe that a substantially large section of the lot is being used for the event. In fact, it is estimated that maybe 10 -12 acres of the lot which is close to the road is being used. This is a far cry from the 88 acres suggested and more in line with many lots in Nottingham.

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Point 2) No other property has a pond and a gravel pit.
Granted it is a gravel pit, however events like this happen in other towns in the state on other ponds that are not gravel pits. There are many water crossings. Not all of them are on gravel pits.

Granted the gravel pit is different and unique from its immediate neighbors, but that alone does not qualify it to meet the all the criteria of unnecessary hardship. There are many mitigating factors. Neither does the fact that just because a Gravel Pit has been grandfathered in does not make the property part of a commercial (like) zone. In fact just the opposite is true. Efforts should be made to contain the business that exists not expand it to a MORE commercial like zone. That is the intent of the Master Plan, and that is what is specifically outlined in the scope of the zoning ordinance.

The property has a pond. How many other properties have a pond? Too many to count. How many towns have gravel pits with ponds? Almost every town. Does the property owner disclose that this pond in fact is used in the production of its gravel as a sieve? That this pond already has a business purpose? Does the property owner suggest that if this variance is not approved, that they could not put a six unit condo complex overlooking a spectacular private pond with a beach and they could not sell those properties at a substantial financial gain?

The applicant states: "Watercross events would simply not be possible on other properties in the area." That is not true as mentioned above and – if this particular series of events don't happen, so
what? The operator states he has nine other events planned in other towns. To say that if this event does not happen in Nottingham, then somehow race fans will be left out is not true. There are many race venues within easy driving distance of Nottingham in Epping and Lee most notably and Freemont. This would be a minor inconvenience for race fans.

But the statement opens up the question about the history and use of the gravel pit. The Gravel pit is in full operation. In fact, the Nottingham Gravel Pit has been grandfathered as a business for at least 41 years since the adoption of Zoning in March of 1980.

So for 41 years or four decades the Gravel pit has enjoyed this status of a non-conforming business on a non-conforming back lot. They have conducted a commercial, somewhat noisy business that no other

property in the residential area is allowed to conduct. They have made a profit by digging up sand and soil and selling it to the community. They have had more than "reasonable" use of the property for decades.

The applicant has failed to demonstrate the "special conditions" of the land that distinguished it from other properties, so that the restriction in the zoning ordinance imposed more of a burden on the subject property than on other properties. Zoning prohibits any changes on back lots. The lots already enjoy a substantial reasonable use by any measure: A nice home, a thriving business, and a rental apartment.

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The Relationship Test:

Legal criteria as defined by the State of NH Zoning laws.

(1) there is no substantial relationship between the purpose of the ordinance and the specific application of the ordinance as applied to the property;

What is the purpose of the Zoning Ordinance provision for this area?

Section G of the General Provisions of the Zoning in Nottingham is very specific about the use of property in the Residential and Agricultural district. (1)

Specifically, the zoning says: **The purpose of Zoning in this district is to prevent adverse impacts of activities associated with home occupations.** One would surmise that the same intent of protection applies to events and adjunct businesses in grandfathered lots. The applicant states that this new race business is part of their "home business".

Additionally, "The purpose of this provision is to allow home occupations that are **compatible with residential areas.** A Race track, or drag way which is what the Water Cross is, is in no way compatible with residential areas. Events with thousands of people are in no way compatible with the intent of the Master Plan for this area. Haphazard camping is also not compatible with or incidental to Home Business as defined by the Zoning.

Restricting this property from having a race track is a necessary purpose of this ordinance. If property owners can have large loud noisy events that disturb their neighbors, poison the air, soil and water and reduce property values, the purpose of the ordinance will be diminished. The neighborhood will be changed in a substantially bad way.

The Property owner has in no way established that there is a "public good" that outweighs the potential harm.

What Other Zoning Provisions Apply?

The events are asking to be permitted on lot 10 as part of a home business.

There is no home located on lot 10. There is only a rental apartment.
Section 3 of Home Occupation in the Zoning ordinances states the following:

a) A Home Occupation shall be carried on by the occupant only within a dwelling or accessory structures and shall be **incidental and secondary** to the use of the property as a dwelling.

The key words here are incidental and secondary.

Is a race track **incidental** to their Home Business, that business being excavation and a gravel pit.

What does incidental mean legally?

"Contingent upon or pertaining to something that **is** more important; that which **is** necessary, appertaining to, or depending upon another known as the principal."

One can qualify if one type of business is incidental to another by reviewing the Standard Industrial Codes or SIC. All businesses fall under one classification or another. This business and these events have no correlation to one another. They are not incidental to the home occupation in any way. One is grandfathered in – the gravel pit, the other is in no way related to the gravel pit or a home occupation by any stretch of the imagination.

The Board's Decision

In addition to the procedural errors detailed above, and in addition to the fact that the Applicants failed to produce evidence sufficient to meet their burden for each of the five mandatory variance requirements, the following are additional legal errors:

The Board never received specific answers or established specific conditions of approval regarding fundamental aspects of the proposed uses, including the number of heats or competitors, limits on the number of heats or competitors, etc.

The Board also failed to articulate any specific bases or facts for that might support its decision.

These are additional errors for which the board should grant this motion for rehearing.

The Role of the Zoning Board

At least one member of the Zoning Board appeared to have no understanding of the important role that the Zoning Board plays in the interpretation and enforcement of the Zoning Ordinance itself, and no understanding of individual property owners' rights, and their obligations to use their property in ways that do not unreasonably interfere with other property owners.

To this point, undersigned counsel would remind the Board and parties of the

fundamental importance of our Zoning laws generally, and this Board's critical role, as expressed by the United States Supreme Court:

> "Zoning is a complex and important function to the State. **It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.**" Justice Thurgood Marshall, dissenting in the case of *Village of Belle Terre v. Boraas*, 416 U.S. 1, 39 L. Ed. 2d 797, 94 S. Ct. 1536 (1974). (Emphasis added).

In the "Land Use Planning and Zoning" volume of the New Hampshire Practice series Attorney Peter Loughlin (reminds us),

> **The beauty of a residential neighborhood is for the comfort and happiness of the residents and tends to sustain the value of property in the neighborhood. It is a matter of general welfare, like other conditions, that adds to the attractiveness of a community and the value of the residences located there.** (Citing Deering v. Tibbetts, 105 N.H. 481 (1964)). New Hampshire Practice, Volume 15, §2.17. (Emphasis added).

Loughlin goes on to state,

> **The New Hampshire Supreme Court eliminated any doubt about the ability of a municipality to use its zoning powers to promote aesthetics** in *Asselin v. Town of Conway,* (137 N.H.369 (1993)) where it stated
>
> > **We now conclude that municipalities may validly exercise zoning power solely to advance aesthetic values, because the preservation or enhancement of the visual environment may promote the general welfare.** *See* RSA 674:16,I; Opinion of the Justices, 103 N.H. 268, 270... (1961).

In **December 21, 2001** the New Hampshire Supreme Court dealt with similar issues **involved in the Town of Weare.** In NBAC Corp. V. Town of Weare, __N.H.__(2001), (attached), the Court upheld the Weare SelectBoard's denial of an application, because it

"...(1)would be injurious to public welfare and the residents of the town, which included having a **detrimental effect on the property values** and the **character of the town**; (2) **may be visible from the road**; and (3) **could have a detrimental effect on the environment**..." (Emphasis added).

The Supreme Court noted that the Superior Court cited the Asselin case cited above, which stated

> [t]he concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. **It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.** (Emphasis added).

The Supreme Court continued

> After reviewing the record, the superior court concluded that there **was sufficient evidence to support a finding that there would be adverse effects to the aesthetics, health and safety, spiritual well being and economics of the town, in addition to concerns regarding pollution and changes to the lot's topography**. (Emphasis added).

CONCLUSION

For all of the reasons stated above, the Board's June 15, 2021 decision was unlawful and independently unreasonable, and the moving parties respectfully request the Board to grant this Motion for Rehearing, so that all parties can have an opportunity to properly review and comment on the issues raised in this Motion.

By their attorney,
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