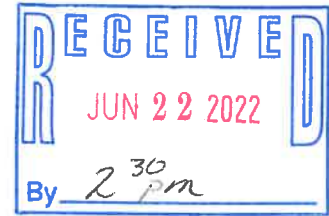




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June 22, 2022

HAND-DELIVERED

Arthur Parrott, Chair
City of Portsmouth, ZBA
1 Junkins Ave., 3rd Floor
Portsmouth, NH 03801

RE: In the Matter of the Variance Application of JRDEV, LLC
225 Banfield Road, Portsmouth, NH (Tax Lot: 266-1 & 254-1)

Dear Mr. Parrott:

Enclosed is a Motion for Rehearing with regard to the above. Thank you for your attention to this matter.

Sincerely,

Jeffrey C. Christensen

JCC/sm

Enclosure

cc: Pike Industries, Inc.
Peter Stith, Principal Planner

4895-8524-8806, v. 1

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

CITY OF PORTSMOUTH
ZONING BOARD OF ADJUSTMENT
APPLICATION NO. LU-22-91

In the Matter of the Variance Application of JRDEV, LLC
225 Banfield Road, Portsmouth, NH (Tax Lot: 266-1 & 254-1)

MOTION FOR REHEARING

Pike Industries, Inc. (“Pike” or the “Abutter”), by and through its attorneys, Cleveland, Waters, and Bass, P.A., respectfully moves, pursuant to RSA 677:2 and the City of Portsmouth Zoning Ordinance (the “Ordinance”), for a rehearing of the May 24, 2022 decision of the City of Portsmouth Zoning Board of Adjustment (the “Board”) granting the request for a variance in connection with the real property located at 225 Banfield Road (Tax Map and Lot 266-1 and 254-1; the “Ricci Property”) to construct a 60-unit apartment building (the “Residential Building”) in the Industrial Zoning District where such uses are broadly and expressly prohibited pursuant to Section 10.440.1 of the Ordinance. In support thereof, the Abutter states as follows:

BACKGROUND AND INTRODUCTION

1. The Ordinance identifies several different residential uses, all of which are expressly prohibited in the Industrial District where the Ricci Property lies. See Ordinance, §10.440.1. Nevertheless, the applicant, JRDEV, LLC, on behalf of the property owner, Ricci Construction Co., Inc. (collectively, the “Applicant”), proposes to construct sixty (60) residential dwellings on the Ricci Property in violation of those provisions. Pike owns the abutting property located at 650 Peverly Hill Road (Tax Map and Lot 254-7, the “Pike Property”) whereupon Pike operates a construction aggregate recycling and distribution yard, hot mix asphalt pavement plant, and equipment repair facility which has served the construction materials needs of the seacoast area since the 1930’s. Attached hereto as Exhibit 1 are photographs of the Pike Property

and the activities that will be adjacent to this residential development. The construction of multiple residential dwellings adjacent to the Pike Property will have significant detrimental impacts on Pike's operations and the value of the Pike Property.

2. The purpose of creating zoning districts is to provide space for uses and structures which are compatible with each other, combining compatible uses into a district, and separating each class of use into its appropriate geographic area. See 3 Arden H. Rathkopf, et al., *Rathkopf's The Law of Zoning and Planning* §10.1 (4th ed. 2017). There are various benefits to the segregation of incompatible uses, such as "promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; ... the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops, and factories" and because "the construction and repair of streets may be rendered easier and less expensive, by confining the greater part of the heavy traffic to the streets where business is carried on." Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 391 (1926).

3. In short, segregating residential and industrial uses from each other is to the benefit of both. Residents of the City can safely enjoy their homes without risk of safety concerns, while industrial businesses can operate without the burdens created by residential neighbors, such as complaints about the noise and or the safety of children wandering just outside their backyard into an industrial area. Similarly, the City is saved from trying to accommodate the needs of residential uses, such as fire safety and emergency access, in an area where risks may be heightened due to industrial uses and access may be occasionally blocked by the movement of industrial vehicles.

4. Additionally, designating territory for specific uses reserves land for necessary but perhaps less profitable uses. It is necessary for the orderly functioning of a city and the provision of supplies for there to be local, accessible uses of all sorts. Pike, for example, provides necessary construction materials to the seacoast area, without which construction and maintenance needs would become more burdensome due to the expense and delay inherent in shipping materials from elsewhere. If the City does not reserve and protect space for such industrial uses, it risks vital resources becoming crowded out by more individually profitable uses, at a loss to the public.

5. Variances are intended to be an “escape hatch” or “safety valve” designed to avoid unjust applications of general zoning regulations. See 2P. Salkin, *Anderson’s American Law of Zoning*, §13:1 (5th ed.). As such, it should be limited to cases where unusual or exceptional circumstances exist to justify deviation from otherwise applicable zoning laws. Id. Absent such circumstances, allowing a single parcel to engage in a use different from that of the rest of the zoning district for the benefit of the owner of that parcel can constitute impermissible “spot zoning”. Id., §6.12.

6. As discussed below, however, the Board’s decision to grant the Applicant’s variance is contrary to the applicable law. Accordingly, the Board should reconsider and rehear the Applicant’s request for a variance from Section 10.440 of the Ordinance. Upon doing so, for the reasons set forth below, the Board should find that the Applicant is not entitled to a variance.

DISCUSSION

7. To be granted a variance, an applicant must show that: “(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, LLC v. Town of Chesterfield, 157 N.H. 361, 365 (2008); RSA 674:33, I. The applicant, not the abutters nor anyone else, bears the sole burden of presenting evidence to support each and every one of the five variance criteria. Nine A, 157 N.H. at 365. If an applicant fails to meet any single criterion, the variance must be denied. Id.

I. There is no unnecessary hardship.

8. A variance may only be granted when, among other criteria, “literal enforcement of the ordinance would result in an unnecessary hardship.” RSA 674:33, I(a)(2)(E). “Unnecessary hardship” means that, “owing to the 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.” Id. “Generally, a use variance requires a greater showing of hardship than an area variance because of the potential impact on the overall zoning scheme.” Harrington v. Town of Warner, 152 N.H. 74, 80 (2005). “Use variances pose a greater threat to the integrity of a zoning scheme because the fundamental premise of zoning laws is the segregation of land according to uses.” Id.

A. There is nothing unique about the Ricci Property that makes a residential use reasonable.

9. “The reasonable use factor is the critical inquiry for determining whether unnecessary hardship has been established.” Garrison v. Town of Henniker, 154 N.H. 26, 32 (2006) (internal quotations omitted). “The reasonable use factor requires a determination of whether the hardship is a result of the unique setting of the property.” Id. (internal quotations omitted). “The applicant must show that the hardship is a result of specific conditions of the property and not the area in general.” Id. (internal quotations omitted). A use is presumptively

reasonable only if it is otherwise permitted by the Ordinance. See Malachy Glen Assocs., Inc. v. Town of Chichester, 155 N.H. 102, 107 (2007). If, as is the case here, the proposed use is not otherwise permitted, the variance may be denied if the Board disagrees with using the Ricci Property for residential purposes. See id.

10. The Applicant identified several allegedly unusual characteristics of the Ricci Property: the fact that it comprises two lots containing wetlands, and has frontage on Banfield Road in two different locations. These factors, however, are unrelated to the proposed development of a sixty-unit residential building. For example, although the Ricci Property has frontage on Banfield Road in two different locations, the proposed residential use would use the same frontage and the same driveway as the existing commercial or industrial uses of the Ricci Property. Nor does the construction of sixty residential dwellings protect the nearby wetlands. It is not enough that the Ricci Property be different or unique compared to other properties, but the hardship must arise out of that difference. See Garrison, 154 N.H. at 32. Here, regardless of whether these conditions are unique, they do not create a hardship.

11. The Applicant also identifies the proximity of the Community Campus and other recreational opportunities as unique conditions of the Ricci Property. Several properties in the area abut the Community Campus. Proximity to nearby recreation is true for the entire area. The Ricci Property is not meaningfully closer to recreational opportunities than the other nearby properties. The Applicant's hardship must arise as a "result of specific conditions of the property and not the area in general." Garrison, 154 N.H. at 32. They do not. Arguments, such as raised by the Applicant, that this area is generally suitable for residential use or is evolving beyond its designated industrial purpose are not applicable to an application for a variance. This Board does not have the authority to rezone the district or "spot zone" the Applicant's property. Unless the

City rezones the area, the Applicant must establish that the hardship arises directly from the specific and unique conditions of the Ricci Property itself.

12. Additionally, the Applicant identifies no reason why the proposed residential portion of the Ricci Property could not be used for any of the permitted uses in the Industrial District. It appears that the reason to instead insert a residential use into the Ricci Property is simply because it would be more profitable and as stated by Ricci, more expedient than seeking to have the area rezoned. Monetary advantage, however, is insufficient to qualify for a variance. See Rowe v. Town of N. Hampton, 131 N.H. 424, 428 (1989) (“The uniqueness of the land, not the plight of the owner, determines whether a hardship exists”). There is nothing unique about the Ricci Property that makes it more suitable to a residential use than the other nearby properties in the Industrial District. There is no hardship.

B. Residential use of the Ricci Property is contrary to the purposes of the Ordinance.

13. The general purpose of the Industrial District is to “accommodate industrial, wholesale, and storage uses”. See Ordinance, §10.410. As mentioned above, the purpose of creating zoning districts in general is to provide space for compatible uses, while protecting such spaces from incompatible uses. See 3 Arden H. Rathkopf, et al., *Rathkopf’s The Law of Zoning and Planning* §10.1 (4th ed. 2017).

14. Inserting a large-scale residential building into an industrial zone is directly contradictory to those purposes. It will likely be detrimental to both the residents and to the neighboring industrial uses. As the Supreme Court has recognized, there are several good reasons to separate residential and industrial uses. Vill. of Euclid, 272 U.S. at 391. Among these reasons are the “promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry” and “aiding the health

and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops, and factories.” Id. Children who wish to play outside the newly created sixty residential dwellings, or who are traveling by foot to the nearby Community Campus, risk inadvertently wandering into the surrounding industrial areas where children are unexpected and at risk. Similarly, residents of all ages in the new sixty dwellings would be at risk from the spread of fire or other hazards from adjacent properties.¹

15. At the same time, isolating industrial uses is beneficial to industry as well as to residents. Property owners in an industrial district benefit by being able to operate without the likelihood of children wandering into the area from next door, without residential neighbors complaining of the noise, and without the other burdens of having neighbors of incompatible uses. Inserting sixty dwellings next door to the Pike Property and its facility means there will be sixty families who will be expecting Pike to operate as if it were in a residential neighborhood. This situation will be to nobody’s benefit.

16. The Applicant identifies no reason why the Ricci Property could not be used entirely for any of the permitted uses in the Industrial District and should instead be used for residential purposes. It appears that the reason to instead seek to insert a residential use into the Property is because it would be more profitable. Allowing the Industrial District to be used for residential purposes, in direct contradiction to the Ordinance, simply because it is more profitable risks crowding industrial uses out of the area entirely. As a direct result, landowners in the Industrial District will seek to repurpose their land, reducing the supply of industrial space in

¹ The chance of these hazards spreading across Banfield Road are much lower than spreading to adjacent properties without the barrier and separation of the street. For this reason, a residential use inside the Industrial District cannot be compared to residential uses on the other side of Banfield Road. It may be reasonable to have residential uses in a residentially zoned development across the street but not in a property next door without such a clear separation.

the City. Those that do not will experience conflicts with their new residential neighbors that will require City resources and potential litigation for all parties. The proximity and commingling of residential uses will further disincentive industrial uses in the area, further driving out industrial uses and making the industrial zone less attractive and marketable for resale in this City. This is contrary to one of the reasons for creating a zoning district, to reserve space for uses, like industrial uses, which are meaningful and necessary for the City and the surrounding area, but should not be commingled with other uses. See Harrington, 152 N.H. at 81 (“because the fundamental premise of zoning laws is the segregation of land according to uses, the impact on the character of the neighborhood is central to the analysis of a use variance”).

17. There are good, valid, and legitimate reasons residential uses are prohibited from the Industrial District. There is nothing unique about the Ricci Property that makes those reasons inapplicable. There is no undue hardship justifying the Applicant’s variance.

II. The variance will diminish nearby property values.

18. A variance must not diminish the value of surrounding properties. See RSA 674:33, I(a)(D). As discussed above, commingling industrial and residential uses creates burdens on the industrial businesses, not only on the residents. These burdens, or the possibility of these burdens, will reduce the value of the remaining properties in the Industrial District. For example, if Pike were to market the Pike Property and the industrial facility thereon for sale, the proximity of sixty residential dwellings next door would be a significant impairment. Potential buyers would be concerned that, if they were to run industrial equipment at night, they would receive complaints from sixty families in the morning. They would be concerned about the increased safety costs of having to operate so close to residential uses where children may inadvertently wander onto the Pike Property. Anyone considering purchasing the Pike Property for

redevelopment would be concerned about sixty-residential abutters opposing any redevelopment that is inconsistent with what would be, in those residents' minds, a residential space. Reduction of risk and leveraging certainty are hallmarks of sound business decision strategy. This proposal will increase risk and uncertainty for any potential buyer in the future, negatively impacting Pike's ability to sell and value of the Pike Property or other nearby properties.

19. All of these concerns would lead potential purchasers to prefer industrial properties that are not commingled with residential uses and all of the complications that come with having sixty neighbors just over the boundary. As Pike indicated at the original hearing on this matter, if there had been a sixty-unit residential building next door prior to Pike's ownership of the Pike Property, that would have deterred Pike from purchasing it in the first place. See Roy v. State, 104 N.H. 513, 517 (1963) (holding that a landowner is qualified to offer evidence as to the value of their own property). Instead, Pike purchased the Pike Property relying upon the Ordinances express prohibition on residential uses in the Industrial District. As a result of this variance, the market value of the Pike Property and other nearby properties in the Industrial District will be diminished.

III. The variance is contrary to the public interest and the spirit of the ordinance.

20. An applicant is not entitled to a variance if the proposal is contrary to the public interest or inconsistent with the spirit of the ordinance. RSA 674:33, I(a)(2)(A)-(B). The requirement that the variance not be "contrary to the public interest" is "related to the requirement that the variance be consistent with the spirit of the ordinance." See Nine A, supra, 157 N.H. at 366. A variance is contrary to the public interest when it unduly, and in a marked degree conflicts with the ordinance such that it violates the ordinance's basic zoning objectives. Id. There are two methods for determining whether a variance would violate an ordinance's basic

zoning objectives: (1) “whether granting the variance would alter the essential character of the neighborhood” or (2) “whether granting the variance would threaten the public health, safety or welfare”. Harborside Assocs., L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 514 (2011).

21. The proposal to add sixty residential dwellings to the Industrial District would alter its essential character. While the Applicant points to nearby residential uses on the other side of Banfield Road, those are in the Single Residence A Zoning District, and separated from the Industrial District. There is a material difference between having a single-family residential development nearby and having a sixty-unit residential building right next door. The single-family development here is well set back off Banfield Road and enjoys a forested buffer from the Industrial District, so even those homes that are closest to the Industrial Zone are protected. This proposal, however, places all sixty dwellings directly adjacent to a shared property line with a heavy construction aggregates facility. Residences separated by a street and trees are less likely to result in problems, such as those discussed above, than residences next door. Likewise, residences built in a residential district do not crowd out industrial uses from the Industrial District, as this variance threatens to do. This alteration of the essential character of the neighborhood will have a detrimental impact on the utility and value of the neighboring industrial properties.

22. The variance also threatens the public health, safety, and welfare. As discussed above, there are certain inherent risks associated with industrial uses, such as fire and other hazards. This is one of the reasons for isolating residential uses from industrial uses, as recognized by the Supreme Court. See Vill. of Euclid, 272 U.S. at 391. Those engaged in industrial activities are aware of and prepared for those risks. Residential tenants are, frequently, not so informed or prepared.

23. Moreover, industrial activities often involve large equipment and vehicles that could be an impediment to emergency vehicle access, especially where the residential building shares a driveway with other commercial or industrial uses. Industrial equipment or commercial vehicles are often in positions that are more difficult or slower to move out of the way of emergency vehicles than traffic associated with residential use. A large construction vehicle in the driveway could impair emergency access much more significantly than the ordinary traffic of cars going into an apartment building. This problem is compounded when such impairments impact sixty different residential dwellings.

IV. The variance is not consistent with substantial justice.

24. A variance must do substantial justice to be granted. RSA 674:33, I(a)(2)(C). The “substantial justice” element of a variance is guided by two rules: that any loss to the individual that is not outweighed by a gain to the general public is an injustice, and whether the proposed development was consistent with the area’s present use. Malachy Glen, 155 N.H. at 109. As discussed above, the proposed development of a sixty-unit residential building is not consistent with the present use of the Industrial District. Separately, there is a public interest that outweighs the loss to the Applicant by denying the development of the Apartment building.

25. As discussed above, there is a need for industrial uses in the City of Portsmouth and surrounding area. These uses are beneficial to and support all of the other uses and development in the area. There is a reason why the City deemed it necessary to dedicate space to industrial uses and specifically designate a district for the purpose of “accommodate[ing] industrial, wholesale, and storage uses”. See Ordinance, §10.410. Allowing such space to be converted to residential use will crowd out industrial uses, both by reducing the amount of land available for such use, and discouraging the use of adjacent land that is now less desirable due to

the close proximity of incompatible uses. It further signals to other potential developers that they cannot rely upon the City's Ordinance when it excludes incompatible uses. This will reduce the feasibility of industrial uses in the area, harming the public that depends on those uses. If the public cannot rely on local industrial suppliers, all personal and business activity that depends on those uses will bear the increased costs and delays of relying on industries at a distance (especially given the current dramatic increase in fuel costs and supply chain disruptions). These costs outweigh the loss to the Applicant, which is merely the inability to use the Ricci Property for a use that was known to be prohibited and for which the Applicant has alternatives. As discussed above, there is no evidence presented that alternative, non-residential uses of the Ricci Property are unavailable or impractical; the only benefit to the Applicant is monetary. The Applicant's individual financial gain does not outweigh the impact to the overall zoning scheme. See Harrington, 152 N.H. at 80.

26. The Applicant has argued that the proposal creates a public benefit by increasing the housing supply. While increasing the housing supply is generally a legitimate goal, the housing supply should be increased by development in appropriate areas, not inserted into an Industrial District that is ill-suited to residential use and will surely render adverse repercussions for all parties. The new residential development in the residential zone on the other side of Banfield Road demonstrates that there are appropriate areas for residential development in the City. The Industrial District is not one of them. Accordingly, the variance is not consistent with the principles of substantial justice. See Malachy Glen, 155 N.H. at 109.

CONCLUSION

27. The Applicant did not present sufficient evidence to show that the five elements necessary for a variance were satisfied. The Board should reconsider its decision and, upon a rehearing, deny the requested variance.

WHEREFORE, Pike Industries, Inc. respectfully requests that the Board:

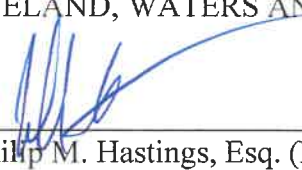
- A. Grant the foregoing motion and schedule a rehearing on the variance application;
and
- B. Upon rehearing, deny the variance.

Respectfully submitted,

PIKE INDUSTRIES, INC.

By its attorneys,
CLEVELAND, WATERS AND BASS, P.A.

Dated: June 22, 2022

By: 
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