ZONING BOARD OF ADJUSTMENT
268B MAMMOTH ROAD
LONDONDERRY, NH 03053

DATE: MARCH 20, 2013

CASE NOS.: 10/17/2012-2, 3, AND 4 (REHEARING CONTINUED)

APPLICANT: ALFRED WALLACE, HENRY WALLACE, AND HAROLD WALLACE
62 PERKINS ROAD
LONDONDERRY, NH 03053-2416

VAN STEENSBURG ONE FAMILY TRUST,
LEO AND MELANIE VAN STEENSBURG, TRUSTEES
48 PERKINS ROAD
LONDONDERRY, NH 03053-2416

LOCATION: 62 PERKINS ROAD; 16-3; AR-I (WALLACE) AND
48 PERKINS ROAD; 16-1; AR-I (VAN STEENSBURG)

BOARD MEMBERS PRESENT: JIM SMITH, CHAIR
LARRY O'SULLIVAN, VOTING MEMBER
JAY HOOLEY, VOTING MEMBER
JAMES TOTTEN, VOTING ALTERNATE
NEIL DUNN, CLERK

REQUESTS: CASE NO. 10/17/2012-2: VARIANCE TO ALLOW PROJECT PHASING TO EXCEED THE MAXIMUM NUMBER OF DWELLING UNITS LIMITED BY SECTION 1.3.3.3, AND TO PROVIDE RELIEF FROM BUILDING PERMIT RESTRICTIONS UNDER SECTION 1.4.7.2.

CASE NO. 10/17/2012-3: VARIANCE TO ALLOW A REDUCTION IN THE NUMBER OF WORKFORCE HOUSING UNITS FROM 75% AS REQUIRED BY SECTION 2.3.3.7.1.1.4 TO 50%.

CASE NO. 10/17/2012-4: VARIANCE TO ALLOW 24 DWELLING UNITS IN A MULTI-FAMILY BUILDING WHERE A MAXIMUM OF 16 UNITS IS PERMITTED BY SECTION 2.3.3.7.3.1.2, AND A VARIANCE FROM THE DIMENSIONAL RELIEF CRITERIA OF SECTION 2.3.3.7.4.5 AND THE ADDITIONAL CRITERIA OF SECTION 2.3.3.7.4.6.

PRESENTATION: The Clerk read Case Nos. 10/17/2012-2, 3 and 4 into the record with no previous cases listed.

JAMES SMITH: For everybody's information, the Board had a couple of questions. They were questioning the cost of construction and also the rate of return, I believe was the next?

LARRY O'SULLIVAN: Yup.

JAMES SMITH: And we've contacted numerous different people and we've yet to come up with somebody who can help us come up with an evaluation of those two questions. We're still working on that and we'd still like to come up with some sort of an answer, but at this point, we have not. Having said that, we'll give it over to the applicant and his attorney and they can continue. I believe you had gone through the general information and now we were getting down to the individual cases and the answers for the five points of law on each case. Unless the Board has any other questions, observations at this time? Okay. You get the floor.

THOMAS J. LEONARD: Thank you, Mr. Chairman. My name is Thomas J. Leonard. I'm here representing Thomas Monahan. Mr. Monahan, as you know, has an agreement to acquire the two parcels of land that we're talking about. We're still talking about the same project that we've presented all the information and I'm understanding that there's no need to go over any of that. I noticed that there were some draft minutes of last meeting and I don't know if everybody…I also noticed that we have an additional member this particular hearing and is everybody comfortable that he's had an opportunity to see whatever is in there?

JAMES TOTTEN: Yeah.

THOMAS J. LEONARD: Yeah. Okay. I just didn't want to…I didn't know if I should repeat something or…

JAMES SMITH: He's had an opportunity to review the minutes.

THOMAS J. LEONARD: Okay.

JAMES SMITH: And I believe you have.

JAMES TOTTEN: Correct.

JAMES SMITH: So he's…

THOMAS J. LEONARD: All the stuff has been around for a couple of months, but…

NEIL DUNN: It's on television.

JAY HOOLEY: Yeah.

LARRY O'SULLIVAN: Still.

THOMAS J. LEONARD: Okay. I think we left off last time with primarily the overview of the project and the economic discussion with some of the infrastructure discussion. Again today I have with me Mr. Mark Fougere. Mr. Fougere is the expert planner that put together the report that you have in the package. It focuses on the satisfactory state of things in terms of water, sewer, schools, municipal services. He's prepared to discuss the details of that report that you have. Basically, the report, to summarize it, says that there's no concern, that there is no problem with the capacity of the services or of the infrastructure and if we need any questions on that, Mr. Fougere is here today. But I won't go through that because I know you've had that report for a couple of months and I think that's probably pretty clear. I also have Mr. Karl Dubay. You may remember that we provided a preliminary traffic report for you. Again, he's here to answer any questions should you have any. You haven't had an opportunity to ask him questions, so if you would like, he is certainly here. I think the report stands for itself, unless you have questions. We also have Mr. Lee Berard who is the architect of the project. At the last request for rehearing, we presented some drawings and scale drawings basically to show you that the particular buildings were both appropriate scale and design. That process, should we be allowed to go forward with this to the Planning Board, of course that would be continuing process. But one of the things that the designs show is that we've taken special care to make sure that these buildings are both consistent with the landscape as much as possible and they are definitely consistent with some of the other buildings in the area. They are smaller in footprint and in scale than the ones across the street that are the multi-family units and they are also smaller in both scale and footprint when compared to the hotel. If you had any questions in that scaling, we'd certainly be…Mr. Berard could answer questions in that regard as well. I'm going to assume that those reports kind of stand for themselves, unless I hear that you would like some explanation and further questions, which brings us back to where we kind of started at the beginning of last meeting and that is that you would like me to address each variance specifically and with the five points for each variance. So that's what my plan is right now. Taking what is actually variance 10/17/2012-2, the request to allow phasing over three years instead of the five that would be required by statute; I'd like to address that one first. And we are requesting a variance from two particular sections of the ordinance; Section 1.3.3 and Section 1.4.7.2. The reason we've put them together as the real request is to simply allow for phasing over three years. One point three point three (1.3.3) is very confusing and what it actually requires I'm not clear on, but I think it's fair to say that it's probably five years. The reason it's not exactly clear is it depends on how many units is in a building and it depends on the total project and things like that. Section 1.4.7.2 is what people refer to as the Growth Management Ordinance. Right now it is not in play. There is no restriction because there is no need for it. As we explained a couple of meetings ago, the request is that we need permission to phase over three years. We have a very specific plan that is presented with a three year phasing. And we just want to be very clear up front about the whole thing. Generally, a variance obviously is an administrative situation and it has to be justified by these five points of law, so I'd like to go through those step by step. But the first one, and really the second one, that is the variance will not be contrary to the public interest and the variance is consistent with the spirit and intent of the ordinance or the spirit is observed, those are really very similar and the law in New Hampshire treats them as co-extensive and related. And all the court cases pretty much raise the same issues in that discussion and the focus on, in talking about those two factors, is really what is the objective of the zoning ordinance? Generally speaking, so long as we are not contrary to the objective of the zoning ordinance, then we are going to be consistent with the public interest and not contrary…I'm sorry, not contrary to the public interest and consistent with the spirit. The ordinance itself is the best source for determining what the public interest is and what the goals of the ordinance are. So I'd like to just focus on a couple things. Now, these things will also relate to some of the next variances, so I'll take a little bit more detail in the first one, but I won't go over all the same things for the second one…second and third. First off, I think it's important to point out that Section 1.3.3 of Londonderry's zoning ordinance itself specifically says that the goal is to promote health, safety, and welfare of the community. That's kind of the catchall and every ordinance is toward that end. That is what zoning is for. Section 1.1.3.5 then says, in the local ordinance, that there is a goal to provide adequate housing choices within the economic reach of all citizens. That is an express statement of purpose in the Londonderry zoning ordinance. Section 1.3.2.1 is where we start to get a little bit more specific and it states that…I'm gonna read it just so that I don't re-misstate it. One point three point two point one (1.3.2.1); that's the phasing section.

And the stated purpose of the phasing section…this is one of the sections that we are requesting a slight relief from. Requesting three years when five years is what is required. And under Section 1.3.2.1, it specifically states that the purpose is to "evaluate, plan, and guide residential growth that is consistent with the Town's capacity for planned, orderly, and sensible expansion." And then it goes on to say "without establishing absolute limits." So it's an ordinance that is designed for orderly and sensible expansion. Looking at the next section just below it, Section 1.3.2.3, again it states "the orderly and gradual expansion of community services." So we're talking about…the goal here is to enable the town to deal with growth in an orderly fashion. Pretty straightforward. In Section 2.3.3.1, we then go to the section of the ordinance that talks about workforce housing and in fact, it characterizes…the ordinance itself is characterized as inclusionary housing. Now, inclusionary housing is a very specific term under the State law. Within the local ordinance, it is used to encourage workforce housing. And one of the stated purposes in inclusionary housing, or let me put it a different way here; Workforce housing in the Town of Londonderry is permitted under inclusionary housing. And inclusionary housing is a specific kind of ordinance that is allowed under State law and we'll talk about that in a moment. But the stated purpose of the workforce housing/inclusionary housing is to encourage and provide for the development of workforce housing within Londonderry. It is intended, and I'm reading here, it is intended to "ensure the continued availability of a diverse supply of home ownership and rental opportunities." So it clearly makes a distinction between, or it clearly states that it's for purposes of encouraging affordable housing and it makes a very clear distinction that diversity is important and ownership and rental are both important. So those are kind of the purposes that we have to think about as we consider the public interest and the spirit and intent of the ordinance. Now I'd like to point out two other things that are in the State law that relate to the discussion of phasing because phasing really addresses a number of issues in planning. Generally speaking, there's phasing of a development on site and you want to make sure that the infrastructure occurs as the units are sold. So that's kind of a clear, obvious thing. You've got to make sure that there's a septic system and all of the appropriate infrastructure for each unit as you sell. But then there's also phasing as we are talking about today, which is really a growth restriction. It's a limitation on the number of units because of course the number of units doesn't have anything to do with coordinating building the units and providing appropriate services. It's a limit on how many you can build each year. That kind of limit is restricted by State law in New Hampshire and the law is RSA 672:22, III. And what that law specifically states is that, and you have this in your packet, but I'd just like to just kind of focus on it for the moment. It says that "a local legislative body may adopt a Growth Management Ordinance under this section only if there is a demonstrated need to regulate the timing of development based upon the municipality's lack of capacity to accommodate anticipated growth in the absence of an ordinance." So you can only have growth restrictions under very specific circumstances and they're set out in the statute. It then goes on to say that the section…"any ordinance adopted under this section shall include a termination date and shall restrict projected normal growth no more than is necessary to allow for orderly and good faith development of municipal services. Now the reason all that matters is, again, the purposes of these things are not long term growth regulation. The purposes, the legitimate purposes of phasing and of a Growth Management Ordinance are to enable a town to gradually develop their services consistently and appropriately for growth as it happens. That's the goal that we're trying to balance and we ought to also keep in mind the stated goal of workforce housing. Actually, there's one other thing I'd like to point out. I mentioned to you the inclusionary housing term. Inclusionary housing is actually a defined term by State statute. And again, it is a very specific thing and under RSA 674:21, the State of New Hampshire has given the municipalities the right to use certain innovative land use controls. One of those is defined as in the term inclusionary zoning. Now, inclusionary zoning means "a land use control regulation which provides a voluntary incentive or benefit to a property owner in order to induce the property owner to produce housing units which are affordable." And then it goes on to explain “affordable” a little bit. But again, inclusionary zoning is not anything that a town wants to do. It has to be something that encourages affordable housing, which in this case, is the same thing as workforce housing. So those are the purposes of the workforce housing and the phasing and growth management that we have to balance. So looking to our legal obligations, or legal standards, if you will, in variance one, the question is will permitting this project, permitting it to be developed over three years instead of five, does that prevent the accomplishment of those zoning purposes that we’ve talked about? Now, I’m suggesting to you that it absolutely does not prevent those purposes and in fact, it enables them. Mr. Fougere in his report was quite detailed. He made it very clear that there is sufficient sewer, there’s sufficient water, the roads are adequate, the schools are sufficient. In fact, there’s declining enrollment. The municipal services are sufficient. The Master Plan, the Sewer Master Plan, and the Capital Improvements Plan all are adequately addressed. There is no concern. This project will not cause an adverse impact to the services as they are being provided by the Town of Londonderry. There is no reason to restrict the growth at all. And in fact, Mr. Fougere in his report pointed out that in 2004, you had 175 building permits. I think in the last two years, it’s been closer to being between 20 and 25. So there is no growth. There hasn’t been growth for many years. There is no reason to restrict it. There's no justification to restrict it and the impact that restricting has on a workforce housing project is time. And time, as we saw in the reports from Collier and heard last week from Mr. Thibeault, time is the enemy of an affordable project because it causes uncertainty. Just a one percent increase in construction costs changes things. A one percent increase in interest rates for financing changes things. This is all very specific to our project now and keep in mind, there’s a huge difference between an ownership project and a rental project. The financing for an ownership project is obviously much simpler. You finance and then when you sell, it’s done. You don't have to worry. So it’s a much shorter time. When you build and develop a rental project, you hold onto it, you start out with construction financing. That’s construction over the phased period and the permanent financing comes in at the end of the phased period and that’s why the phasing is important. You can’t get financing that you hold on and then just get rid of when you sell it. It’s a permanent thing and interest rates and construction costs have a big impact. So as it relates to this particular project, it’s clear that allowing three years instead of five years is not contrary to the purpose of phasing or growth management because there's no need and it is definitely consistent with the purpose of workforce housing because it enables it. The discussions of these kinds of issues in the court cases is a balancing. Can you justify the regulation with some benefit to the Town? And there is no benefit to the Town to delay the construction of this from three to five years. And in fact, as we’ve talked a little bit in the past, by extending the construction, it actually causes interruption for a longer period of time and may be disruptive to surrounding properties for a longer period of time.

NEIL DUNN: Attorney Leonard? Excuse me.

THOMAS J. LEONARD: Yes?

NEIL DUNN: When you say there's no benefit to the town, what point are you speaking to?

THOMAS J. LEONARD: I’m speaking to the “not contrary to public interest,” and “the spirit of the ordinance is observed.”

NEIL DUNN: Okay.

THOMAS J. LEONARD: And I'm suggesting that there are also…and it actually brings us to the next point, substantial justice will be done to the property owner by granting the variance. All of those three talk about a balancing. The first two tend to focus on the purpose, the second, the law requires that we consider what benefit is the town getting and what harm is occurring to the landowner and is it justified? So they're all very related and the discussion is very related in the context of the purpose of these ordinances and the State law. I think the general rule regarding substantial justice, and let me specifically address that, is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. And here we have a situation where you have a town that can handle the project. The municipal services are not a concern. The growth is not a concern. We also have a town that has a stated purpose for workforce housing and diverse housing and specifically rental housing. So the question then becomes does allowing that project to occur over three years harm the town in a way that is justified? Or, put it in another way, by imposing that restriction of five years, are you getting something for the town that justifies that restriction? And I think if you ask the question either way, there is no justification for the restriction and the harm to the builder and the project outweighs any benefit to the town. And that's what substantial justice is. By granting this, you are doing substantial justice to the developer because there's no harm to the town and allows for this project to go forward and perhaps in an affordable way. I do want to address….well, if you have any questions on those three points, I'm happy to get into the details more if somebody would like to.

JAMES SMITH: Neil?

NEIL DUNN: Do you want him to finish it all before…or do you want to go now is fine…

JAMES SMITH: Well, this is so complicated, maybe it would make more sense to…

LARRY O'SULLIVAN: Small bites. Smaller bites.

NEIL DUNN: If I may then, when you say that there's no benefit to the town on the phasing and because it's not needed now, and you're looking at your one project and the benefit to your one applicant, if you will, we have to look at the town in totality. So at some point in two years, there could be another person who says 'Well, I'm gonna do 1,000 units,' and we do have a lot of big projects coming around, so I'm still trying to get a handle on…Maybe from your perspective, right now, today, with nothing else and the enrollment dropping and no other building permits, it would seem like there's no benefit to the town. But in two years, if all these other projects come on board, I guess I'm having an issue that the town does not gain a benefit and that maybe the way to justice or substantial justice to the applicant, the dynamics change and the scales change a little, so I…So talking it in just one little project does not talk to it from our Board's point of view and the town's point of view and because the phasing really doesn't kick in or it does, I guess this is where we get confused again, only if the GMO kicks in and we do have a lot of numbers and we have more people lined up, then would it…would apply anyway, so…I can see where the benefit would be to the town and the scale could change in that two years instead of three or five or today where you're making the argument that there's no substantial justice.

THOMAS J. LEONARD: May I respond? So, first off, we have to consider things today. But let's, for a short discussion here, let's talk about phasing and we'll push aside the growth management for a moment. Phasing, what you're suggesting, in other words, anticipating growth that isn't yet here, a worry about the next couple of years, a worry about other projects coming in, that's exactly what the State law does not allow you to consider. The State law says that you cannot consider restricting growth, and I'm going to read it again here just because I don't want to misstate it. "In order to restrict growth in a New Hampshire municipality, a local legislative body can only do that if there is a demonstrated need to regulate the timing based upon the municipality's lack of capacity to accommodate anticipated growth. We do not have that. There is no anticipated lack of capacity and no anticipated growth that will be beyond the capacity of the town.

LARRY O'SULLIVAN: As of today.

THOMAS J. LEONARD: As of today. And today's the only point we've got to worry about.

LARRY O'SULLIVAN: Okay. Are you familiar with the Hickory Woods scenario?

THOMAS J. LEONARD: I am.

LARRY O'SULLIVAN: That came here before?

THOMAS J. LEONARD: I am and I agree that there are other projects. What I'm saying to you is the State law does not give you the authority. Now, you may not agree with me and that's fine, but…and that's, you know, I just have to tell you where I'm coming from and you have to make a decision.

LARRY O'SULLIVAN: We're not saying…

THOMAS J. LEONARD: But I'd ask you to take a look at the next step, though. Okay, so that's section two of 674:22. Then take a look at the next one where it says when you have adopted one, it shall include a termination date. And it shall restrict projected normal growth no more than is necessary to allow for orderly and good faith development. Well, right now you have capacity. You have capacity on all fronts and it's not challenged in any sense. And there is no construction that is going on that will challenge it. And in fact, the Planning Board and the Planning office has decided that there's no reason to restrict it because there's no estimate. So that's really where I'm…

LARRY O'SULLIVAN: No reason to restrict what?

THOMAS J. LEONARD: Pardon me?

LARRY O'SULLIVAN: No reason to restrict what?

THOMAS J. LEONARD: No reason to impose the Growth Management.

LARRY O'SULLIVAN: Growth…right. Today.

THOMAS J. LEONARD: Right. Today.

LARRY O'SULLIVAN: Okay.

THOMAS J. LEONARD: We're only talking about today.

LARRY O'SULLIVAN: Mm-hmm.

THOMAS J. LEONARD: And this project and my request for a variances today under today's circumstances.

LARRY O'SULLIVAN: But it's for five years or three years.

THOMAS J. LEONARD: I understand that, but again, I'm just suggesting the way…the town has authority only if these circumstances exist and they don't. But I'm also suggesting that it relates to the discussion today because they're not at issue. There is no question. There's no problem. So here we are…don't forget, I'm not asking to build these all tonight. What I'm asking for is three years instead of five. And I'm asking for that to begin after we get approved, which is probably, you know, it's a period of time down the road, so this is all…there is a natural phasing going on here anyway. But from our standpoint, I'm suggesting to you that the natural phasing and the three years gives the town all of the time they need to plan. It's a four or five year period and that is sufficient time for the town to plan, especially in view of the fact that they have plenty of capacity in all regards right now. That's basically what I'm saying. With regard to the Growth Management Ordinance, I understand the concern and I understand why it raises some questions because right now it's not even in place. So if the Board has trouble with that particular one, I do too. I'm really trying to be straightforward.

LARRY O'SULLIVAN: Mm-hmm.

THOMAS J. LEONARD: If the Board decided that they did not want to address that issue, you know I don't know how I feel about that. What I'm trying to do is point out all the potential areas in this ordinance that cause a potential problem. We're trying to build this project in over a three year period and that could be a problem, but right now it isn't, so I totally understand your comment in that regard Mr. Dunn. Does that…? I know that doesn't mean we agree…

NEIL DUNN: No, no, that helps a lot…

THOMAS J. LEONARD: Okay.

NEIL DUNN: …because, you know, stating that your interpretation is it's the here and now…

THOMAS J. LEONARD: Yeah.

NEIL DUNN: …and the next guy, if it's under something that is here now, that helps me understand better. Absolutely.

THOMAS J. LEONARD: Okay.

JAMES SMITH: I've got a question.

THOMAS J. LEONARD: Yes.

JAMES SMITH: Per your interpretation of that particular law regarding the growth control ordinance, are you suggesting that the town would be prohibited from readopting that ordinance, given the current circumstance?

LARRY O'SULLIVAN: Reinstituting it.

THOMAS J. LEONARD: I actually think that right now, they can't have an ordinance. It has to be terminated. And I'm not saying they couldn't redo it when the circumstances to justify it exist, and it may have been a very effective tool back in 1982-3 when we had that…or whenever it was. Not '80. I'm dating myself. No, my point being I'm not saying that it wasn't well written and didn't accomplish…it in fact probably accomplished its goal. And it's time to stop it and it's not appropriate now. If, five years from now, you start to get 175 or 250 building permits a year, you know, maybe it's appropriate. I don't know. But right now, we're nowhere near that and there's plenty of capacity in all regards. So that's really what I'm saying. So still with variance one, the only request here…this sounds like a tremendous discussion on a very critical matter in a…well, I guess all I'm trying to say is we're really only asking for three year phasing when five is probably permitted. And the natural delays and process is gonna add another year to that anyway. So I think that addresses the public interest, the spirit of the ordinance and the substantial justice question. I have with me today a letter from Mark Fougere [see Exhibit "Q"]. Mark Fougere is a professional planner whose job has been for the last number of years, I know it's more than 20, where he assists both landowners and municipalities in their zoning and planning process. And as a part of that, of course, you try to match uses and regulations to accommodate and make sure the impact on surrounding properties is not adverse. He's also very familiar with values and how these ordinances work with one another. At the last meeting, somebody asked the question of the impact of these variances on values, so I've had Mr. Fougere take a look at it and he came up with a letter I'd like to hand out if I may.

LARRY O'SULLIVAN: We don't already have copies of this?

THOMAS J. LEONARD: This you do not because it came up recently. And again, I have Mr. Fougere here. Basically, what it says is, and we did talk about this at the last meeting…actually, we probably talked about it at each of the meetings, focusing on this particular variance, again, the question is will allowing this project to occur over three years have an adverse impact on surrounding properties as compared to allowing it over five years. That's the question. Mr. Fougere expresses the opinion that it absolutely will not have an adverse impact. I think Mr. Thibeault said the same thing. The primary reason is obviously that we're not talking about a use. We're talking about the time of construction. And the time of construction, the longer it is, the worse it is for the surrounding properties. So shorter is actually better. So again, we're meeting the requirements of the five points.

LARRY O'SULLIVAN: So this letter…

THOMAS J. LEONARD: That letter addresses all three variances. Yeah. So I'm going to stick to the one we're talking about here, three years for five. Which brings us to the last point. And that is owing to special conditions of the property that distinguish it from other properties in the area, no fair and substantial relationship exists between the general public purposes of the ordinance and the specific application to the property. And the proposed use is a reasonable one. So here what we're doing is we're looking at the ordinance as it applies to this property and this use. And in a very general sense, we still have those same issues. We've got the workforce housing, we've got the phasing and restriction of growth. They have to be balanced. The question is, how does it relate to rental housing? Because this is a rental project. And while you may justify growth ordinance for an ownership project, in this particular circumstance, it's a rental project, so it's a very unique application and I am suggesting to you that that changes the whole discussion also. And in this fifth category is probably where that comes up the most. Yes, sir?

JAY HOOLEY: Just to ask a clarifying question; whether it's rental or ownership, would renters have less need for expansion of community service, including but not limited to education, fire protection, road maintenance, waste disposal, police protection, and recreation?

THOMAS J. LEONARD: No, they don't less need.

JAY HOOLEY: Then I guess I'm unclear on, unless I misheard you…

THOMAS J. LEONARD: Well, what I'm saying…yes. What I'm saying is that in the fifth requirement…

JAY HOOLEY: Mm-hmm.

THOMAS J. LEONARD: …we also have to look at the fair and substantial relationship of the ordinance as it is applied to this property and project. And while all of the earlier discussion still holds, now focus for a moment on how this ordinance adversely impacts rental projects as compared to ownership projects because it actually makes it worse without accomplishing any of those goals because substantial relationship means does the regulation actually accomplish the goals of the public purposes? And when applied to a rental project, it does that even less than normal and the reason it does is because it very adversely affects a workforce housing rental project. The economics of it. So the economics become an ever more important part of things in this part of the discussion. And we've had the discussion about the difference in finance between ownership and rental. Ownership is a shorter term financing. Rental is a longer term financing. But the other distinction that we talked about a little bit last time is that the definition of workforce housing when it's an ownership, a sale of a unit, the definition is it has to be 30%...it's based on 100% of the median income of a four person household. Is it affordable to that median income? And the affordable is the 30%. Whereas with rental properties, it's based on 60% of the median of a three person household. So the number is lower. To be affordable, the income is lower and it's that same ratio of it to income, but the income is lower. And what does that matter? Well, here we have an ordinance that is designed to phase and accommodate growth, which is not an issue here today, but the way it impacts this particular project is basically, it adds a cost that will not be affordable to the people we're targeting. So the line of affordability is so much tighter in a rental property than it is in an ownership property, that it could be said that this does not adversely impact the affordability of an ownership property, an ownership project, but it does adversely impact the affordability of a rental project. And I think that's the distinction I'm trying to make. I'm sorry for not being clear on that. Is that helpful at all?

JAY HOOLEY: Yeah, I mean the need is no different for…

THOMAS J. LEONARD: The need is the same. We're now looking at the other side of the equation of the affordability and in effect, we're eliminating affordability to renters and we're doing that with a restriction that doesn't really accomplish its goals because the goals are already accomplished. That is the phasing.

There's no need for phasing, so we're not going to accomplish goals of phasing without it…with phasing. They've already been accomplished. Now, if you look at the unexpected impact of the ordinance, it just adds costs that take you out of the rental possibilities. And that's kind of the discussion that we have had in the past about this overview of the Daniels case. And I know that gets used…you probably hear that every time you get a zoning case now. And I apologize for that, but I do think it's appropriate and I think there was some discussion month ago about how it does relate. This is an overview that is just kind of the context for the discussion. So in sum, the special conditions are that this property is particularly unique in that it has been identified and you have all those reports. It's been identified by the local housing report, that it's a very appropriate location for high density workforce housing. Multi-family. It's appropriate for a whole series of reasons. There's a study by Mr. Dubay who showed that there's a few sites around town that have been zoned for this. This is probably the best site of all of them for this particular use. So taking into consideration that special quality and location, I mean even the most recent, as I understand it, the most recent Master Plan for the town has said let's locate dense housing next to highways. This is right next to, along the highway. It's appropriate. And that's what this site does that is unique and why this project on this site is unique. So I think that unless you have some questions, that summarizes the five points with regard to our request to enable construction over a three year period when five is required. And I would say that the most important components, as I view it, first off, this does not depend on Mr. Thibeault's economic analysis because as we heard the last time, the phasing…he did not quantify that and I think there were questions, 'Well, what would happen if it were four years?' Timing and the time of construction is an expense that is hard to quantify. It could possibly be that interest rates don't go up and it could possibly be that construction costs don't go up. But the finance markets do not expect that and you saw from the Colliers letter that time, from a financing standpoint, presents serious problems. But I don't think it requires analysis by outside experts because nobody has disagreed, nobody's quantified it. We just know it costs money and costing money for no reason is contrary to the purposes of workforce housing, which is a primary goal of the town. I think in view of that, and in view of the very questionable present status of restricting growth, then when you start to consider the purposes, this small variance, this small relief from five years to three years is justified. I would ask that, you know, I think it's important, one thing that we…it's important to make findings on each case. So I'd ask you, in your process, if you would please consider to make…please consider findings on this particular matter. Okay, so that takes us to variance number two, unless…if there are questions, either of me or of any of the experts we have in the room, any follow up on any of those reports, we're happy to address regarding this particular variance.

LARRY O'SULLIVAN: You brought up a couple of the statutes from the State that had to do with the growth management.

THOMAS J. LEONARD: Yes.

LARRY O'SULLIVAN: One of the things that we have to take into consideration here, because almost everything that this Board does and the Planning Board does is about the future. We have a Master Plan that's only about the future. It's ten years into the future. And one of the things that every one of the Master Plans has, that I've been involved with, has said is that we need to have some type of growth structures in place that could be allowed and how or what we do in the way of our ordinances is something that, I think, deserves a challenge. In my opinion, our ordinances are legal and while the Growth Management Ordinance isn't in effect at this time, it can become in effect based on things that happen. Right now, our plan has heard of Hickory. You heard it a little while ago, 98 units at Hickory Woods. Lorden Commons is something that's already on the books for 51. Mill Pond for 16. Whittemore Estates for 77. And this unnamed thing behind Mountain Homes for 19. The Nevins has five. We only had 21 permits in 2012. Well, I guess we have another number other than 21, but all these things make 240 over three years, which means 80 a year. All of those then have other restrictions. What should be the advantage for a rental property to be exempt from our growth ordinances if we know, if we've already heard the plans for seven other or eight other fairly large developments? And I didn't mention once the elephant in the room; Woodmont.

THOMAS J. LEONARD: Yeah.

LARRY O'SULLIVAN: Fourteen hundred. So…

THOMAS J. LEONARD: So the answer to that question is…

LARRY O'SULLIVAN: They haven't built anything yet.

THOMAS J. LEONARD: No. No, that's not the only answer. That's part of the answer. They're not built. So far, you still only have 20 permit requests per year. And of course, all your infrastructure can handle what is presently proposed.

LARRY O'SULLIVAN: Mm-hmm.

THOMAS J. LEONARD: But the real answer to the question that you asked is that the State of New Hampshire has told all the communities in this state that they must provide workforce housing and none of those other projects you talk about are subject to that or have the advantage of that mandate. This project you have before you today does. Not only does it have the moniker of workforce housing, but it also happens to be the most difficult workforce housing project from an economic standpoint in that it's a rental project. Because the economics of a rental project are most difficult. So that's really the reason…that's really the most basic answer to your question. If there were no other reason, that's sufficient so long as it doesn't adversely impact the town specifically and it doesn't because the facilities and the infrastructure in town can handle it. And I know we disagree on the status and the present phasing and growth management. I think the phasing is a growth management ordinance right now because it's not just phasing on site, it's phasing over time and so it has to be read in the same terms. But I know we disagree on that. I believe that…

LARRY O'SULLIVAN: I just think that there's an impact on those other projects…

THOMAS J. LEONARD: And it may be.

LARRY O'SULLIVAN: …because we offer you the relief on this…or potentially offer you the relief on this one.

THOMAS J. LEONARD: But I think the answer is the mandate from the State and the mandate from the State is actually a State law that is intended to simply codify a mandate from the State Supreme Court. So you've got it both from the law, the common law side of things, and the statutory side of things. And then you have, under that, you have your local town saying we want diverse, affordable housing. So you add all of those three mandates and I think that's what separates this project in terms of the phasing. So if there are no other questions on that particular one, I'll go to the next one which is…and there are similar arguments because all of these are in the context of the workforce housing purposes which are very important purposes and very difficult to accomplish. That's why there is no workforce housing project in the town, even though there's an ordinance on the books, there is none. There has not been one. And that's true, I might add, of a lot of towns. It's a struggle because it's hard to do. The economics, even in these times now, where costs seem to have been lower, et cetera, they're still having great difficulty…

MARK FOUGERE: It's from the task force. Londonderry's task force.

THOMAS J. LEONARD: Yeah, they have that. Yeah. So let's take a look at the second variance, which is…So Mark is pointing out to me, in the information that you were provided in the memo, I gave you the report for the Londonderry task force, and Mark is pointing out, and rightly so, that there is a specific finding in that report which talks about the costs of project timing from concept to the approved plan is a crucial factor in determining costs, et cetera, and interferes with a low or moderate return. Delayed permits, prolonged board review, department phasing, et cetera, all create the uncertainty. So this is all toward that end and I think you have that both in the Londonderry report and in the State report that I also provided to you through a communication after our first hearing. Okay, so taking a look at variance number two, which is our request to…the local inclusionary housing ordinance, which is designed to encourage workforce housing, requires that if it is a workforce housing project, 75% of them have to be workforce housing qualified units. We are requesting that 50% of them be workforce housing qualified units.

NEIL DUNN: So that's case dash three.

THOMAS J. LEONARD: So this is case 10/17/2012-3. Now, I want to start out by again focusing on what is inclusionary housing and if I may, just refer to the State law on inclusionary housing and inclusionary zoning. When it specifically says that inclusionary housing or inclusionary zoning is a regulation that provides a voluntary incentive to encourage affordable housing and to induce the owner to produce affordable housing units. So that is the only way you can have inclusionary housing is if you do that. If you do it in a way that encourages workforce housing. And that seems to be what the goal is. I mean, if you ask for 75%, you're trying to get more workforce housing. Well, as a practical matter, I'm going to suggest to you that it does the exact opposite and what it does is it prevents workforce housing. And the reason…I just want to start out with the notion that if you…the way the local ordinance works is it allows for up to twice the density. So if you start off with 100 units, you may be entitled to 200. But by requiring 75%, what happens is you would have had a profit based on those first 100, you are allowed to build another 100, but those don't make money and in fact, cost money. Then you have to take half of the first 100 that you were making money on and lose money on those as well. And Mr. Thibeault's analysis was basically a clear statement that there is no way, if workforce housing units don't…if they are priced at less than market, in other words, they don't carry the return that would enable them to be accomplished in the ordinary market, if that's true, and Mr. Thibeault showed that it was true, by requiring 75%, you, by definition…the math is simple. You automatically tell a developer that if he wants to have twice as many units, he has to make half as much profit. And of course, that doesn't make sense. That is not an inducement and it's not inclusionary zoning. It's not permitted. Now, that only happens in the rental circumstance because the same math applies, but the same profits do not apply, so again, it's a very unique situation here because we're talking about a rental property that is a long term ownership with a revenue stream as discussed with Mr. Thibeault. But the math is clear. If you want to be workforce housing rental, you're gonna make half as much money and that's not an incentive. So I start out with that comment. Then I'd like to just have you consider that the public interest…the variance will not be contrary to the public interest and the spirit of the ordinance must be observed. Again, those two things are related, they're coexistent, and they focus on the purposes of the ordinance. The purposes of the ordinance are very similar to the last discussion. We still have the purpose of the workforce housing ordinance. The only thing is we don't have anything to counterbalance it. In this particular request, we're simply asking that we provide what is going to be 120 workforce housing units, rental units. And we're asking to be allowed to do that in spite of the regulation that requires 75%. But there is no benefit to the Town to enforce that restriction because we heard, and the simple math shows, that it won't happen. By causing 75% of the units to be both restricted in price and restricted in the potential market, because don't forget, these have to be rented to people with 60% of the median income of a three person household, those are the only people that these can be rented to under the local ordinance, the effect of that restriction makes this not work. Just from a simple math standpoint. So that's clearly in conflict with the stated purposes of the ordinance and not consistent with any purpose of the ordinance. There's no stated purpose in the State law or in the local ordinance that says anything along those lines. To allow 50% is not going to change the nature of this project. It doesn't change the use. We're not talking about a use. This is a permitted use. We're only talking about how many of those units have to be restricted. It doesn't change the character of the locality. It doesn't threaten public health, safety, or welfare. Those are the tests for whether this is against the public interest. And it just does not do that and there's no…I can't fathom a reason that it would. I mean, it's the exact opposite. If you take a look at the math, this requirement, when applied to a rental project, means that you will not have a workforce housing rental project. In fact, it's kind of the flip of that. Failure to grant this variance is contrary to the public interest because by not granting this, it is clear that it won't happen. And that's the most important thing. With regard to the spirit of the ordinance, I think the same argument holds true again. We're just talking about allowing a slight relief from 75 to 50%, such that the math works. The next criteria is substantial justice. As we talked about in the last discussion, this is a balancing kind of thing. The analysis for substantial justice requires balancing of the interests of the general public in holding to the restriction, that is requiring the 75% and the interests of the individual property owners and the developers in not requiring it. And that's balanced….what benefit are you getting by standing with the 75%? By requiring Mr. Monahan to restrict 75% of those rental units. And the answer is you're not getting any benefit because we know that the math and the economics don't work and you won't have any workforce housing rental units. The same general discussion on the values of surrounding properties will not be diminished by the granting the variance. And again, I guess I want to focus; we're only talking about the question of relief from 75% to 50%. And by Mr. Fougere's letter, you'll see that that has no impact on the surrounding values and it makes sense that it doesn't have impact. All we're doing is we're saying that the general public can rent 50% of the units instead of just 25%. It's still the same units, it's still the same project. It's just a question of who occupies. And it's really irrelevant and immaterial to the value. The use is a permitted use and I think one of the difficulties in this discussion is we talk about these three variances, but we've got to keep stepping back. These are permitted use. The buildings, everything is permitted about them except these three minor regulatory-type issues that are not…they don't affect the use, they don't affect all of the things that are typically a concern. Then the last point of discussion on the variance number two, owing to special conditions of the property that distinguish it from other properties in the area, no fair and substantial relationship exists between the general public purposes of the ordinance, that is the requiring 75%, and the specific application to this property and the proposed reasonable use. So again, we have a restriction that says it has to be 75%. Does that make sense under these circumstances and under the goals of the ordinance to create workforce housing rental units? And it's working against that purpose. The facts are clear. The purpose for the workforce housing is clear. Rental project versus ownership creates the distinction. We have to work under that same umbrella of a goal for workforce housing and requiring an excessively high percentage of restricted units, I mean it stands to reason that that prevents an economically viable project. It's just simple math. And it's especially harsh for renters, as I've mentioned. The special conditions are also to be considered in the Daniels-type context. This particular property, again, is very appropriate for multi-family residential. Multi-family rental. And again, I would ask you to call upon your memory of Fougere report because he did talk about these kinds of things in his report with the sufficiency of all of the infrastructure, et cetera. So again, I think this particular variance, like the first one, again does not depend on Mr. Thibeault's economic analysis because the math is much more simple. I mean, there's no question that if you have some profit and an ordinance makes you give some away, there is no incentive to do that, whatever it is. It's just simple math. I also think that the incentive…the ordinance has to be…well, in order for it to be a legitimate ordinance, it has to provide an incentive and it doesn't. So that's a consideration. It only doesn't in the context of rental. So all of those things together give you the special circumstances of this particular project on this particular property in the Town of Londonderry. I will leave variance number two right there unless people have some questions.

NEIL DUNN: I have a question. I'm looking at, getting back to the benefit, the substantial justice and weighing…I agree with your math, that obviously 50% of the units, 25% more of the units can get higher money then it helps your numbers. But looking at it from the town's benefit, we give the incentive for double density, if you will, so if we determine there was a need and we want to fulfill that need, we would have less properties of this size possible changing the rural character of the town. With the 75% requirement, we would have to build less large projects like this, so that the benefit to the town is we maintain our rural character. We get them out where they can be handled safely with traffic and all those other concerns. So you're kind of saying you didn't see the benefit. I'm seeing the benefit that would have less of these 240 unit workforce housing units all over town that do impact the character and the look, which…So I do, I see a benefit, so how do you help me get around that?

THOMAS J. LEONARD: Okay. Well, a couple of things. First off, workforce housing simply means that it's affordable to people who have regular jobs; teachers, firemen, policemen, et cetera. Young people. One of the reasons you want rental is some people aren't in a circumstance where they can or want to own. Usually it's at either end of life scale, right? Usually younger people or older people want to rent. Or people in a transition. So this is not subsidized housing. This is not housing that you need to limit. If you could have 100% workforce quality housing in the town, I think most towns would actually want it. All it means is it's affordable to everybody. Second thing, the Town of Londonderry has actually said they want it and identified this as the site for it. They did it in a discussion, they had a long discussion, and then adopted an ordinance that was adopted under the State law that says 'Well, you can provide special incentives to accomplish this.' What I'm simply suggesting is the way the incentive is written, by requiring 75% in the context of rental, it's not an incentive. So, in fact they did the exact opposite of what they wanted to do. Now, if they want to limit the number of workforce housing units in the town, they could…I mean, what you're suggesting is you don't want a whole bunch of these things.

NEIL DUNN: With double density.

THOMAS J. LEONARD: I think that's the exact opposite of what the ordinance says. But let's say that is a goal. Well, they could do that or they might do it by saying 'Okay, we're gonna do it in certain areas and we're gonna only have so many projects.' They didn't do that. What they said was, we want to create an incentive to do this. And they didn't. In fact, the way it works is it's a disincentive. So, I guess I have to disagree with you on the goal of limiting these projects, but I also have to point out that this particular site, even if they did want to limit them, they identified this site as one they want it at in high density. But you still have to make it work and it won't happen if it doesn't work. Any other comments or…? That brings us to the third variance.

LARRY O'SULLIVAN: Could you take two minutes to give us a…?

THOMAS J. LEONARD: Absolutely. Yeah.

LARRY O'SULLIVAN: Just to get my…I want to get myself oriented with the documentation. There's just so much of it.

JAMES SMITH: All three of them are strung together…

LARRY O'SULLIVAN: I've got 176 pages that I'm trying to go through and I don't know how to work this program, so…

[Board members take several minutes orient themselves amongst the electronic documents].

THOMAS J. LEONARD: Okay, so we're talking about the third variance is a request that the buildings that we're proposing to build, that we be permitted to have 24 residential units in each building when 16 is permitted. So it's really one request for relief from that requirement. The three sections are different sections within the same inclusionary housing incentive ordinance that the particular requirement comes up in a certain fashion. So that's why I listed all three of them. It's really the same request and in fact, one of them really doesn't relate. It just refers to it just it. Just to cover all bases, I wanted to make sure that everybody knew what was going on. But it's really only one request. We have 240 units that are proposed. The density is permitted. The use is permitted. And we're requesting that those 240 units be permitted in ten buildings rather than 15. Twenty four units per building rather than the permitted 16. And I think, again, it's important, in going through these five criteria and five steps of discussing a variance, I think again it's important to focus on the purposes. But the first step is that this particular restriction is part of the inclusionary housing ordinance. And the inclusionary housing is allowed by statute when it is an incentive for affordable housing. It's only allowed if it is an incentive for affordable housing. So that's a State requirement for the authority to have inclusionary housing ordinance. The local ordinance then takes it a step further and states its purpose and we talked about it a little earlier but again, it talks about, and this is section 2.3.3.1;encourage and provide the development of workforce housing within Londonderry. It is intended to ensure the continued availability of diverse housing, of home ownership and rental opportunities. So we're talking about a diversity of housing. We're talking about a stated purpose from the local ordinance. We're talking about a limit on the authority that the State has given local towns and the way that it works on this particular rental project is a problem. It's a problem because, as we heard, and I think Mr. Thibeault's analysis and Mr. Dubay's discussion of the last time are very important to this discussion. It is all about economics. Building 15 buildings of 16 units as compared to 10 buildings with 24 units, you increase the cost about 13%. And Mr. Thibeault, that was his analysis. He relied in part on Mr. Scudder's. I think everybody agreed that the cost is substantially more for a 16 unit building project as compared to a 24 unit building project. I'd also like to point out that in the May 2010 memo, the Planning Board hired an expert to look at the cost of construction of a 16 unit as compared to a 24 unit and it concluded, the Planning Board's expert, confirmed that same roughly ten percent difference in the actual construction cost. He didn't look at site costs. So the economics of that are very clear. And of course, the only purpose of this is that incentive ordinance to provide affordable housing. So here we have a situation where everybody agrees that the result of requiring 16 instead of a simple request for 24 automatically adds cost and it adds cost in the context of affordable housing under an ordinance which was…really only had the purpose of creating affordable housing. That is the purpose of the incentive housing ordinance. So there is no balancing interest that is going on here. Even if you try to imagine what the interest would be, even if you try to imagine what the interest would be, even if you try to imagine what a purpose would be, it doesn't accomplish that purpose. And let me go through that process just a little bit because I think it relates…this all goes to the 'this variance is not contrary to the public interest,' and 'it is consistent with the spirit of the ordinance' to allow for 24 units in a building, even though 16 are permitted, because the sole purpose of this ordinance is to create affordable housing and this requirement does the exact opposite of that. But let me just indulge you, if I may, for a minute about imagining what might the purpose of this restriction be. Because under State law, you can regulate the height of a building, you can regulate the scale of a building, you can regulate how close it is to other buildings, but it doesn't allow you to regulate the internal configuration of the building. There's no place in the zoning ordinance where you do that. That's another…that's fire issues, but it's not zoning issues. Here, the buildings we propose, the ones that I've shown you in the pictures that are in your packet, they're smaller than the ones surrounding at Vista Ridge. They're smaller, obviously, than the hotel. They're designed to present in a way that the scale is not an issue. Their footprint is smaller than those other buildings. They're a permitted use. There's no height problem. There's no scale problem. They have the right number of stories. Everything is right. The only thing we're talking about here is can we have 24 units and the only reason that restriction is in place, the only place that the 16 units is in place is in the incentive to provide affordable housing. So it just doesn't make sense. This request to allow 24 units is definitely…advances the public interest and it is consistent with the spirit. Again, if you go to the test, does it alter the essential character of the locality? Well it certainly can't be said that it does because you can't tell how many units are in a building. It's the same scale. All of those…it looks the same. It's actually a better design. Going to the third item, and that is the substantial justice will be done to the property. Again, that's the balancing test that we're talked about. To require this project to be done in 16-unit buildings, 15 buildings, the effect is that you have more site work, you have more disruption, you have less open space, you have a building that has the same footprint and it probably isn't going to be substantially lower because it's two and a half story versus a three story. You know, the scale of the building is not that much different. But the economics are substantially different and those economics are why this is…it's necessary, and it's also why it's appropriate to allow this minor relief, because there is no benefit to the town at all. The values of the surrounding property, again, the values are not affected in any way, as Mr. Fougere's letter shows, and as common sense shows. The values of surrounding properties are not affected by the number of units in a building. This project is going to look the same. It's a permitted use. In fact, there will be more buildings if we don't permit this, there will be less open space, we won't be able to design the site so that more of the buildings are back in the forested area as is presently proposed. We lose all those planning benefits by requiring 15 buildings instead of ten. I don't believe that's the purpose of the ordinance, but that would be a result. And then basically, going to the last criteria, the special conditions of the property and the no fair and substantial relationship exists between the general public purposes of the ordinance, providing workforce housing, and the specific application to this property. It's the same discussion, same facts, it's a very clear thing. I think that the thing about this particular regulation is that it is an isolated regulation in an incentive workforce housing ordinance and as it applies to this rental project, it just doesn't make any sense. It doesn't accomplish a goal that is a reasonable goal. It doesn't accomplish a goal that's a stated goal. It seems to be in conflict with the State law. It seems to be in conflict with the local law. It talks about internal configuration when that is not a legitimate comment. It does not adversely affect health, safety, or welfare. It is consistent with all of the other regulations that the Town has, including use and size. So unless you have some questions, I will leave that one there. But I would say that this is a classic regulation…classic example of a regulation that, in a context such as this, that is providing affordable housing and rental property housing, it's a classic example that it does not accomplish a legitimate goal and that it's unintended consequences are exactly what this Board is authorized and charged with providing relief for. The last one got a little shorter because I think we heard it many times here and I recognize that, but if you have any questions of me or anyone with me, we certainly would enjoy trying to respond. After that, I do have one minor little thing to make about the workforce housing statute itself.

JAMES SMITH: Okay. Does anyone on the Board have questions?

LARRY O'SULLIVAN: No, but I'm not asleep.

NEIL DUNN: I would like to hear his statement on the workforce housing thing, because I have some questions on them in general, and then an overall picture on…questions on the financial thing, which unfortunately, we're not gonna really get to all tonight, but maybe you can help me understand better some questions there, but I'd love to hear your thought on the…

THOMAS J. LEONARD: Shall I go ahead? So the workforce housing…so we've asked for three variances and the first variance is really three year phasing. The economics, while they make a difference, they're not complicated. Mr. Thibeault's report doesn't count a whole lot. And the same thing is true for the 50 versus 75. The economics are very clear. It's just numbers. The 24 units is much more about construction costs, et cetera. And those are more complicated figures. So the variances really stand on traditional grounds. The one thing where the economics start to play an important part is kind of that umbrella idea that all of it has to be interpreted within the context of this lot being appropriate, zoned for, and a good spot for this kind of project. And that's kind of the Daniels case. So you could grant variances on all three of those and we don't need to talk about workforce housing. And I'm going to suggest to you that you could grant variances on the first two without reviewing Mr. Thibeault's economics because the first two aren't the complicated economics. I think the economics is important to the workforce housing discussion. And the workforce housing statute and the mandate under that statute is really separate from the variances in that there's a special authority that there isn't another kind of situation where you have these same authorities and powers. What the workforce housing statute does is it defines some terms and we'll talk about those in a minute. But basically, the process is that whenever a developer comes in and wants to provide a workforce housing opportunity, they put the local land use board on notice and they present the project and it's more of a discussion of sorts with the common goal of accomplishing this thing. And the way the statute reads is that we make a proposal to you, you either approve it or you approve it with conditions. So I suppose in this circumstance, you could say 'Well, we agree with your idea but these restrictions should stay in place and that one need not…you can get relief from that one.' And we could then respond by saying 'But if you require that, it's gonna cost too much and we can't do this.' And we'd have that sort of exchange. Now we've kind of been doing that as we go through the process, but that's the idea of the statute and that's what the statute sets up. And it does that within the context of some very specific, defined terms. What it says is towns have to have ordinances or that their zoning has to allow for these special kind of projects and the economics have to be viable. It has to encourage these things to occur. So there are defined terms. "Reasonable and realistic opportunities for the development of workforce housing, including rental multi-family housing." So that's one of the things that has to happen. That's the one we're focusing on because ours is a rental project. "Reasonable" means opportunities to develop them in an economically viable way, so that's why we've talked about the economics. If you think we can develop this workforce housing rental project economically with, say, relief of two of those restrictions and not one, then you might suggest that. And again, we might come back with something or not. And it's all within this process that starts with simply a letter from us saying we want to have a workforce housing. Now, I kind of view it as more of a give and take discussion. I think we've been having that. But I think the economics are the ultimate discussion because of course, affordable is what workforce housing is. Affordable in a rental context is what the focus has to be, so it's that number of 30% of 60% of the median income of a three person family. That's the number we've got to focus on. And that's why the economics matter so much. Because the number is low. The rent is lower than the market. So the economics that we've presented to you are Mr. Thibeault, Mr. Scudder, Colliers, and your own Planning memo all about the costs of construction and in particular , probably focusing on the 24 units versus the 16 because that's the real quantifiable construction cost. This Board has the authority, aside from variances, this Board as a land use board has the authority to waive any and all restrictions as may be reasonably necessary to make this an economically multi-family rental project. And that's what the workforce housing statute says. You have that authority. You don't have to find any hardship. You don't have to find anything. All you have to find is that the economics reasonably require it and that's what your charge is. So that's kind of where we are on the workforce housing. If it helps anybody feel more comfortable, I happen to see the local paper here a couple of days ago and Mr. Thibeault actually did a study for the town and he's involved, the Town of Londonderry, he's involved in the Pettengill Road project and the economic analysis up there. I know there was a question on some of his construction numbers. I actually think a lot of them are…you know, I think they're probably intuitive in a lot of sense. It makes sense that it's gonna cost more to build 15 buildings than it's gonna cost to build ten. And it makes sense that more site work is more money. And if this project is as tight as it seems to be, and I would suggest to you that when you don't have any other projects before you, that are rental multi-family workforce housing, that's because they're too tight. So I think that alone is pretty good information about how close the economics of this project is.

NEIL DUNN: If I may, Mr. Smith? Chairman?

JAMES SMITH: Sure.

NEIL DUNN: You talk a lot about economics and viability, but you're not doing any tax credits or incentives or anything of that nature which seem to be either through the Department of Urban Development or through New Hampshire Housing and Finance…

THOMAS J. LEONARD: I don't think that's any of the discussion in workforce housing. That's…

NEIL DUNN: Well, it gets back to the economics and you can get some different interest rate loans. I don't know. I'm throwing these out here from what I'm reading from New Hampshire Housing Authority, which you quote all the time, on workforce housing. They talk about low interest loans. They talk about some different scenarios and monies available for tax credits and all that which you said you weren't gonna use any of, so that all ties back to the economics for me and if you want us to base it on economics, I'm wondering why you don't go that route and how I should weigh that into it. If other communities have covered them all over the state with all kinds of financing packages from either HUD or Rural Development Authority or NHHFA or whoever.

TOM MONAHAN: May I?

THOMAS J. LEONARD: Yeah.

TOM MONAHAN: I'm Tom Monahan. I have the agreement to buy the property and the developer. You know, I'm very familiar with different kinds of financing. I'm the Chairman of the Nashua Housing Authority. I've just finished developing that development in Bedford, which is the direction I would go in. And what that financing is, it's a guaranteed loan by HUD…excuse me, it's a 221D4 is what it's called and HUD guarantees the bank the loan if there's failure. It's a workforce housing development and there are very few of those loans that have become available because there have been some failures over the years. But the loan process that I would be taking and the benefit of this is, as I didn't do in Bedford also is I didn't go get State Housing Authority money. But what I did do is I got the 221D4 money which is a fixed rate for 40 years which really helps the whole process. It's a much longer term than most apartment buildings get and that's the benefit that I can work, go out 40 years. It's a regular bank…Bedford, for instance, Wells Fargo lent me the money and it's just guaranteed by HUD if there's a failure involved. So that's really the angle that I'm pursuing. Long term fixed financing instead of a normal apartment loan would be ten years and then your subject to new rates out there in ten years. And that's why I'm looking at this at a more longer term apartment complex. People say 'What the heck are you doing building an apartment in this day age?' because the site and the development costs are so much. But I'm looking out ten years. I'm looking out that, you know, ten years when I have a fixed four percent rate, you know, with another 30 years to amortize it, that's the route my plan is to go.

NEIL DUNN: And aren't there also tax incentives or credits that you can use? The LH…

TOM MONAHAN: They've very difficult to get. They're very, very difficult to get and you have to, again, you're dealing with another bureaucracy and you're at risk. It's almost an annual grant or an annual loan. It's short term. You gotta pay, it's not a grant, you gotta pay it back. Londonderry is, you know, would be a difficult town to get that kind of a loan. You know, they look at the more…as you were saying, Mr. Dunn, but, you know, this is a pretty urban town now and they look at the more rural loans. And I know I discussed it with…my Bedford loan, at the outset, I discussed it with the Manchester NeighborWorks and they said 'All our money is either going to downtown Manchester or out in the suburbs and the more rural areas." So we sort of don't qualify for that and it would be…it's a very difficult thing to get. I have another development in Lowell, Mass, where we're trying to get tax credits and if I had to do it over again, I wouldn't even attempt to do it because it's just a very difficult thing. You're subject to the criteria of, you know, on an annual basis of having to respond to not only the State but the Feds and it's a very difficult thing. It's difficult enough dealing with the towns with our workforce housing certifying on an annual basis. I have to certify to the Town of Londonderry on an annual basis that I am adhering to the workforce housing ordinance, which includes a full scale audit. And that's plenty.

THOMAS J. LEONARD: But I think the other thing that has to be considered is we're talking about a stated goal of the Town to provide an incentive to developers to build these projects. It doesn't depend on them finding unusual financing or tax credits. It depends on what they actually have and there's an obligation to provide that incentive and the Town of Londonderry has accepted that obligation with open arms.

NEIL DUNN: With the ordinance that they've put in place that you're looking for the variances on. So when I go to New Hampshire Finance Authority and they say that 65% of the total project costs are covered in a majority of the all workforce housing in the state and you're not going there, then I'm saying, well maybe the economic viability, maybe this isn't the one the Town wants to promote.

THOMAS J. LEONARD: Well, I think…

NEIL DUNN: I mean, I don't know. That's where I'm…help me understand that is all I'm saying.

THOMAS J. LEONARD: Well, I guess I would say where do you…where does it say that? When I…

NEIL DUNN: It says it on New Hampshire…I can give you a copy…

THOMAS J. LEONARD: No.
NEIL DUNN: …or I can give you the website link. I mean, it's on New Hampshire Housing and Finance Authority.

THOMAS J. LEONARD: But my point is that…

NEIL DUNN: I'm just using that because you're saying economic viability is the basis for all these changes and it doesn't look like you're using maybe all the economic avenues. Again, I'm trying to get educated. You guys do this for a living, or Mr. Monahan does.

TOM MONAHAN: May I?

NEIL DUNN: And that's why I'm asking, that's all.

TOM MONAHAN: There's no better financing than the financing that I'm trying to obtain. There's nothing better. It's the most difficult financing to obtain. You know, they're not gonna let me go out, New Hampshire housing isn't going to let me go out 40 years. You're amortizing something over 40 years as opposed to 25 years. This would be a no-go deal and there's no better financing. I've looked high and low. I've hired the best I could hire, money men, to go out and see if we could get life insurance companies to get involved and this is the absolute best financing available.

THOMAS J. LEONARD: Well, and I think what I'm trying to say, Mr. Dunn, is that if it was a requirement that you seek and obtain the absolute best financing available under any circumstances, it would be part of the State statute and the local ordinance and it isn't. What it says is the Town and the State want to provide incentive. And what you are seeing is an effort to do it. But the way the ordinance is working, it's not an incentive. It's a disincentive. And that's really the focus here. There's no…Tom is trying to get the best financing he can get in his business sense and in his business judgment. He's meeting all of the requirements of the workforce housing law. He's meeting all of the purposes. And he's doing that in a situation where he's only asking for three, what I'm gonna say are not major requests for relief. One is five years to three, one is 75% to 50%, and one is 24 units in a building instead of 16. I don't think those are major requests and I think that in the overall context, it makes sense.

NEIL DUNN: In regards to need, also if you go to New Hampshire Housing and Finance Authority, and I think I mentioned this at the last meeting, Rockingham County has 30% of the rental units fall within the…percent of two bedroom units in rental cost surveyed that are affordable to the median income per the standards for Rockingham County. And Rockingham County is at 30.5% and everybody else is down at 0.8, 5.2, 16.2, whatever. And this, again, is at New Hampshire Housing and Finance Authority residential rental cost survey. So it looks like our region, I mean, the argument is that you were looking at the task force thing that was done by volunteers, much like us up here, I'm not faulting them there, but it looks like Rockingham County already has a pretty good workforce housing availability in the rental market. So how do you help me…?

THOMAS J. LEONARD: Well, first up, I think you're miss…I don't think you're reading that statistic correctly. What the statistic is talking about is the percentage of units that are affordable. Is that right?

NEIL DUNN: Correct.

THOMAS J. LEONARD: It doesn't say whether the number of units meets the demand, which is the real question about providing affordable housing.

NEIL DUNN: Which would require a market survey, I believe.

THOMAS J. LEONARD: Well, and the closest thing we have to that are the statements of the Town of Londonderry in their purpose. And they have come out and said they want to have more and they want to have more rental. And in fact, they restated that in a recent discussion of the 2013 Master Plan. They identified they don't have housing for younger people and people that…rental properties. There haven't been rental properties built in Londonderry. I think I'm right when I say there hasn't been a rental project in ten years.

UNIDENTIFIED: Thirty.

THOMAS J. LEONARD: Thirty years. Okay, so that…you know, what we're talking about is brand new rental units that are affordable. It isn't being offered in Londonderry. Now I also sent to you, further as comment on your question, at the second meeting that we went to, I sent you the demographics of Rockingham County and without going through them…it's in the packet. The conclusion is in there from New Hampshire Housing and from the local…and without going through the numbers, they come to a clear conclusion that there are not enough rental units. The other thing that I think is important to be said is rental units should be 100% affordable by the median income because most people who are renting are at that income or lower. That's just…you know, if…most people seek to own, so it's usually the people who can't own yet or have a particular circumstance that cause them to rent. And…so anyway, I think that the statistic is not necessarily inconsistent with a true demand that has been identified by the Town's Housing Task Force, by the Town's Planners, by the Town's Master Plan, and by the State of New Hampshire. One of the things that has been happening in New Hampshire over the last 15 years that is causing the greatest concern is that there is not housing for young people and that they have to move out and this is exactly what we are addressing. Exactly.

JAMES SMITH: Any other questions? At this point, we'll open it up to the…anybody in favor of this?

THOMAS J. LEONARD: Thank you very much. I appreciate all of your patience. I know it's tedious and…

NEIL DUNN: And thank you for yours.

THOMAS J. LEONARD: And we, of course, are here and ready to ask questions if people have them. Ready to answer questions.

JAMES SMITH: Anyone in opposition who would like to speak?

LARRY O'SULLIVAN: Questions?

JAMES SMITH: I asked for questions. No one in the audience has any questions?

LARRY O'SULLIVAN: Last chance for comments, gang.

JAMES SMITH: I'm a little bit surprised, considering what we had from the first time we heard this case. I'm going to ask the Board; are we still wanting to get those questions answered by an outside expert?

NEIL DUNN: I would like to and I think we also have something coming from New Hampshire Housing on comparisons. I would like to, for myself.

JAMES TOTTEN: I agree. I think everything comes down to the economics.

JAMES SMITH: I got one questions I would like to ask. When we talked about the finances of this, they talked about rate of return, is that the term? And in that rate of return, you said that covered the maintenance of the project and several other things. And after you've paid those things, the money left over would be for paying the loan and I presume profit. I would like to have an idea what percentage of that is the profit?

THOMAS J. LEONARD: Well, I think you're referring to Mr. Thibeault's analysis and…

JAMES SMITH: Would you come back to a mic?

THOMAS J. LEONARD: Yeah.

JAMES SMITH: I think it was 6.5% was what…

THOMAS J. LEONARD: Yeah. So let me just kind of go back a little bit and I hope this is helpful. The way Mr. Thibeault did his analysis is he kind of did it a little backwards or in reverse. And what I mean by that is he figured out how much the project will bring in for revenue. He figured out how much those, what he called operating expenses, so those would be maintenance, et cetera, how much those would cost. And then he made the mathematical calculation and ended up with a number. And then he took that number and he said 'Okay, how much bowering, how much investment will that number support?' So he ended up with a total of what the market would support with this project. So in other words, the income generated by the project after you take all those immediate expenses off the top, it can support an investment of whatever he came up with. And that's based on a rate of return of what he said is 6.5%. Now the rate of return is…that is the money that the finance industry, or the return that the finance industry will demand in order to invest that much money. So in our case, the money that would be invested based on the net income was less than the cost of the 16 unit buildings and therefore it's not economically viable. But it was slightly more than the cost of the 24 unit buildings and therefore it is just barely economically viable. And that's based upon a 6.5 rate of return. It's not the same…it's not really a profit. What it is is, that's really…in some senses, that's a zero profit because what all that calculation does is it says that the finance world will lend that amount of money in order to accomplish this project. So that 6.5% actually goes to the finance, whoever finances it. Now if there's a combination of equity and outside financing, then the developer might share in a portion of that, so I don't know if that answers your question or makes it any clearer, but the rate of return is really not the return to Mr. Monahan. It's the return that the bank or insurance company or whomever would demand before they would make the investment in the project. And he arrived at that rate by…and that's where his expertise comes in. He arrived at that rate by looking at, you know, treatises and expert reports and looking at the typical return demanded by different industries and different investments and different projects.

LARRY O'SULLIVAN: Well that doesn't really answer your question, though. That's not driving to what you…

THOMAS J. LEONARD: Well, the return…the profit, that's not…it's like apples and oranges, yeah.

LARRY O'SULLIVAN: I think what…

JAMES SMITH: Okay, the point I was trying to get clear in my mind; the 6.5% doesn't represent a profit. It just represents an amount of money being generated by the rental of these properties to pay off the mortgage and whatever else to operate the thing over a given timeframe.

THOMAS J. LEONARD: So the profit, under that circumstance… so the circumstance of Mr. Thibeault's analysis where he was able to justify an investment for the 24 unit buildings? That actually ended up with a zero profit to the operator. What it did is it covered…what it said was that the revenues from the project covered all of his financing expenses, all of his maintenance expenses and all his operating expenses.

NEIL DUNN: So he's doing this for nothing. [Indistinct].

THOMAS J. LEONARD: Well, as then as you pay it down…

NEIL DUNN: Welcome to my world.

THOMAS J. LEONARD: As you pay it down, and prices go up, that's what happens. But right now…

NEIL DUNN: [Indistinct].

THOMAS J. LEONARD: …or if he builds it for less.

JAMES SMITH: So your profit is the equity that you build out.

THOMAS J. LEONARD: That you build through time.

TOM MONAHAN: Correct.

JAMES SMITH: Yeah.

TOM MONAHAN: The only benefit I get the first five years would be some depreciation, you know, so I'd have to have the benefit of making money in other developments. But in five, ten years, as Attorney Leonard said, it sort of…the ships will pass at night and the income will exceed the expenses. But there's a risk. The risk I'm taking also is, and again, this happened to me In Bedford this year, is New Hampshire Housing came out and I had…my rents were lowered in Bedford this year by dictate of New Hampshire Housing. I went from $1,100 a month to $999. So that, I'm hoping, I'm gambling that's not gonna happen and you know, I feel quite certain and that's why I have the confidence in Londonderry. Londonderry is in the Rockingham market. Bedford, unfortunately, is in the downtown Manchester market, so I lost in that. But I don't believe it will happen here, but I've, again, Bedford was different because it was 25% workforce housing, so I could work within those parameters.

THOMAS J. LEONARD: So what he's talking about is the calculation on the median incomes in the different regions are different and they went down.

NEIL DUNN: Are all your…are the full 25% rented at this point in Bedford?

TOM MONAHAN: Yes.

NEIL DUNN: Would you call these high end apartments? Mid-range? Price per square foot based on your…whatever you came up with…total…so if we took the number of units or the square footage and divided the whole project, either the 30 or the 33, we'd come up with a price per square foot? Or do you have a price per square foot?

TOM MONAHAN: You know, I'm gonna…I know Bedford, you know, again, it would be guessing this. I do know what Bedford's prices were and they're about $110 a square foot.

NEIL DUNN: But based on your numbers here that we were using on those two comparisons…

TOM MONAHAN: Mm-hmm.

NEIL DUNN: ….you're thinking it's the same?

TOM MONAHAN: Close. Those numbers are close. I mean, I expect them to be…

NEIL DUNN: Well, it's…

TOM MONAHAN: …more high end to benefit from the 50% of the, hopefully, the 50% of the renters are gonna pay…for instance, my workforce housing people in Bedford are paying a gross of $1,100 and my other residents are paying upwards of $1,500, $1,600, $1,700 and it's totally seamless. Nobody knows. Every unit's the same. It's not as though I built a workforce and put, you know, it's totally seamless. You wouldn't know and they rent it up right away, the workforce, fortunately.

THOMAS J. LEONARD: When he says "gross," that means including all the utilities.

TOM MONAHAN: Yeah.

JAMES SMITH: Okay.

LARRY O'SULLIVAN: So we have two of us who want to have the…

JAMES SMITH: Well two, three…

LARRY O'SULLIVAN: …outside financial…

JAMES SMITH: …four.

THOMAS J. LEONARD: Mr. Chairman?

JAMES SMITH: Yeah?

THOMAS J. LEONARD: Would the Board consider voting on one or two of them that are…like the phasing and the 50% versus 75% where the economics are not as big of a discussion? Not as difficult.

NEIL DUNN: I would prefer not to.

JAMES SMITH: One.

JAMES TOTTEN: Likewise.

JAMES SMITH: Two. Would you want to vote on two of the three Jay? Or do you think you want to wait?

JAY HOOLEY: Is anything that we're gonna get from that analysis going to shed light on the 75 versus 50%?

LARRY O'SULLIVAN: I thought it would.

JAY HOOLEY: Think so? Okay.

LARRY O'SULLIVAN: I would think. I would think that we'd have a difference in the three to five year or potentially a difference in the three to five year.

JAMES TOTTEN: Certainly on the 50 versus 75.

LARRY O'SULLIVAN: So…

THOMAS J. LEONARD: I don't want to make people decide before they want to.

JAMES SMITH: I think the consensus of the Board is we would rather wait until we get this additional information and be able to vote based upon that.

THOMAS J. LEONARD: Is there anything that we can do to help? I know that Jaye has been working hard…

LARRY O'SULLIVAN: She's handicapped because she's got a $1,000 she can spend and some of the people have gotten back to here and they're more than $1,000.

THOMAS J. LEONARD: I'm a little bit curious about the $1,000.

JAMES SMITH: Okay, what we're under, the restriction of the Town; if something is going to be estimated at over $1,000, it has to go to a bid process and you have to…

LARRY O'SULLIVAN: Which could take months.

JAMES SMITH: …take three different bids. If we can keep it under $1,000…

THOMAS J. LEONARD: Even when we reimburse?

LARRY O'SULLIVAN: Yeah.

JAMES SMITH: Yeah.

LARRY O'SULLIVAN: Transparency.

THOMAS J. LEONARD: Okay.

TOM MONAHAN: I can do it for $500.

[Laughter].

JAMES SMITH: [Indistinct].

LARRY O'SULLIVAN: That's why I said just give us a credit care. You know, we'll take care of it.

JAMES SMITH: Again, you know, we're under the rules of the Town…

THOMAS J. LEONARD: Yeah.

JAMES SMITH: …and that's what their…

THOMAS J. LEONARD: Sure.

JAMES SMITH: …finance people have…

LARRY O'SULLIVAN: We can't get a variance from the rules, so…

JAMES SMITH: Whether that number should be revised, who knows, but that's not our decision. But that's where we've been…Jaye has made multiple emails and we've talked with different people and…

THOMAS J. LEONARD: What if we give you the money in advance? Does that matter?

LARRY O'SULLIVAN: Give it to Jaye.

[Laughter].

JAMES SMITH: I wish we could say yes, but…

JAY HOOLEY: Somehow somebody spin; 'If we give you money tonight, can we get a vote sooner?'

THOMAS J. LEONARD: No, that's not we're after…

[Laughter]

JAY HOOLEY: Yeah, I know, I'm just…

THOMAS J. LEONARD: We're not giving you the money.

JAY HOOLEY: The guy in the back with the notepad, make sure, you know, that's not what we said.

JAMES SMITH: Having said all of that, I'll entertain a motion to continue this case until…that's the question. When do we want to continue it to?

LARRY O'SULLIVAN: Who knows when we're gonna…it's been a month and we haven't gotten an answer.

JAMES SMITH: So the next date we've got is the…

LARRY O'SULLIVAN: I mean, if we had answers tomorrow, would it make a difference if we were on…? What would the backup be, that Thursday?

JAYE TROTTIER: April fourth, I think is the first Thursday.

LARRY O'SULLIVAN: April fourth.

JAMES SMITH: Fourth. And today's the 20th. That would give us another couple of weeks.

LARRY O'SULLIVAN: What is your flavor of what these people have been responding? I mean, they've been responding, but could they act that quickly?

JAMES SMITH: If we don't do that, what's next month's meeting?

JAYE TROTTIER: The 17th.

NEIL DUNN: The 17th.

JAMES SMITH: Seventeenth.

JAMES TOTTEN: It's not a matter of getting a response, right? It's…some that said it's a five business…

JAMES SMITH: They have to have time to do it, too.

JAMES TOTTEN: Five business day turnaround, so…

JAMES SMITH: Yeah.

JAMES TOTTEN: Two weeks is tight.

JAMES SMITH: So I think to be safe, we ought to continue to the next regular…

NEIL DUNN: Yup.

JAMES SMITH: …meeting. Which would be the 17th, I believe. Okay, have I got a motion to that effect?

NEIL DUNN: Mr. Chairman, I'd like to make the motion to continue cases 10/17/2012-2, 10/17/2012-3, and 10/17/2012-4 until our April 17th, 2013 meeting.

JAMES SMITH: Do I have a second?

JAY HOOLEY: Second.

JAMES SMITH: Jay seconds. All in favor?

JAY HOOLEY: Aye.

NEIL DUNN: Aye.

LARRY O'SULLIVAN: Aye.

JAMES TOTTEN: Aye.

JAMES SMITH: Aye. Continued.

RESULT: THE MOTION TO CONTINUE CASE NOS. 10/17/2012-2, 2 AND 4 WAS GRANTED, 5-0-0.

RESPECTFULLY SUBMITTED.

NEIL DUNN, CLERK
TYPED AND TRANSCRIBED BY JAYE A TROTTIER, SECRETARY

APPROVED APRIL 17, 2013 WITH A MOTION MADE BY LARRY O'SULLIVAN, SECONDED BY JAY HOOLEY AND APPROVED 5-0-0.