

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

DATE: JANUARY 21, 2015

CASE NOS.: 11/19/2014-4  
11/19/2014-5  
11/19/2014-6

APPLICANT: FIRST LONDONDERRY ASSOCIATES, LLC  
80 NASHUA ROAD  
LONDONDERRY, NH 03053

LOCATION: 30 STONEHENGE ROAD AND 113 HARDY ROAD, 12-120 & 131, AR-I

BOARD MEMBERS PRESENT: JIM SMITH, CHAIRMAN

JACKIE BENARD, VOTING MEMBER  
JIM TIRABASSI, VOTING MEMBER  
ANNETTE STOLLER, VOTING ALTERNATE  
BILL BERNADINO, NON-VOTING ALTERNATE  
NEIL DUNN, ACTING CLERK

ALSO PRESENT: RICHARD CANUEL, SENIOR BUILDING INSPECTOR/HEALTH/ZONING  
OFFICER  
DAN DRAMER, ASSITANT BUILDING INSPECTOR/DEPUTY HEALTH OFFICER  
JAYE TROTTIER, ASSOCIATE PLANNER

REQUESTS: MOTION TO REHEAR CASE NOS. 11/19/2014-4, 11/19/2014-5 AND 11/19/2014-6 (SEE ORIGINAL REQUESTS BELOW)

CASE NO. 11/19/2014-4: VARIANCE TO ALLOW 24 DWELLING UNITS PER MULTI-FAMILY BUILDING WHERE A MAXIMUM OF 16 UNITS IS ALLOWED BY SECTION 2.3.3.7.3.1.2.

CASE NO. 11/19/2014-5: VARIANCE TO ALLOW THE PERCENTAGE OF WORKFORCE HOUSING UNITS IN A MULTI-FAMILY WORKFORCE HOUSING DEVELOPMENT TO BE LIMITED TO 50% WHERE A MINIMUM OF 75% IS REQUIRED BY SECTION 2.3.3.7.1.1.4.

CASE NO. 11/19/2014-6: VARIANCE TO ALLOW PHASING OF A PROPOSED WORKFORCE HOUSING DEVELOPMENT OVER THREE YEARS WHERE OTHERWISE LIMITED BY SECTION 1.3.3.3, AND TO EXEMPT SUCH DEVELOPMENT FROM FUTURE IMPLEMENTATION OF GROWTH CONTROL REGULATIONS AS PROVIDED IN SECTION 1.4.7.2.

JIM SMITH: Do we have any comments or observations from...?

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NEIL DUNN: Well, I you know we get motions to re-hear a lot of times, and it's always good to re-hear them to see if we missed anything and to make sure that we did our due diligence, but in the application that was submitted, I do have some concerns that every time anybody talks about the financial viability of a project that somehow the Board has to approve it. I'm wondering if we can get some guidance from Town Council or somebody on where do we draw that line. I'm not a lawyer. You know, I have a day job, but it seems like the bulk of the argument is first of all maybe we can only listen to expert witnesses. We maybe have to discount stuff unless they're experts is what I kind of got out the Fougere letter, and that kind of concerns me, so I'd also like some direction on that, and then also can we get some direction on...we can't possibly be responsible for every project put in front of us financially viable, so I would like to get some guidance on that if we can, but I'm fine with doing a rehearing.

JIM SMITH: Anyone else? Yeah.

ANNETTE STOLLER: On some of the commentary I was reading, and they weren't our assertions, but for example that Fougere letter there was some assertions that we not true; for example, that everybody went along with your statistics, etc., on the Board all seemed to agree – I totally disagreed, so I wasn't in that all. You know that's an example. There were several things that if we left them on the record, we really have to get them corrected.

JIM SMITH: Okay.

NEIL DUNN: So, I think I'm really looking for guidance there to because what this bulk of it was to paraphrase it was that the only expert testimony that was presented was presented by the applicant and because there was no other expert testimony that basically we can't consider anything else whether it was my own research because we didn't have anything, or anybody's statements from the crowd, so I'm trying to get some guidance on that. My thought was, and the guidance from the courts was the reason we're on the Board is because we know the local area. We know the character and the type of stuff the Town is after and so to the point you know there's some misstatements in the application, and I would like those cleared up myself, but I would also look for some guidance from the Town Council on that.

ANNETTE STOLLER: Yeah, may I Mr. Chair?

JIM SMITH: Yeah.

ANNETTE STOLLER: In response, or further commentary on that there were other expert witnesses that were hires of the applicant, so there were several other expert witnesses. If we you, if we would consider them expert witnesses.

JIM SMITH: Okay, ah.

RICHARD CANUEL: Mr. Chairman, if I could interject?

JIM SMITH: Sure.

RICHARD CANUEL: In a previous variance application for a similar workforce housing project, the Board recalls there was the issue of economic feasibility and the Board actually requested that a fiscal analysis be done and be presented to the Board to verify what that feasibility was, and it may be beneficial for the Board to go back and review those minutes of that case and see what information was provided and maybe duplicate that, and

95 another issue is possibly get some guidance from our Town Council along with our Legal Counsel regarding  
96 workforce housing units. I know that was part of the discussion as to whether we met our quota or not  
97 without having hard data; it's difficult for the Board to say if the variances should go forward or not.  
98

99 JIM SMITH: Okay, I think we need to be careful about what we're attempting to do on this case because when  
100 we are looking at especially the first two (2) variances; one was on the number of units in a building and the  
101 fifty (50) percent vs. seventy five (75). Those were two (2) of the criteria which the Planning Board is  
102 supposed to use in determining whether or not this type of, whether or not for them to issue a conditional use  
103 permit. I think we're, one of the things I take out of what I've read and what I've seen about this is the very  
104 fact that this ordinance is on the books means that the Town Planning Board and Town Council made a  
105 determination that the Town needs this type of housing, and it's really their prevue to either change that  
106 ordinance, or withdraw that ordinance, or make a further determination on whether or not the Town makes  
107 that, has that need, and it's really not up to use as the Zoning Board to make that determination.  
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109 RICHARD CANUEL: Well the Planning Board is going through that process now.  
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111 JIM SMITH: Right, I understand that.  
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113 NEIL DUNN: If I may, Mr. Chairman? I understand where you're going with that, but I don't know why even if  
114 we did meet based on some study that came through that said we meet or didn't meet the ordinance. If we  
115 met it there's no reason to eliminate the ordinance because someone still might want to build workforce  
116 housing and that would still be the codified ordinance that we have, and so as soon as they come in front of us  
117 as a Zoning Board and say we want to reduce what's been codified, and yes the Planning Board has to do the  
118 conditional use, now you have to convince me as a Zoning Board member who's fiduciary responsibility is to  
119 ordinance in the Town why I should go along with the reduction, and so if we're meeting it and we know that  
120 there's other properties in Town that are doing it without those lesser requirements then that's part of what  
121 helps me form my opinion whether I agree with providing the variance, so I understand where you going. It  
122 really goes a step passed here, but in order to convince me as a Zoning Board member and my responsibility  
123 to the Town and everything else those/that's part of the information that I use, and if I'm wrong well then  
124 we'll let the courts settle it out, but I don't think we are that's why we have the Zoning Board here and that's  
125 why it's of local character and we have our local input because we know the Town better than some body  
126 down in Rockingham or whether they'd be going next and so it kind of gets back to what is, we look at  
127 numbers and you know numbers you can make them say almost anything you want so to my point, I have no  
128 trouble with rehearing it, but I do think it is pertinent when we go to change from seventy five (75) to fifty (50)  
129 percent that we know if we're in compliance or not, or what our opinion should still be counted, and based on  
130 what we are reading from the rehearing thing, I don't think it should be discounted and all thrown at the  
131 Planning Board, I guess is my point. If they want me to reduce it from seventy five (75) percent to fifty (50),  
132 you have to convince me why, and it has to hit all five (5) point not just one (1). Just because it's not  
133 financially viable if it's not in the spirit or something else that's beyond me as far as my responsibility to the  
134 ordinance as it's written. No different than it would be interpreting an electrical code, or a plumbing code.  
135 It's codified text.  
136

137 JIM SMITH: Here's where I go back to. When you read the purpose of this part of the ordinance, the first  
138 sentence says "the purpose of this section is to encourage and provide for the development of workforce  
139 housing within Londonderry", and if you have constructed the ordinance in such a manner when you look at  
140 the RSA which deals with this section, it says you can't put things in that same ordinance which discourage the  
141 building of it, and I think again I'm going back to what our Legal advice was that he was basically saying those  
142 numbers were arbitrary.  
143

144 NEIL DUNN: Everything is arbitrary unless you have the original text of how the thing was, what the rationale  
145 was on the process when they wrote the ordinance. The ordinance is not that old, we did hear people testify,  
146 give testimony last month to the fact that...

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148 JIM SMITH: Okay.

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150 NEIL DUNN: So all's I'm saying is those are things that do matter to me when I'm zoning, and we all have  
151 differences of opinion and that's what it's all about, so I'm in favor of that, but I would for some guidance from  
152 Town Council and we can address some of these issues more at the rehearing if we choose to do that.

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154 JIM SMITH: Okay, anybody else?

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156 ANNETTE STOLLER: In reference to that looking for guidance. I think we have to be very specific number one  
157 who we are asking for guidance and what exactly we are asking for guidance for otherwise it's just out there in  
158 the cloud voting.

159  
160 NEIL DUNN: And so to my point where is our, can we get some guidance on what we have to make financially  
161 viable, we can't be responsible for every project in Town because someone says it's not viable. There's got to  
162 be better guidance than that, so that would be my specific interest in that point, and it could even be in  
163 reference to the case in general, and then the second point is talking about the misstatements of what I feel  
164 are misstatements in the motion for rehearing, aren't we allowed to use our local knowledge and our own  
165 research, or does everything have to come from some kind of expert witness. It's a general statement, it  
166 doesn't have to be big and long, but I would think that's why the Zoning Boards are in place in our local  
167 Boards. I just don't understand that so I don't know how to get more specific than that other than if someone  
168 in a crowd is quote-unquote is not an expert witness and they you know we heard people saying that the  
169 Southern New Hampshire Planning thing has coming down we're down to seventeen (17) units or something  
170 and the numbers are changing, we can't take that into consideration? Some guidance on that kind of thing in  
171 a general sense.

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173 ANNETTE STOLLER: So what did, sorry, what are you asking for? I'd say if we could get it specific, we might  
174 get an answer.

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176 NEIL DUNN: Well, and I could go through every point in the rehearing motion, but basically there was a  
177 statement in the Fougere letter or however you pronounce that that the only expert witnesses that were  
178 called and presented were that of the applicants.

179  
180 ANNETTE STOLLER: Correct.

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182 NEIL DUNN: And essentially that's all we're supposed to base our ruling on, and to me that is not accurate, we  
183 have people in the crowd who brought up different points, technical points what they felt was the existing  
184 housing stock that's been approved that wasn't used in the expert testimony from the applicant. Those  
185 numbers weren't in there. What's been approved already just because they said they're not built yet. Well,  
186 we could approve, what we were supposed to approve them until they get built and then we can...no I'm, so I  
187 don't know how to get more specific other than are we allowed to accept that testimony from outside and  
188 consider it good enough.

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190 JIM SMITH: I think we can.

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192 ANNETTE STOLLER: You can.

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194 JIM SMITH: But again, I think we need to be clearer on what we're talking about. I think one of the big  
195 problems that we really shouldn't get too far in to...  
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197 NEIL DUNN: Right, that's why I was trying to leave it more open so that the Town Council could say here's a  
198 general guidance. I mean here's what's been published. I know that some of the rulings that have been  
199 referenced in the past refer to the local Board's knowledge of the Town and the community, and what they're  
200 really looking at is legal procedures. Did you somehow not perform your legal duty, or your fiduciary  
201 responsibility? I mean, I think the Town Council could kind of answer that in a generic sense, or something like  
202 more without...  
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204 JIM SMITH: Okay when you say Town Council are you taking about legal representation, or...

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206 NEIL DUNN: Interpretation of the letters that were put, but with the specific things to...  
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208 JIM SMITH: Okay, you're talking about our Town lawyer.

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210 NEIL DUNN: I don't know who I'm talking about. I don't know if it's our Town lawyer, or who it is. Yeah, I  
211 would imagine that's who it would go to, yes.  
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213 JIM SMITH: Okay, well at this point, all we have to determine whether or not we have sufficient grounds to  
214 grant a rehearing on these three (3) cases.  
215

216 NEIL DUNN: Right.  
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218 JIM SMITH: I think based upon what our Town lawyers have submitted to us, I think we are in a position  
219 where we should be able to make that decision.  
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221 NEIL DUNN: Oh, absolutely, but I was trying to be proactive and get guidance from the Town lawyers because  
222 of the some of the items that were brought up in the motion to rehear. I'm comfortable with a motion to  
223 rehear, but also I think it would help guidance, I mean we can wait until next month and do it, but that is what  
224 I would need before I feel comfortable.  
225

226 JIM SMITH: Okay.  
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228 NEIL DUNN: I don't know, you can reach out and, or not, but that is my thought.  
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230 JIM SMITH: Okay, anybody else?  
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232 JIM TIRABASSI: I do have a question, and it's based continuously on the economic hardship principle.  
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234 JIM SMITH: Okay.  
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236 JIM TIRABASSI: What is it that deems it an economic hardship? If this is a factor. Is it a business that doesn't  
237 make money from day one (1), or make money in day sixty five (65), or is it that it has from day one (1), or else  
238 it's...that's one of the biggest parts is the economic part because that's the part that's pointed to continuously,  
239 and there's no clear definition of is the Board supposed to make it a profitable project, and does it relate to a  
240 business as opposed to a personal relationship.  
241

242 JIM SMITH: I think when you review, or take a look at the Board, I mean the RSA what it's saying is for the  
243 Town ordinance to meet the intent of that RSA it has to provide a means for an economically feasible project  
244 to be undertaken.

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246 JIM TIRABASSI: I understand that, right, right, right.

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248 JIM SMITH: Okay, so we're just talking about a particular project.

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250 JIM TIRABASSI: Right, right.

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252 JIM SMITH: If it's not, if there is rules put into the ordinance that make it impossible for anyone to have an  
253 economically feasible project under that ordinance, it's doesn't meet the intent of that RSA.

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255 JIM TIRABASSI: Right, but the point being the projections they presented show that if they weren't granted  
256 the variances they would not be [Overlapping]. It would not be financially feasible until point "x". They  
257 wanted it financially feasible from point "y".

258  
259 ANNETTE STOLLER: Correct.

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261 JIM TIRABASSI: Is there a point at which we don't...it will be financially feasible, but...is opposed to be looking  
262 to have us create it so it's financially feasible before it begins? That's what the financial statements are asking.

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264 JIM SMITH: Well...I think what it, it has to be set up in such a manner that if the person undertakes the  
265 project.

266  
267 JIM TIRABASSI: Right.

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269 JIM SMITH: If the project goes through to the end, it's going to be an economically feasible project. It's not  
270 saying it has to make money on day one (1), but it has to be able to make money at some point. Otherwise, if  
271 the person is in business he can't make a profit why is he going to do anything you know?

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273 JIM TIRABASSI: No, I understand that they ultimately need to make money. That's why I'm saying is there a  
274 point because that particular financials provided that they would make money after year five (5). They just  
275 wouldn't make it in year one (1) to five (5).

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277 JIM SMITH: Right, but again...

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279 JIM TIRABASSI: And they're saying it's an economic hardship if they could only make money starting in year  
280 (5), but not in year one (1).

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282 [Overlapping Comments]

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284 JIM TIRABASSI: They are asking for the relief of expedited development because they would incur an  
285 economic hardship by having to increase their manufacturing costs instead of being able to do it over a period  
286 of time and lay those costs out over time.

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288 ANNETTE STOLLER: Mr. Chair.

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290 JIM SMITH: Yeah.

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292 ANNETTE STOLLER: It was stated by their attorney basically that they can only make a narrow margin of profit.  
293 It is not our charge to determine what margin of profit they can make, as long as we are not dooming them  
294 and dooming their financial investment, I don't think the amount of profit should really concern us.  
295

296 JIM SMITH: Okay, I think going to your point, I think what they were saying was if they had to go over five (5)  
297 years, they couldn't get the financial backing to even start.  
298

299 ANNETTE STOLLER: Right, the banks wouldn't do it.  
300

301 JIM TIRABASSI: Okay, but they rolled it into two (2) because their costs would be that much greater is why  
302 they...  
303

304 JIM SMITH: Okay, well, well, I think it went even further than that. If they went to a bank [Overlapping  
305 Comments], and the bank looked at this and say this is going to take five (5) years, we don't want any part of  
306 it. [Overlapping Comments]. So I think that's part of what the argument of the three (3) years vs. the five (5).  
307

308 JIM TIRABASSI: Correct, that was, there were two (2) components rolled into one (1).  
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310 JIM SMITH: Right. It just takes, it's not, okay, so...  
311

312 NEIL DUNN: And so that is why I was looking for guidance. I don't know how the Town Council would want to  
313 address it. We don't, I can't see how we can possibly be responsible to make every project in front of us viably  
314 financially viable, so I'm looking for guidance. There's got to be some place where we can draw the line, and  
315 that the Town Council can say, no here's give us a better understanding of these questions.  
316

317 JIM SMITH: Okay, I think what Richard suggested, we did get some information along that line and that  
318 previous case.  
319

320 NEIL DUNN: Um, hum, so that would be first then continuance.  
321

322 JIM SMITH: That would, I think and answer some of that question.  
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324 NEIL DUNN: Absolutely.  
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326 JIM SMITH: And, I think that would be something that we could review, and just for the overall record. I think  
327 one of the things that we have as a Board with the procedures that we have in places, we have an application  
328 that lists the five (5) points of law, and in the past we've always asked the applicant to give us a nice run down  
329 of each of those five (5) points and to follow that procedures, and I think it makes it much clearer for us as a  
330 Board to work with information presented in that format. I'm must throwing that out for general information.  
331 Having said all that, I guess we have to vote on each of three (3) cases separately?  
332

333 NEIL DUNN: Mr. Chairman, I'd like, let's see how did he request it? Did he, he request them individually, yes.  
334

335 JIM SMITH: Yeah, because they are different.  
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337 NEIL DUNN: Yeah, Mr. Chairman, I'd like to make a motion to grant a rehearing on case number  
338 11/19/2014-4.  
339

340 JIM SMITH: Do I have a second?

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342 JACKIE BENARD: Aye.

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344 JIM SMITH: Jackie second. All those in favor?

345  
346 ALL: Aye.

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348 JIM SMITH: Okay, motion on case five (5).

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350 NEIL DUNN: Mr. Chairman, I'd like to make a motion to grant the rehearing of case 11/19/2014-5.

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352 JIM SMITH: Jackie?

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354 JACKIE BENARD: I second that.

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356 JIM SMITH: All those in favor?

357  
358 ALL: Aye.

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360 NEIL DUNN: Mr. Chairman, I'd like to make a motion to grant the rehearing of case number 11/19/2014-6.

361  
362 JACKIE BENARD: I second that.

363  
364 JIM SMITH: All those in favor?

365  
366 ALL: Aye.

367  
368 RESULTS: CASE NO. 11/19/2014-4: THE MOTION TO GRANT A REHEARING OF CASE NO. 11/19/2014-4  
369 WAS APPROVED, 5-0-0.

370  
371 CASE NO. 11/19/2014-5: THE MOTION TO GRANT A REHEARING OF CASE NO. 11/19/2014-5  
372 WAS APPROVED, 5-0-0.

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374 CASE NO. 11/19/2014-6: THE MOTION TO GRANT A REHEARING OF CASE NO. 11/19/2014-6  
375 WAS APPROVED, 5-0-0.

376  
377 RESPECTFULLY SUBMITTED,



378  
379 NEIL DUNN, ACTING CLERK

380 TYPED AND TRANSCRIBED BY NICOLE DOOLAN, PLANNING & ECONOMIC DEVELOPMENT DEPARTMENT  
381 SECRETARY

382 **APPROVED (FEBRUARY 18, 2015)** WITH A MOTION MADE BY NEIL DUNN, SECONDED BY JACKIE BENARD AND  
383 APPROVED 5-0-0.