Daniel D. Muller, Jr.
Admitted in NH

VIA HAND-DELIVERY

March 20, 2020

Neil Faiman, Chairman
Town of Wilton Zoning Board of Adjustment
Main Street
P.O. Box 83
Wilton, New Hampshire 03086

Re: **Motion for Rehearing - Case No. 7/9/19-1**
Lot B-10, 50 Quinn Drive, Wilton, New Hampshire

Dear Chairman Faiman:

Our office represents Quinn Properties, LLC ("Quinn"), the owner of the above-referenced property (the "Property"). Quinn sought to construct a 68 foot high asphalt plant with a 72 foot high silo and was only advised that it needed to obtain a variance from the 45 foot height restriction in the Industrial zoning district for its proposed development. The Board voted to deny the variance after deliberations ending on February 19, 2020 and raised new grounds for aggrievement with respect to said denial. Quinn asserts that the denial of the height variance for the proposed use was unlawful and unreasonable for the reasons set below.

1. Quinn did not propose that the prevention of visual impacts might be a purpose of the height restriction and neither the history nor structure of the Zoning Ordinance.

Quinn asserted that the height restriction served to secure against fires and to provide adequate light and protection. It was the Board and members of the public who asserted that the height restriction served to prevent undesirable industry and preserve the rural character of the Town by preventing any visual impact on non-industrial properties. Quinn merely asserted that the variance would not unduly conflict with the visual impact purpose assuming the height restriction served that end as suggested by the Board and, to the extent that the height restriction served to prevent undesirable industry, such a purpose would render the ordinance invalid as it would not advise an average person of what is prohibited. Town of Freedom v. Gillespie, 120 N.H. 576 (1980). Quinn maintains its position that if the height restriction was intended to "prevent undesirable industry" (i.e. is a disguised use restriction), the ordinance would be void for vagueness as what is "undesirable" varies from person to person and there are no standards for the same. In short, the Board misstates that Quinn proposed that the height restriction served

to prevent any visual impact on non-industrial properties. Indeed, contrary to the Board's findings, the Board is barred from adopting that position and, even if it were not barred, the Board's conclusion that the height restriction served to prevent visual impacts is contrary to the actual language of the Zoning Ordinance read as a whole, Batchelder v. Town of Plymouth, 160 N.H. 253 (2010) [Zoning ordinance are construed as a whole and based upon the language actually adopted and not on language that the legislative body did not see fit to include.], and the history of that ordinance.

The Board considered the same request for relief in 1988. In 1988, Quinn asserted that the height restriction served a fire protection purpose and the Board, which was sitting a mere seven years after the adoption of the 1981 zoning amendments, implicitly agreed with the same raising no objection to that assertion. Pappas v. City of Manchester, 117 N.H. 622 (1977) [Zoning board deemed to make implicit findings in support of its decision where no express findings supporting the decision were made.]. That membership of the Board was different back in 1988 is irrelevant as the Board is a continuing body regardless of its membership at the time as a matter of law. The Board made a final decision based upon the representation as to the purpose and no one challenged that final decision. The doctrines of res judicata and collateral estoppel can apply in the administrative context, Cook v. Sullivan, 149 N.H. 774 (2003); *see* also, RSA 677:4 [30 day appeal period to challenge zoning decision, and the Board has offered no authority for what amounts to its effort to disclaim or reverse the 1988 decision over thirty years after the fact and its implicit finding as to the purpose of the height restriction. Moreover, from a reasonableness standpoint, as suggested above, the 1988 Board was in a much better position to understand the purpose of the height restriction adopted in 1981 than the Board is today more than thirty years later. The Board's reliance upon a newspaper description of a voter summary without even reviewing the actual warrant article reinforces this point. In short, the Board was barred from relitigating the purpose more than thirty years after the fact.

Assuming that the Board is not barred from disclaiming its earlier position, the Town of Wilton Zoning Ordinance, at all relevant times, has generally served "the purpose of promoting the health, safety, morals, prosperity, convenience or general welfare, as well as efficiency and economy in the process of development, of the inhabitants of the incorporated Town of Wilton, New Hampshire, by good civic design and arrangements, wise and efficient expenditures of public funds, and the adequate provision of public utilities and other requirements," 1974 Zoning Ordinance, Article I, with the purpose of protecting farmlands and open space added by 1990. Zoning Ordinance, Article 1.0. The protection of a rural aesthetic has never been a general purpose of the Town of Wilton Zoning Ordinance, *contrast* Zoning Ordinance, Article 1.0, *with*, Alexander v. Town of Hampstead, 129 N.H. 278 (1987) [Town of Hampstead zoning ordinance was adopted "[i]n order to retain the beauty and countrified atmosphere of the Town of Hampstead and to promote health, safety, morals, order convenience, peace, prosperity and general welfare of its inhabitants."]. Moreover, given Wilton's history, in part, as a mill town,

the concept of the applicable rural aesthetic is undefined and not readily ascertainable and appears to governed by the mere personal opinion of Board members. *But see*, Continental Paving v. Town of Litchfield, 158 N.H. 570 (2009) [Board decision cannot be based upon mere personal opinion of board members.]. Finally, the property at issue is in the Industrial District and since its purpose was first defined to the present, the Industrial District has served "to provide a location for the establishment of plants to improve employment opportunities and broaden the tax base." 1981 Zoning Ordinance, Article VIII; Zoning Ordinance, Article 8.0. The preservation of a rural aesthetic has never been a recognized purpose of the Industrial District. The Board cannot add purpose language that the Town has not deemed fit to include in the Zoning Ordinance. Batchelder, *supra*.

The Board also relied upon language in a voter summary prepared by the sounding board relative to the 1981 zoning amendment to the Industrial District as that summary was described in a newspaper article to find that the height restriction served to prevent any visual impacts in order to preserve the so-called rural aesthetic. However, the language of the voter summary was not adopted as a part of the Zoning Ordinance and the Board cannot lawfully add the language of the voter summary to the Zoning Ordinance. Batchelder, *supra*. Additionally, the Board ignores the language of the warrant article with respect to which the purported voter summary was provided. Per the 1980 Town of Wilton Annual Report, Question 7 of the warrant read "[a]mend Article VIII Industrial District by deleting the present text, and adding proposed text which states the purpose of the Article, permitted uses, lot sizes and frontages, condition for use of water supply, signs, and buffer zones." In short, the warrant article for which the summary was provided did not even reference the height restriction and, therefore, relying upon that summary of that warrant article to surmise the purpose of an unidentified restriction would not be reasonable. Indeed, the purposes set forth in the voter summary appear to concern the provision actually cited in the warrant article. As such, the Board's reliance upon the description of the voter summary in a newspaper article to divine a purpose of the height restriction was both unlawful and unreasonable.

The Board also relied upon another provision of the 1981 zoning amendments to the Industrial District, the buffer provision, to assert that the height restriction served to prevent any visual impacts on any other properties, including any impacts deemed reasonable under its own Zoning Ordinance. However, the Board ignores that the tenor of the 1981 zoning amendments as a whole and effectively argues for a confiscatory regulation. As observed, the 1981 zoning amendment added a purpose provision to the Industrial District and the Board's theory is inconsistent with the letter and spirit of that purpose provision. Second, the 1981 zoning amendments included several provisions intended to mitigate not eliminate the impacts on, in some cases, "neighboring" or "adjacent" properties, such as performance standards or water supply requirements, or, in other cases, "abutting residential properties," such as in the case of the buffer requirement. As such, under its plain language, the 1981 buffer provision would not

have served to prevent visual impacts to all other properties or even recreational properties, like Goss Park, but rather only abutting residential properties. The Quinn property upon which the plant is proposed to be constructed has no abutting residential properties to the Forest Road side. In short, the actual language of the 1981 buffer provision does not support the broad proposition urged by the Board. Furthermore, by suggesting that the buffer provision is tied to the height restriction in the 1981 amendments such that the intent of the latter was to prevent any visual impact on surrounding properties, the Board suggests that screening has to, at least, match the height of any building, if not exceed it due to topographical differences. The 1981 height restriction applied to buildings only, rather than all structures, and the buffer provision under its plain language contemplated screening through fences or "evergreen shrubs." Stock of evergreen shrubs near 45 feet in height do not exist as a matter of common knowledge and even twenty foot fences would be cost prohibitive, not to mention not exactly consistent with the so-called rural aesthetic. In short, the Board's effort to justify its theory on the buffer provision actually undermines its position and suggests that the Town contemplated imposed standards either impossible or cost-prohibitive to comply with in order to use an industrially zoned property thereby rendering its zoning scheme confiscatory contrary to the New Hampshire and federal constitutions. Accordingly, read in the context of the entire scheme as actually written, the 1981 zoning amendments do not support the Board's theory that the height restriction was intended to prevent any visual impacts to any other properties to preserve some rural aesthetic.

The Board also oddly ignores the language of the height restriction itself and the history of the same in the Zoning Ordinance. At the time that the Town adopted the height restriction in 1981, there were two other height restrictions in the Zoning Ordinance. The 1974 Zoning Ordinance included a 45 foot or two stories height restriction in the Residence District. That district generally permitted residential uses, institutional uses, like schools, libraries, and hospitals, and place of assembly uses, such as churches, at higher densities. The Baker-Berry Library in Hanover and the Pinkerton Academy Tower in Derry both exceed one hundred feet in height, but could hardly be said to detract from the town atmosphere even with nearby residences thereby suggesting height itself does not necessarily undermine a town aesthetic. The adoption of a height restriction to secure against fire and provide adequate light and air given high density development of occupied structures would have been consistent with the enabling legislation and the Preamble. In 1979, the Town added a 35 foot height restriction with a means to measure the height of the buildings for purposes of determining compliance with the same in the newly created non-residential office park district. When adopting a height restriction for the Industrial District, the Town did not elect to mirror the language of the non-residential Office Park District restriction, but rather the language of the restriction for the Residence District. Having elected to use the older language a mere two years after the adoption of the Office Park District and its alternative height restriction, the Town suggested that it intended the height restriction in the Industrial District to serve the same purposes as the height restriction in the Residence District. As discussed above, the nature of the Residence District as a high density district and the uses

allowed does not lend itself to an argument that the height restriction therein was intended to prevent visual impacts in order to preserve a rural aesthetic. In short, the language of the relevant restriction adopted in 1981 does not support the Board's theory as to purpose.

The Chairman has raised the lack of height restrictions in certain zoning districts. However, that notion cuts both ways. For example, there is no height restriction in the Commercial District even though the uses and buildings therein could equally impact the rural aesthetic. Indeed, the lack of consistent regulation throughout different zoning district merely calls into question whether the current regulatory scheme as a whole is reasonable and, therefore, ultra vires or otherwise invalid. There is no apparent reason why, for example, a light industrial use in the Commercial District can be in a 65 foot high building, but the same exact use cannot be in a similar building in the Industrial District. While the Chairman has raised this issue, no explanation has been forthcoming from the Board to justify the same and absent a legitimate interest, Quinn should not be required to obtain variance relief in the first instance.

Finally, the history of the Zoning Ordinance since the 1981 amendments undercuts the Board's theory as to the purpose of the height restriction. While it amended the Preamble in 1990, the Town has not added any language relative to the preservation of a so-called rural aesthetic. The purpose of the Industrial Zoning District remains unchanged. The only amendment to the height restriction in the Industrial District expanded its scope to include structures generally, something that also occurred with the Residence District height restriction. The buffer requirement for the Industrial District still relies upon landscaping and focuses upon abutting residential zones or uses and the view from the public roads. While neither the federal or State law dictated such an election, the Town elected to allow telecommunication towers up to 200 feet in height. At 200 feet in height, telecommunications towers even under former federal law would have triggered the need for markings to make the same visible. In short, the election made by the Town was inconsistent with the notion of preventing visual impacts. Small wind energy systems may also exceed generally applicable height restrictions, including within the Industrial District. That being said, the Town elected to include specific visual impacts language in the small wind energy systems provisions meaning that it knows how to set forth such a purpose expressly if the same is its intent. In sum, the history of the Zoning Ordinance following the adoption of the height restriction in 1981, something ignored by the Board, further undermines the Board's theory that the height restriction was adopted to prevent any visual impacts on other properties and, therefore, to the extent that the Board relied upon just an intent to deny Quinn's variance, its decision was unlawful.

2. Assuming arguendo that the height restriction in the Industrial District serve to prevent any visual impact on other properties, the regulation is invalid and unenforceable as it violates the equal rights protections under the State and federal constitutions.

As observed above, the same exact use in the Commercial District, or the Downtown Commercial District for that matter, may be located in a building exceeding 45 feet in height, while that use in the Industrial District could not be placed in such a building under the current regulations. Properties in the both the Industrial District and the Commercial District may be located adjacent to residential zones or lots. While towns may have regulations which differ between zoning districts, a public purpose must still be promoted. From the standpoint of preventing visual impacts to preserve the rural aesthetic, the same use in the same building in the Commercial District and the Industrial District would have the same visual impact on other properties. The Board has offered no explanation justifying this disparate treatment and no apparent governmental interest is promoted by the disparate treatment. Community Resources for Justice v. City of Manchester, 154 N.H. 748 (2007) [Explaining standard and government's burden relative to zoning provisions under equal protection.]. As such, the height restriction is unconstitutional and unenforceable and no variance is required.

3. No variance should be necessary as the Board has stated that the height restriction no longer serves any legitimate public purpose as written.

The Board has authority to determine whether a variance is required in the first instance in the context of a variance application. Bartlett v. City of Manchester, 164 N.H. 6343 (2013). For the reasons set forth above, the height restriction does not serve to prevent visual impacts, including on the grounds that the Board is bound by its prior unappealed decision and the implied findings therein. While Quinn asserted that the height restriction could serve to preserve adequate light and air consistent with the enabling legislation, the Board, for reasons unknown, rejected such a purpose and only recognized fire protection as a potential alternative purpose for the height restriction. The Town's Fire Department stated the proposed height of the silo and plan did not present a fire protection issue with its equipment. The Board's Chairman made statements suggesting that the current height restriction from a fire protection perspective was obsolete. Zoning ordinances must be reasonable and further a public purpose lest it effect a taking or otherwise be invalid. Metzger v. Town of Brentwood, 117 N.H. 497 (1977) [When a restriction as applied to a particular piece of land is unnecessary to accomplish a legitimate public purpose or the gain to the public is slight, but the harm to the citizen and his property is great, the exercise of the police power becomes arbitrary and unreasonable and this court will afford relief under the constitution of the state.]; Chesterfield v. Brooks, 126 N.H. 64 (1985), *overruled in part by* Community Resources for Justice v. City of Manchester, 154 N.H. 748 (2007) [Clarifying equal protection analysis to place burden on government.]; Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning, §2.02 [Ordinance which serves no police power objective is invalid.]. In addition, a zoning ordinance violates substantive due process as applied to a property if it serves no legitimate governmental interest. The height restriction as currently written does not further fire protection purposes and it is incumbent on the Town to

review its zoning ordinances to make necessary amendments. In short, the Town's admissions in the case demonstrate that the height restriction does not promote the fire protection purpose and, therefore, is invalid and otherwise unconstitutional.

4. The Board's finding that the public interest and spirit of the ordinance elements were not satisfied were unlawful and unreasonable.

In order to be contrary to the public interest and the spirit of the ordinance, the proposed variance must not only conflict, but unduly conflict with the basic objectives of the relevant zoning ordinance. However, the Board conflated the two notions by defining the basic purpose of the height restriction as preventing any industrial structure from being visible from any other property. As suggested above, even a compliant building could not meet such a standard as the necessary screening would be cost-prohibitive, impossible to find, or would substitute one objectionable structure from the rural aesthetic perspective for another and that does not even account for differences in topography if the site in question lies lower than some of the surrounding properties. If one cannot fully screen the structure under the Board's rationale, then no variance can be granted and if screening, from a practical or policy perspective, is impossible, then no variances can be granted. In short, by requiring strict compliance, the Board did indirectly what it could not do directly, namely deny the variance for the very reason it was sought. Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102 (2007). As such the Board acted illegally. Furthermore, by eliminating any safety valve in the form of variances, the Board rendered the ordinance confiscatory in nature.

In addition, even if one assumes that the prevention of visual impacts is the purpose of the height restriction, the tenor of the other provisions applicable to the Industrial District, including those adopted at the same time as the height restriction do not support the Board's absolutist position. The other provisions speak of mitigating impact or avoiding significant impacts. Furthermore, the provisions of the Industrial District focus on impacts on abutting properties, particularly abutting residential properties, or on the view from public roads. The Board cites statements made by persons claiming to see a at least a portion of the lift or bright orange flag from Goss Park, including a snowmobile trail running through the same, or distant properties. Even if one ignores characteristics of the land between these sites and the proposed plant location and accepts the representations as true, the zoning provisions, under their plain language, are not intended to protect these non-abutting properties and the Board cannot rewrite the ordinance for the purposes of this application to expand the scope. The proposed plant is located on Lot B-10 and Goss Park abuts a separate lot across the railroad line from B-10. Furthermore, while Mr. Balch opined that the trees on Goss Park were predominantly white pine, he offered nothing as to the types of trees on the abutting property or on Lot B-10. There are deciduous trees on the intervening lot and the proposed plant is to be located towards the middle

of Lot B-10. Even though the Zoning Ordinance would permit a 200' cell tower on Lot B-10 the bottom portion of which would have to be painted bright orange per FAA directives, Quinn does not intend to have a plant painted the bright orange of the flag used for the sight test. Quinn would even be willing to paint the plant dark green to blend in with the trees or a stone color to blend in with the existing quarry (i.e. use the same strategy used to diminish the visibility of taller telecommunication towers.). The proposed plant is on a lot surrounded by land either owned by Quinn or a related entity, owned by another quarry operator, or which is undeveloped. Most of the surrounding lots are wooded with several held by Quinn or a related entity in current use. There is no place with this Industrial District where there will the same level of natural buffers as on the Property with much of that buffer being mature trees and not the shrubs and younger trees generally permitted under the buffer provision. In short, this is not the situation where an industrial building will be visible from an abutting property and, in particular, an abutting residential property. Furthermore, the silo and plant will be better screened than a permitted forty-five foot building situated closer to residential properties would be with a buffer of younger trees and shrubs contemplated by the Zoning Ordinance. Board members have suggested a 62 foot structure or equipment has existed on the neighboring property. The Quinns are willing to paint the building to better blend in with either the trees or the earth. In short, assuming such a purpose exists, the grant of the height variance would not unduly conflict with the basic objectives of that purpose given the limited scope of the same under the actual language of the Industrial District provisions.

The Board also predicated its finding on concerns over light pollution. Quinn agreed that lighting would comply with the Town's own dark skies ordinances, Article 16A, which governs non-residential lighting throughout the Town, including in those district where no height regulations exist. However, the Board found the same was insufficient. It cited no authority for its apparent proposition that it can ignore the Zoning Ordinance and the policy therein in the case of industrial uses and adopt higher standards on ad hoc basis. Indeed, given the objections to the use raised by members of the majority during deliberations notwithstanding the Board's repeated statement that the case was not about the use, the decision that the Board can disclaim the Town adopted standard suggests that politics not the law drove the analysis. Furthermore, the Board's decision that compliance with the dark skies ordinance was insufficient to protect public interest denied Quinn equal protection of the laws by imposing disparate treatment for no other apparent reason than a dislike of the proposed use or not some substantial government interest. This effort to ignore the express public policy is the type of rare conduct that can justify an award of damages from the responsible parties. Win-Tasch v. Town of Merrimack, 120 N.H. 6 (1980) [Awarding damages against Town for bad faith conduct by zoning board disclaiming written policy.]. Finally, the Board's analysis was somewhat hypocritical from the practical standpoint. As the opponents emphasized, the area is characterized by hilly topography such that external lighting on compliant structures at higher elevations, including houses, could be as objectionable as lights on a higher structure at a lower elevation simply due to line of sight. In short, Quinn's

compliance with the Town's express policy addressed the relevant public interest and the Board acted well without its lawful authority in disclaiming that policy and its reliance upon the alleged light pollution was unreasonable.

The Board does not suggest that the variance would unduly conflict with any fire protection purpose of the height restriction and, therefore, the public interest and spirit of the ordinance elements were necessarily satisfied with respect to this purpose.

5. The Board's determination that there was no hardship was both unlawful and unreasonable.

While the statutory language is not identical to the definition of hardship used in Simplex Technologies v. Town of Newington, 145 N.H. 727 (2001), the New Hampshire Supreme Court has construed the hardship definition set forth in RSA 674:33, I(b)(1) to raise the same essential consideration as the hardship definition set forth in Simplex; namely, whether the proposed development is reasonable in light of the special conditions of the property at issue. Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 517-518 (2011), *citing*, Rancourt v. City of Manchester, 149 N.H. 51 (2003). The Board's Chairman suggested this was not the case and the Board's decision reflects that position. In short, the Board's position as to the essential question of hardship is contrary to established precedent from the New Hampshire Supreme Court.

The Board also asserted that there were no special conditions of the land to justify a finding of hardship if the purpose of the height restriction was fire protection. The Board adopted an overly cramped notion of special conditions and continues to ignore one for which it has had no answer. The Board in its decision asserted that the characteristics cited were shared by other lots in the Industrial District. A condition need not be unique to be special, it only need not represent a burden shared equally by all similarly situated lots. Harrington v. Town of Warner, 152 N.H. 74 (2005). Likewise, the Board adopted an overly narrow view of what conditions could make it such that there was no substantial relationship between the general purpose of securing against fires and its application to the property. Indeed, during the deliberations, the Chairman, who voted with the majority, essentially suggested that he knew of no conditions of the land that would justify a departure from the height restriction even though he acknowledged that said restriction might not further that purpose as a general matter anymore. As such, once again, the Board adopted a position which essentially meant no variances were possible contrary to the law.

Quinn asserted in this proceeding and in the prior proceeding asserted that the height restriction served to secure against fire. The ZBA in 1988, just a few years removed from the 1981 zoning amendment as opposed to the current board which is decades removed from the

same, did not disagree with that assertion. That Town has fire equipment that can reach the upper levels of the taller structure is but one consideration as to whether the underlying purpose of securing against fire is met. Having the necessary equipment is irrelevant if it cannot get to the tall structure or use the equipment around the structure. As Quinn observed, the Planning Board had already approved the development of an asphalt plant on the property. Indeed, a condition of that approval was that Quinn paved the auxiliary entrance to the property presumably to facilitate emergency vehicle access to the plant. Quinn spent money to make that improvement by May 1990.as well as a detention pond to handle drainage. The Planning Board would have reviewed the industrial wells to assure that there was sufficient water on the site, while at the same time the limitations on water use also introduced. In short, an infrastructure had been approved for this property to assure that emergency vehicles could get their equipment to the higher silo and plant. Notwithstanding the language of the Board's opinion, the Board does not identify any other property with this development record. In addition, Board members referenced a 62 foot high structure. While the Board members believed to be on a neighboring property, the minutes from the 1988 hearing make clear that what was described as 62' stack was on the property at issue. The so-called stack was a crushing facility for the quarry and it had been on the property for decades up to a few years ago. Additionally, the long-time crushing operation on the property had several facilities over 45 feet in height. As reported during the 1988 hearing, the height of the facilities were not cause of any complaint or an issue at that time and were not an issue after the fact. In short, unlike other properties in the Industrial District, Lot B-10 has handled higher structures without incident or complaint and has approved improvements in place for the specific use, including improvements which facilitate emergency vehicle access to the taller proposed structures. The property is such that plant may be situated not only so that emergency vehicles may readily access the plant and silo, but such that it does not present a fire hazard to nearby properties. Finally, the structures do exceed 45 feet will not even be occupied above the 45 feet. While some other properties may have some of these characteristics, no other property has been identified in the Industrial District with the same overall circumstances and any belief that other properties could one day have similar circumstances is nothing but improper personal speculation. In short, there are conditions of the property which distinguish it from others that make it such that the general purpose of securing against fire is satisfied even if the height restriction is exceeded thereby making the proposed structure reasonable.

Even if one assumes that the height restriction served to prevent visual impacts, the Board as discussed above construes that purpose so broadly that it effectively takes the position that no height variances can ever be granted and it does so even though the actual language of Article VIII and the history of the Zoning Ordinance. Read in context of the overall scheme, the height restriction at best serves to mitigate visual impacts on abutting, particularly abutting residential properties. Unlike many other properties in the Industrial District, Lot B-10 is not only a large lot, but one separated from other residential properties used for residential uses. Of

the abutting properties zoned residential, one is owned by the neighboring quarry and another in Lyndenborough is undeveloped. The majority of the surrounding lots are owned by Quinn or a related entity with many of the same being in current use. Many of the surrounding lots are forested not only with evergreens as Goss Park apparently is, but with deciduous trees, a point ignored by the Board. There is only one developed residential property towards the back of Lot B-10 which shares but a corner with it and the Board does not cite any impacts involving that property. The asserted visual impacts involve properties that do not abut the Lot B-10 and in some cases are distant but uphill from Lot B-10 and, thus, outside the scope of properties the restrictions in the Industrial District are intended to protect under the plain language of its provisions. Moreover, unlike other properties in the area, Lot B-10 has a history of facilities over forty-five in height for decades, including a crushing facility which was 62' high. As such, a 62 foot high facility has been on the Property even during that time when opponents asserted that the number of houses increased in the area. Those facilities existed without incident for decades meaning that the presence of such high facilities on the Property was part and parcel of the area. Unlike the flag used in Quinn's test or the 200' foot cell tower that the Zoning Ordinance would allow on the lot, the proposed plant would not be bright orange in whole or in part. While the facility will likely have some external lighting, Quinn has agreed that it will comply with the Town's dark skies ordinance which applies to structures, including those with not height limitations. In short, given its size and specific surroundings together with its history of facilities greater than 45 feet high, the optics of the property will not meaningfully change with the grant of the variance and therefore owing to the special conditions of the property, the proposed use will be reasonable or, put another way, there will be no fair and substantial relationship between the general purpose and its application to the property. The rise of a more vocal opposition to the underlying use and the expressed objections to that use by members of the majority during deliberations does not alter that.

Finally, the Board simply ignored the hardship argument based upon the Harrington case. It cited no basis for ignoring or rejecting that argument and Quinn put in the evidence necessary to sustain a hardship under that case. Accordingly, once again, the Board acted unlawfully and unreasonably

This motion is filed to afford the Board the first opportunity to address new grounds for aggrievement in light of its new decision. For the reasons set forth above, the Board's decision was unlawful and unreasonable and, therefore, must be reheard or it decided that no variance is required in the first instance.

Sincerely yours,
CRONIN BISSON & ZALINSKY, P.C.

By: **[s] Daniel D. Muller, Jr.**
Daniel D. Muller, Jr.

DDM:sms
cc: Quinn Properties, LLC
William Keefe, Esquire