

**CITY OF ROCHESTER
ZONING BOARD OF ADJUSTMENT**

CASE NUMBER 2016-31

**APPLICATION OF LEO YELLE, MANAGER FOR A VARIANCE TO TABLE 18-A
AND CHAPTER 42.29.n.2.K.**

ROCHESTER CITY COUNCIL'S MOTION FOR REHEARING

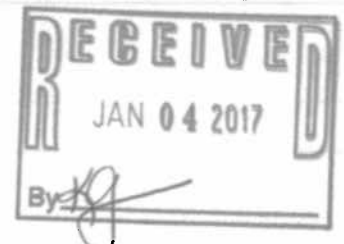
NOW COMES the City of Rochester City Council (the "City Council"), by and through its City Attorney, and files this Motion for Rehearing and, in support thereof, states as follows:

Procedural History

1. On October 10, 2016, Applicant Leo Yelle ("Yelle") filed an Application for Variance to Chapter 42.29.n.2.K. seeking a variance to allow for an Electronic Message Sign in the Downtown Commercial District where those types of signs are not permitted.
2. On December 14, 2016, a Public Hearing was conducted by the Rochester Zoning Board of Adjustment (the "ZBA") on the application. On December 19, 2016, the ZBA issued a Notice of Decision granting the variance.
3. On January 3, 2017, the City Council voted to authorize the City Attorney to file a Motion for Rehearing.

As to the Law

4. RSA 674:33, I, (b) codifies the five criteria which must be met in order to obtain a variance from a ZBA.
5. A party seeking a zoning variance bears the burden of establishing each requirement of RSA 674:33, I, (b). *Simplex Tech., Inc. v. Town of Newington*, 145 N.H. 727 (2001).
6. Claiming a hardship based upon the fact that a sought use is not allowed in any of the city's zoning districts does not meet the requirements of RSA 674:33, I, (b) (5) without demonstrating that the property is unique and that the property is burdened by the zoning restriction in a manner that is distinct from similarly situated property. *Cnty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748 (2007).



7. The criteria for unnecessary hardship to warrant the issuance of a zoning variance was not the uniqueness of the plight of the owner, but the uniqueness of the land causing the plight. *Rowe v. Salem*, 119 N.H. 505 (1979).
8. The owner of a property must show that the hardship is a result of a specific condition or conditions of the property, not the area in general. The burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district as a certain degree of hardship is implicit in all zoning. *Harrington v. Town of Warner*, 152 N.H. 74 (2005).
9. Inability to use land for one particular purpose was irrelevant to whether a variance should be granted. *Ouimette v. Somersworth*, 119 N.H. 292 (1979).
10. Financial hardship in and of itself does not warrant the granting of a variance. *St. Onge v. Concord*, 95 N.H. 306 (1948).
11. "A zoning ordinance is not discriminatory because it permits the continuation of existing structures and conditions while prohibiting the creation of new structures and conditions of the same type....[I]t is the policy of zoning law to construe strictly zoning ordinance provisions which provide for the continuation of nonconforming uses...The policy of zoning law is to carefully limit the enlargement and extension of nonconforming uses...The ultimate purpose of zoning regulations contemplates that nonconforming uses should be reduced to conformity as completely and rapidly as possible." *New London Land Use Ass'n v. New London Zoning Bd. of Adjustment*, 130 N.H. 510, 518 (1988) (internal quotations and citations omitted).
12. Finally, each and every one of the conditions for the granting of a variance must be met and, if any one of the five conditions is not met, the request for a variance must fail. In each instance, the applicant has the burden of proving all issues wherein the exercise of the board's discretion is sought. *Rye v. McMahon*, 117 N.H. 857 (1977); *Saturley v. Hollis*, 129 N.H. 757 (1987); *Fisher v. Dover*, 120 N.H. 187 (1980); *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239 (1992); and *New Hampshire Practice Series*, 15-24 Land Use Planning and Zoning § 24.08, Matthew Bender & Company, Inc., 2015.

As to the Facts

13. Yelle is the Manager of the Knights of Columbus Bingo Hall located at 250 Columbus Avenue (the "Property"). The Property is currently served by a mechanical sign used to alert the public to the various winnings available at the Bingo Hall.

14. In 2015, the City Council passed an update to Chapter 42.29 regulating signage within the City. The effective date of those changes was June 16, 2015. As of that date, scrolling Electronic Message signs would no longer be allowed to be constructed in the Downtown Commercial District.
15. In Yelle's application for the Variance, under the sections claiming an unnecessary hardship pursuant to RSA 674:33, I, (b) (5), Yelle claims that denying the variance would cause an undue hardship because "[t]he existing mechanical sign is required to be removed prior to performance of a projected electrical project in the future." Yelle did not state a single special condition of the **Property** which caused the supposed hardship nor how the **Property** was differently situated from other properties in the area.
16. In the oral presentation to the ZBA, Yelle simply repeated the statements contained in his application and made no further elaborations regarding the unnecessary hardship to the Property.
17. During deliberation on the application, Joe Devine, Code Enforcement Officer, stated it was the City's position that no hardship existed on the Property.
18. The ZBA voted 3-2 to approve the Variance.
19. The ZBA issued its Notice of Decision (the "NOD") on December 19, 2016. In granting the variances, the NOD states that "[t]he variance will not be contrary to the public interest because: It will not increase congestion in the streets.. The spirit of the ordinance is observed because: it will not negatively impact health and the general welfare. If granted, the benefit to this individual applicant outweighs any harm to the community as a whole. The value of surrounding properties will not be diminished because: the hours of operation are such that impacts from increased levels of noise, light, activity or traffic are not problematic."
20. The NOD does not state that Yelle met all five requirements for receipt of a variance under RSA 677:33 nor did Yelle present adequate evidence for the ZBA to make a finding that unnecessary hardship would result from the literal enforcement of Chapter 42.29.n.2.K.
21. Further, in his application, Yelle states that the Electronic Message sign would be used to "announce events at local churches." This would be an impermissible off-premises sign which would require a variance as well which Yelle did not seek nor was this issue addressed by the ZBA.

Analysis

22. RSA 677:2 states that a ZBA should grant a Motion for Rehearing if "if in its opinion good reason therefor is stated in the motion."
23. The good reason stated herein is that Yelle did not meet his burden of proving each of the five conditions under RSA 674:33, I (b), particularly, Yelle failed to demonstrate that the Property would suffer an unnecessary hardship.
24. A further good reason stated in this Motion is that the ZBA failed in its duty to deny a variance application if each and every one of the five conditions is not met. The ZBA "may grant a variance **only** if the applicant has satisfied [the] five conditions" contained in RSA 674:33. *Saturley v. Hollis*, 129 N.H. at 759. (emphasis added)
25. Clearly, the ZBA did not feel that Yelle met the unnecessary hardship provision as that section of RSA 674:33 is completely ignored in the NOD.
26. In his application, Yelle states that the use is not contrary to the spirit of the Ordinance because "[t]here are existing digital signs in the immediate area." Yelle failed to admit and the ZBA failed to inquire as to the fact that the other digital signs in the area preexisted the change to Chapter 42.29 and thus are "grandfathered" non-conforming uses. As stated in *New London Land Use Ass'n v. New London Zoning Bd. of Adjustment*, the continued existence of grandfathered conditions or uses does not justify the granting of a variance to create yet another nonconformity. Hence, Yelle failed to demonstrate that granting his variance would conform to the spirit of the Ordinance.
27. Finally, the NOD is also entirely inadequate. The NOD does reflect the proceedings that occurred at the ZBA on December 14, 2016 in that no findings of fact were made to justify the ZBA's conclusion that any of the five conditions in RSA 674:33 were met. The NOD's flat conclusion that the first four conditions were met is insufficient to support the granting of a variance in the first instance and wholly fail to establish a record to support the granting of the variances under possible future judicial review.

Conclusion

28. The NOD issued by the ZBA granting Yelle's application for a variance is facially invalid. Moreover, the deliberations by the ZBA which lead to the issuance of the NOD were similarly invalid as the ZBA did not conduct the proper analysis under RSA 674:33 for granting variances and did not make the necessary findings of fact to be able to reach

the conclusion that Yelle's applications satisfied RSA 674:33 and warranted the granting of the variances.

29. Based on the above, there is good reason to grant the City Council's Motion for Rehearing and to conduct a Rehearing in accordance with RSA 677:3.

Respectfully submitted,
CITY OF ROCHESTER CITY COUNCIL
Through its attorney:


Dated: January 4, 2016



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been mailed this 4th day of January, 2017 to the Applicant, Leo Yelle, Manager, Columbus Ave. Freight House, Inc., 250 Columbus Avenue, Rochester, NH 03867.


Terence M. O'Rourke, Esquire