

**CITY OF ROCHESTER
ZONING BOARD OF ADJUSTMENT**

CASE NUMBER 2016-21

**APPLICATION OF DONALD AND BONNIE TOY FOR A VARIANCE TO TABLE 18-A
AND CHAPTER 42.30.C.1**

ROCHESTER CITY COUNCIL'S MOTION FOR REHEARING

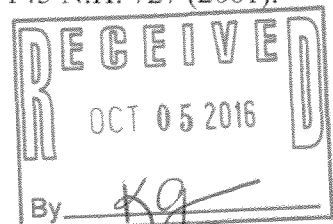
NOW COMES the City of Rochester City Council (the "City Council"), by and through its City Attorney, and files this Motion for Rehearing and, in support thereof, states as follows:

Procedural History

1. On July 20, 2016, Applicants Donald and Bonnie Toy (the "Toys") filed an Application for Variance to Table 18-A (the "Use Table") of the Rochester Zoning Ordinance to allow for a Manufactured Housing Park to be developed even though that use is not allowed in the Use Table.
2. On August 24, 2016, the Toys filed an Application for Variance to Chapter 42.30.c.1 to vary from the Zoning Ordinance dealing with expanding Non-Conforming Uses to allow the Toys to expand their Manufactured Housing Park, which is now a non-conforming use.
3. On September 14, 2016, a Public Hearing was conducted by the Rochester Zoning Board of Adjustment (the "ZBA") on both applications. On that same date, the ZBA issued a Notice of Decision granting the both variances.
4. On October 4, 2016, the City Council voted to authorize the City Attorney to file a Motion for Rehearing.

As to the Law

5. RSA 674:33, I, (b) codifies the five criteria which must be met in order to obtain a variance from a ZBA.
6. 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).



7. 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).
8. 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).
9. 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).
10. 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).
11. Financial hardship in and of itself does not warrant the granting of a variance. *St. Onge v. Concord*, 95 N.H. 306 (1948).
12. "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).
13. Chapter 42.30 of the Rochester Zoning Ordinance does not specifically allow for the expansion of a nonconforming use. Rather, the Ordinance states that a nonconforming condition "shall be eliminated, reduced or mitigated at such time as the owner of the property proposes any further development or redevelopment of that property."
14. 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

15. The Toys own a Manufactured Housing Park known as Addison Estates located at 414 Old Dover Road. The Toys purchased that property on July 30, 1996.
16. On April 22, 2014, the City Council passed an updated Zoning Ordinance. The updated Zoning Ordinance eliminated Manufactured Housing Parks from the Use Table and prohibited the development of new Manufactured Housing Parks in the City of Rochester.
17. On August 15, 2015, the Toys purchased 418 Old Dover Road (the "Property").
18. On September 16, 2015, undersigned counsel informed counsel for the Toys, Attorney Donald Whittum, the Manufactured Housing Parks were no longer a permitted use in the City of Rochester.
19. In the Toys' applications for Variances, under the sections claiming an unnecessary hardship pursuant to RSA 674:33, I, (b) (5), the Toys claim it would be a hardship to force them to change their "existing, thriving business model"; the Property abuts Addison Estates and "therefore expansion is organic"; and "[t]he hardship is that the ordinance is devoid of the ability to expand this high quality, style of development." The written applications do not explain how the Property is result of a specific condition or conditions of the property or how the Property is unique and that the property is burdened by the zoning restriction in a manner that is distinct from similarly situated property.
20. In the oral presentation to the ZBA, the Toys, through their engineer Christopher Berry, reiterated that the "hardship" was caused by not being able to expand their "existing business style"; Mr. Berry also questioned the wisdom of the change to the Zoning Ordinance which excluded Manufactured Housing Parks as a permissible use; and Mr. Berry explained how similar, **not different**, the Property was from the other properties around it.
21. During deliberation on the application, ZBA Chairman Ralph Torr stated that "we never find hardship" when granting variances, or words to that effect. Chairman Torr provided the deciding vote in the 3-2 decision.

22. The ZBA issued its Notice of Decision (the "NOD") on September 14, 2016. In granting the variances, the NOD states that "[t]he variance will not be contrary to the public interest because: it will not negatively impact health and general welfare. The spirit of the ordinance is observed because: it will not compromise the provision of adequate light and air. 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: it will not generate levels of noise, light, activity or traffic that are significantly different from that which currently exists."
23. The NOD does not state that the Toys met all five requirements for receipt of a variance under RSA 677:33 nor did the Toys present adequate evidence for the ZBA to make a finding that unnecessary hardship would result from the literal enforcement of Table 18-A and Chapter 42.30 of the Rochester Zoning Ordinance.

Analysis

24. 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."
25. The good reason stated herein is that the Toys did not meet their burden of proving each of the five conditions under RSA 674:33, I (b), particularly, the Toys failed to demonstrate that the Property would suffer an unnecessary hardship.
26. 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)
27. Clearly, the ZBA did not feel that the Toys met the unnecessary hardship provision as that section of RSA 674:33 is completely ignored in the NOD and Chairman Torr stated his opinion that meeting that threshold is superfluous.
28. The ZBA conducted no inquiry as to why this nonconforming use should be expanded when the Rochester Zoning Ordinance does not allow so and, in fact, calls for the any nonconforming used to be brought into conformity as rapidly as possible.
29. Still further, the NOD is entirely inadequate. The NOD does reflect the proceedings that occurred at the ZBA on September 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. The NOD correctly reflects that the ZBA conducted no inquiry as to the expansion of the nonconforming use.

30. Finally, Mr. Berry made reference in his oral presentation on September 14, 2016 to the Toys disagreement with the changes to the Rochester Zoning Ordinance that ended Manufactured Housing Parks as a permitted use. Chairman Torr also stated that "we could talk about how Chapter 42 [Zoning Ordinance] was changed."
31. This sort of second guessing of Ordinances by the ZBA is totally inappropriate and an affront to our form of government. The ZBA cannot change or rewrite an ordinance. The wisdom of a particular ordinance is a consideration for the City Council and not for the ZBA, or, even for the Courts. The ZBA is only to be concerned with how a particular ordinance applies to a particular piece of property. *New Hampshire Practice Series*, 15-24 Land Use Planning and Zoning § 24.12, Matthew Bender & Company, Inc., 2015.
32. Furthermore, the ZBA should not be concerned with how a particular ordinance applies to a particular property owner.

Conclusion

33. The NOD issued by the ZBA granting the Toys' two applications for 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 the Toys' applications satisfied RSA 674:33 and warranted the granting of the variances.
34. 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: October 5, 2016



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been mailed this 5th day of October, 2016 to Applicants' Counsel, Attorney Donald Whittum, P.O. Box 862, Rochester, NH 03866-0067.



Terence M. O'Rourke, Esquire