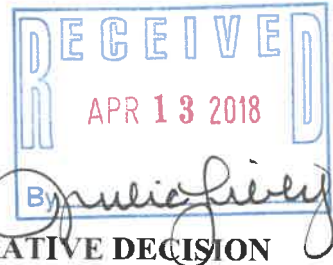


**CITY OF ROCHESTER
ZONING BOARD OF ADJUSTMENT**



**36A INDUSTRIAL WAY, LLC'S APPEAL FROM ADMINISTRATIVE DECISION
CASE NUMBER 2018-04**

**36A INDUSTRIAL WAY, LLC'S
MOTION FOR REHEARING/RECONSIDERATION
PURSUANT TO RSA 677:2**

NOW COMES 36A Industrial Way, LLC (the "Applicant"), Applicant in regard to the above-captioned matter, and hereby respectfully requests and moves that the Rochester Zoning Board of Adjustment (the "Board") rehear and/or reconsider its March 14, 2018 decision with regard to the Applicant's appeal of the January 9, 2018 Administrative Decision of the City of Rochester Director of Building, Zoning and Licensing Services, James Grant, which decision was to the effect that, before a building permit could be granted to the Applicant to fit up approximately 8,200 sq. ft. of space in the Applicant's 63,500 sq. ft. building situate at 36 Industrial Way, Rochester, NH (hereinafter, the "Building") for use as medical office and related space so as to enable the provision treatment, counseling and related services for patients with opioid drug dependency issues, the Applicant would be required to first obtain a conditional use permit from the Rochester Planning Board under the provisions of Section 42.21 of the Rochester Zoning Ordinance as enacted April 22, 2014 (the "2014 Rochester Zoning Ordinance"), which Administrative Decision the Board upheld without explanation in its March 14, 2015 decision denying the Applicant's appeal of Director Grant's January 9, 2018 administrative decision. In support of such Motion for Rehearing/Reconsideration, the Applicant submits that the facts and legal propositions herein set forth below provide good cause for the its within Motion to be granted:

I. INTRODUCTION:

The purpose of this Motion is to provide a factual, legal basis and/or combined basis which constitute "good cause", within the meaning of which of RSA 677:2, as a result of which, the Applicant submits that, this Board's March 14, 2018 denial of its Appeal of the January 9, 2018 Administrative Decision of James Grant, Rochester's Director of Building, Zoning and Licensing Services was in error and should be set aside. While there are a number of legal and factual errors which the Applicant asserts provide sufficient grounds to overturn Dir. Grant's January 9, 2018 Administrative Decision, as set forth in detail below, in Sections II and III of this Motion, the two (2) most prominent reasons for this Board granting a rehearing and/or reconsideration with respect to this Board's March 14, 2018 decision relate to:

- a. This Board's failed to adhere to the nature of the "special exception" which it had granted on September 12, 2001 to the Appellant's predecessor in interest under the

provisions of the 2001 Rochester Zoning Ordinance, with respect to two (2) separate buildings then owned by such predecessor in interest, and which 'special exception' for "Office" uses in the Building had been, as subsequently and consistently interpreted and applied, for a period of approximately (15) fifteen years, by Rochester administrative officials having responsibility for its application and interpretation, in a manner so as to allow a broad range of "Office" uses throughout the entire Building of the nature and type specified in the definition of "Office" set forth in Section 42.6(43) of the 2001 Rochester Zoning Ordinance, as a matter of right; and

- b. The Board's misapplication, or determination not to apply, the specific language of the provisions of Section of Section 42.30(d)(3) of the 2014 Rochester Zoning Ordinance, which clearly and straightforwardly provides that: **"Any existing use which is not a permitted use but which was allowed as a special exception or a conditional use in a district shall continue to be allowed as long as it shall comply with all of its original requirements and approval"**, and which language applies precisely to the underlying facts of this case, so as to clearly allow the continuation of the Applicant's Building's 2001 "special exception" "Office" uses for a wide range of tenants, including medical related service, such as those to be provided by Applicant's prospective Tennant, without the need to first obtain a conditional use permit from the Rochester Planning Board pursuant to the provisions of Section 42.21 of the 2014 Rochester Zoning Ordinance.

The above noted errors, among others arising as a result of this Board's March 14, 2018 denial of the Applicant's Appeal of the January 9, 2018 Administrative Decision of James Grant, Rochester's Director of Building, Zoning and Licensing Services will be discussed in greater detail below, any or all of which, the Appellant submits, constitute "good cause", within the meaning of RSA 477:2, for this Board to grant the Applicant's within Motion for a rehearing and reconsideration.

II. FACTUAL AND LEGAL BACKGROUND:

2. 36A Industrial Way, LLC is the Owner (the "Owner") of a building, formerly owned by Cabletron Systems, Inc. and others, and situated at 36 Industrial Way, Rochester, New Hampshire (the "Building"), such Building currently, and long prior to 2001, consisting of two (2) stories, each with approximately 31,500 square feet of area, and located on a lot with an area in excess of 9.5 acres (the "Lot"). See Exhibit C annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL".

3. The Building, since April 22, 2014 (the date of the adoption of the 2014 of the 2014 Rochester Zoning Ordinance) has been located in Rochester's GI (General Industrial) Zoning District.

4. Prior to April 22, 2014, the Building was located in the I-2 Zoning District of the

City of Rochester under the Rochester Zoning Ordinance which was in effect 2001 (the "2001 Rochester Zoning Ordinance"), a classification that had been in effect from March 3, 1986 until the adoption of Rochester's 2014 Zoning Ordinance, on April 22, 2014.

5. Under cover letter dated August 24, 2001, Norway Plains Associates, Inc., to this Rochester Zoning Board of Adjustment (the "Board"), pursuant to an "APPLICATION FOR SPECIAL EXCEPTION", requested on behalf of Cabletron Systems, Inc., and Enterasys Networks, Inc., that this Board grant it's clients a special exception, so as to permit the use of the two (2) 63,500 square foot buildings (which had until that time supported office use as an "accessory use" related to the permitted primary manufacturing usage, and one (1) of such buildings being the Building which is the focus of this Appeal), so that "office" use of the two (2) buildings "(b)y this application, "use of these two buildings would be allowed as a primary use." (Emphasis supplied) See Exhibit A, annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL", and specifically Norway Plains Associates, Inc.'s letter dated August 24, 2001.

6. On September 12, 2001, when the Building was owned by Enterasys Networks, Inc., the Rochester Zoning Board of Adjustment, granted to the then owner of the Building, a "special exception" under the provisions of "... Section 42.14, Permitted Uses, Table-1 Section b-6 (*sic*)" of the City's then applicable 2001 Rochester Zoning Ordinance, which "special exception" request was granted "... to permit an office use as a primary function ... " of the Building. See Exhibit A annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL", specifically the Rochester ZBA's "NOTICE OF DECISION" of September 12, 2001.

7. At the time of the ZBA's grant of the abovementioned "special exception" for "Office" use as a primary function within the Building, in 2001, the definition of the word "Office" in Section 42.6(43) of the 2001 Rochester Zoning Ordinance (and, in fact, the only definition of "Office" in such ordinance) was: **"A room or group of rooms used for conducting the affairs of a business, profession, service, industry or government"**. (Emphasis supplied).

8. Over the sixteen (16) plus years that have elapsed since this Board's grant of the abovementioned 2001 "special exception" for "Office" use as a primary use throughout the entire Building, a series of subsequent interpretations, decisions, and rulings have been made by various Rochester Building, Zoning and Planning officials, charged with responsibility for implementing both the interpretation of the word "Office" as contained in 2001 Rochester Zoning Ordinance, as well as the impact of such definition on the nature and extent of the "Office" uses, which were included within, and were, therefore, permissible and allowable "office" uses under, the aforesaid "special exception" granted by this Board with respect to the Building in September 2001. See Exhibit A annexed to the "NARRATIVE SUMMARY OF

APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL."

9. In each instance, since September 12, 2001 (the date upon which the "special exception" granting the then owner of the Building the right to use make "Office" use as a primary use of the entire Building), involving an interpretation and/or application of the area in which the 2001 "special exception" "Office" uses allowable in the Building could be made, by any Rochester administrative official(s) having responsibility for interpreting and/or applying the 2001 "special exception" permitting "Office" uses within the Building, the interpretation of the area in which such "Office" uses could, and the scope of the nature of such uses that were permissible within the Building, were consistent and very broad in scope. See Exhibit A See Exhibit A annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL".

10. These subsequent interpretations, decisions and rulings referred to in paragraph 8 above, and discussed, along with other related interpretations in greater detail in this Motion, all viewed the 2001 "Office" uses permitted by the Rochester Zoning Board of Adjustment's September 12, 2001 "special exception" (whether specifically or by implication) as being broad and all-encompassing with respect areas within Building which were available for office uses, and provided the right to make such "Office" uses under the "special exception" attached to (i.e, "ran with") the Building itself (even in the case of a change of ownership). See Exhibit A annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL", and specifically Kenn Ortmann's Administration Decision of November 17, 2004 included therein.

11. Also, such interpretations and decisions recognized that, in light of the broad definition of "Office" contained in Section 42.6(43) of the 2001 Rochester Zoning Ordinance, such "Office" uses clearly encompassed office uses by professionals, such as medical related office uses of a nature consistent with those proposed uses to be made in the portion of the Building to be leased, occupied and utilized by the Owner's prospective tenant, Health Care Resources, Inc. (the "Tenant"), for which the Building Permit that would enable the **fit-up of approximately 8,000 plus square feet of medical office and related space so as to enable the provision treatment, counseling and related services for patients with opioid drug dependency issues, on a purely out-patient basis**, in the space that would be occupied under, the improperly withheld and erroneously denied, Building Permit, that forms the basis for this Appeal. See Exhibits A and B annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL, particularly Michael Behrendt's interpretation dated June 4, 2010, of the wide range of the types of "Office" uses permissible under the Rochester Zoning Board of Adjustment's September 12, 2001 "special exception" granted with respect to the entire Building known as 36 Industrial Way Building, which interpretation specifically included within such "special exception" "Offices" uses for, and related to, " ... **medical and health care practitioners such as a medical office, chiropractic**

officer (sic), massage therapist, physical therapist, etc." (Emphasis supplied).

12. Given the breadth of the term "Office" as defined in Section 42.64(43) of the 2001 Rochester Zoning Ordinance (i.e. , **"A room or group of rooms used for conducting the affairs of a business, profession, service, industry or government"**), one must recognize that, with respect to the wide range of "special exception" "Office" uses that were encompassed in the Section 42.64(43) definition of "Office", such uses, in essence, became permitted uses in the entire Building after this Board's September 12, 2001 grant of the "special exception" use requested by the Applicant's predecessor as owner of the of the Building, which thereafter allowed "Office" uses to be treated as a primary permitted uses in the entirety of the Building. See Exhibit A, annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL", and specifically Norway Plains Associates, Inc.'s letter dated August 24, 2001.

13. Such an understanding of the nature and scope of the "special exception" by this Board acting in 2001, is particularly appropriate given the fact that the exceptionally large manufacturing business that had been operating in the two (2) 63,500 sq. ft. buildings for over a decade, and with respect to which the 2001 "special exception" request was being made, was going out of business, and the two (2) buildings were rapidly emptying out, with no realistic hope of a single manufacturing entity to take up their 130,000 sq. ft. of vacant space. Consequently, this Board's 2001 grant of a "special exception" that would permit these two (2) specific buildings (including the "Building") to be occupied by a broad range of smaller tenants falling within the broad definition of users contained in Section 42.64(43) of the 2001 Rochester Zoning Ordinance was both reasonable and practical (and satisfied the requirement, contained in Section 42.23(c)(8) of the 2001 Rochester Zoning Ordinance, that a building with respect to the "special exception" "Office" use was granted in in September 2001 was located on a lot of, at least, five (5) acres in area if located in Rochester's Industry 2 (I-2) Zoning District. See annexed Exhibit A.

14. Kenn Ortmann's November 17, 2004 ruling, as Director of Planning and Development, further provided that the "Office" use granted with respect to the Building applied to "... a site and not to a specific owner or specific time frame unless that is specified in the approval" (i.e. the "special exception"), which it was not, when the "special exception" was originally approved and issued on September 12, 2001. See Exhibit A annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL".

15. Additionally, with respect to the "Administrative Decision" made by Kenneth Ortmann, Director of Planning and Development for the City of Rochester, on November 17, 2004, pursuant to the provisions of RSA 676:5, such Administrative Decision specifically affirmed and made it clear that the "Office" use granted by "special exception" on September 12,

2001 was still in existence in 2004 and applied to the Building "... in its entirety." See Exhibit A annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL".

16. Director Ortmann's November 17, 2004 ruling further provided that the "Office" use granted with respect to the Building applied to "... a site and not to a specific owner or specific time frame unless that is specified in the approval", which it was not, when the "special exception" was originally approved and issued on September 12, 2001, or since that date. See Exhibit A annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL".

17. With respect to this, perhaps the most important aspect of Kenn Ortmann's November 17, 2004 "Administrative Decision" with respect to the Building (at a time when individual spaces within the Building were being sold as condominium units to be occupied for "Office" related uses), given the September 2001 grant of the "special exception" permitting "Office" uses as a primary use to be made throughout the entire Building, related to the question of "... whether or not the owner of each condominium unit must file an application for a Special Exception." Director Ortmann's November 17, 2004 Administrative Decision definitively answered this question and ruled that the owner of each condominium owner did not have to file for a separate Special Exception because "... Special Exceptions and Variances are granted to a site and not to a specific owner ...". Therefore, he held that the broad range of "Office" uses permitted by the 2001 "special exception" with respect to the Building applied to the entire Building without the need for the building owner, or the occupier of specific space within the Building (whether by lease or condominium ownership) to obtain a separate special exception authorization in order to occupy specific space within the building. See Exhibit A annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL", and specifically letter of Director of Planning and Development Kenneth N. Ortmann, of November 17, 2004 to John T. McLaughlin, Esq.

18. The aspect of Kenn Ortmann's November 17, 2004 "Administrative Decision" with respect to the Building completely undermines the legal basis of the January 9, 2018 Administrative Decision of James Grant, Rochester's Director of Building, Zoning and Licensing Services (i.e. that leaseholders within and/or the Owner of the Building, must obtain a special exception required by the provision dog Section 41.21 of the Rochester zoning Ordinance, if so required, particularly given (or, one could say because of) the specific, clear and unambiguous language of Section 42.30(d)(3) of the 2014 Rochester Zoning Ordinance, which simply provides that: **"Any existing use which is not a permitted use but which was allowed as a special exception or a conditional use in a district shall continue to be allowed as long as it shall comply with all of its original requirements and approval"**. This being the case the January 9, 2018 Administrative Decision from which this Appeal is taken, does not support the provisions of the 2014 Rochester Zoning Ordinance, it clearly violates the specific

mandate of Section 42.30(d)(3) of the 2014 Rochester Zoning Ordinance, and, thus must be overturned by this Board, and Building Permit (TB-17-902 at 36 INDUSTRIAL WAY) must be authorized and ordered to be issued by this Board.

19. It is also important to note that copies of Director Ortmann's November 17, 2004 administrative decision were simultaneously provided to Karen Pollard, the then Economic Development Manager for the City of Rochester, both Tom Abbott and Larry Hammer, both former Rochester Directors of Code Enforcement, and Michael Behrendt, the then the Chief Planner for the City of Rochester, and that none of such officials appealed the "Administrative Decision" made by Mr. Ortmann, under the provisions of RSA 676:5, I, as they, and other Rochester officials were entitled to do, and that such decision and interpretation has been followed and complied with since that date until the January 9, 2018 issuance of the Administrative Decision ruling by the Director James Grant that the Owner's Tenant's proposed medical professional use required that a Conditional Use permit be obtained from the Rochester Planning before a building permit could be obtained by the Owner, or its proposed Tenant. It is this January 9, 2018 Administrative Decision that gives rise to this Appeal to this Board. See Appendix 1 annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL".

20. By another subsequent interpretation of the meaning of the term "Office" as used in the September 12, 2001 "special exception" granted with regard to the Building, Michael Behrendt, Chief Planner for the City of Rochester, under date of June 4, 2010, interpreted the 2001 "special exception" at issue to include a wide range of activities falling within the definition of "office" use which were allowed in the Building, including, specifically noting that such use(s) included "... **medical and health care practitioners such as a medical office, chiropractic officer (sic), massage therapist, physical therapist, etc.**" (Emphasis supplied). See Exhibit A annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL", and specifically Rochester Chief Planner, Michael Behrendt's June 4, 2010 e-mail to Bobby Goodrich Real Estate Broker (and on which e-mail Kenn Ortmann, Rochester Director of Planning and Development, and Thomas Abbott, Rochester's then Director of Code Enforcement were copied).

21. Since the "special exception" permitting "Offices" uses in the Building was granted in 2001, and prior to April 22, 2014, tenants providing medical and medically related services have been tenants within the Building, without the need for first obtaining a variance, or specific, business related "special exception" to operated their business. For example, the Building is currently, and has for a number of years (dating back well before 2014) been home to William Verweij & Associates Physical Therapy, a NH Licensed, medically related, physical therapy business, occupying several thousand sq. ft. of "Office" use space within the Building, and the professional employees of which are also state licensed, with most of their services being

eligible for payment through a patient's medical insurance. Since this tenant has occupied the Building both prior to, and after, the enactment of the 2014 Rochester Zoning Ordinance without the benefit of a variance, its continued occupancy in the Building, must be attributable to the fact that it has been viewed as permissible under the 2001 "Office" use "special exception" granted with respect to the Building.

22. For years during and after the issuance of the administrative decisions referenced in the aforementioned paragraphs relative to the nature and scope of the "Office" uses allowed under the 2001 "special exception" relative to the Building, medical and medical related "Office" uses of various types, varying size, and at various for various durations, were made by occupants of the Building, which medical and medical related uses at their high point took up approximately one quarter of the tenantable space within the Building. In fact, during the years since September 12, 2001, the area of the Building devoted to medical and medical related use "Office" uses has varied, with the maximum level of tenantable space of the Building being occupied by such types of uses, at any one time, being approximately 25% of the available tenantable space.

23. Under date of October 20, 2017, the Owner's builder, Indian Fall's Construction, LLC, on behalf of the Building Owner, filed a "Major Building Permit Application" (Permit/Application: TB-17-902) (the "Building Permit"), with the Rochester Department of Building, Zoning and Licensing Services, to permit the undertaking of a project involving the fit-up of approximately 8,200 sq. ft. of office space within the Building (i.e. "New walls, new lights, new drop ceiling, paint, carpet." See Exhibit B, Major Building Permit Application at p. 1 of 4, annexed to a "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL".

24. Pursuant to the Building Permit application the "use and Occupancy" of the space to be "fit-up" for use by the Owner's Tenant was "Office" and the "Occupant Load" was to be 30 medically related professionals and support personnel employees and patients. See Exhibit B, Major Building Permit Application at pg. 1 of 4, annexed to a "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL".

25. The Tenant intending to occupy the space to be fit-up pursuant to the Building Permit is a nationally known medical service related provider with offices throughout New England, Health Care Resource Centers, the medical professional activities of which include **offices and related space for medical, and health care practitioners involved in the medical treatment, and related counseling and therapeutic services, for patients suffering from/afflicted with opioid drug dependency issues, on a purely out-patient basis.** (Emphasis supplied).

26. The Applicant's prospective Tenant, Health Care Resource Centers, is licensed by the State of New Hampshire Department of Health and Human Services, and its employees will consist primarily of licensed doctors, nurses and therapists, providing the medical treatment, and related counseling and therapeutic services, to the proposed Tenant's patients at the proposed Health Care Resource Centers 36 Industrial Way location.

27. In and around the summer and fall of 2017, Karen Pollard, in her capacity as Economic Development Director for the City of Rochester, worked with the Owner and its prospective Tenant to help facilitate the locating of the Tenant's business (i.e. treatment, counseling and related services for patients with opioid drug dependency issues, on a purely out-patient basis) in the Owner's Building. During this process she, and in some instances the Owner, dealt with Rochester administrative officials, such as the Director of Planning and Development and the Director of Building, Zoning and Licensing Services, to determine whether they were aware of and/or foresaw, any impediments, from a permitting standpoint, to the issuance of a building permit for the fit-up of the space in the Building that the Owner and Tenant intended the Tenant's business to occupy.

28. On a number of occasions with respect to Ms. Pollard's discussions with other administrative officials of the City holding permitting related positions, potentially, and/or necessarily implicated in regard to the project and the fit-up work necessary for the prospective Tenant's business to be located in the Building, she reported to the Owner and the Tenant that the issuance of a building permit for the project would be a routine matter.

29. Based on these assurances from Ms. Pollard to the Owner and the prospective tenant, which, unfortunately, have turned out to be inaccurate, such Parties entered into a Lease for Suites 6 and 7 located on the first floor of the Building in September of 2017, which Lease had an occupancy date for the prospective Tenant of January 1, 2018, a date which has already, by virtue of the January 9, 2018 administrative decision giving rise to this appeal, been rendered impossible to meet.

30. Over the years since September 12, 2001, the area of the Building devoted to medical and medical related use "Office" uses has varied, with the maximum level of tenantable space of the Building being occupied by such types of uses, at any one time, being approximately 25% of the available tenantable space.

31. On November 27, 2017, the Rochester Director of Building, Zoning and Licensing Services, James Grant, verbally informed the Owner's contractor, by telephone, that the use contemplated by the Owner for the Building and reflected in the Owner's pending Major Building Permit Application: TB-17-902 at 36 INDUSTRIAL WAY for Alterations-Non Residential (the "pending Building Permit Application") (see Exhibit B annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL"), filed with the Building, Zoning and Licensing Services Department under date of

October 20, 2017, by the Owner's builder, would require that the Owner obtain a Conditional Use permit for the proposed use, from the Rochester Planning Board because the provisions of Section 42.21 of the 2014 Rochester's Zoning Ordinance (despite the clear and unambiguous provisions of Section 42.30 (d)(3) of the 2014 Rochester Zoning Ordinance to the contrary).

32. On January 9, 2018, James Grant, the Rochester Director of Building, Zoning and Licensing Services, notified the Owner's Attorney, by letter, that before the Owner's pending Building Permit Application could be granted/issued, a Conditional Use permit would first need to be obtained from the Rochester Planning Board under the provisions of Section 42.21 of the 2014 Rochester's Zoning Ordinance. See Appendix 1 annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL".

33. The City's position, as set forth in the Rochester Director of Building, Zoning and Licensing Services' January 9, 2018 letter to the effect that, before the pending Building Permit Application could be granted/issued, a Conditional Use permit would first need to be obtained from the Rochester Planning Board under the provisions of Section 42.21 of the 2014 Rochester's Zoning Ordinance, specifically ignores, and clearly violates, the forthright and unambiguous language of Section 42.30(d)(3) of the 2014 Rochester Zoning Ordinance, which simply provides that: "Any existing use which is not a permitted use but which was allowed as a special exception or a conditional use in a district shall continue to be allowed as long as it shall comply with all of its original requirements and approval", which the Building does, because the its lot is in excess of five (5) acres in area and the 2001 "special exception" "Office" use granted with respect to the entire building was very broad as to the types of "Office" uses that could be made in the Building, so as to include " ... medical and health care practitioners such as a medical office, chiropractic office, massage therapist, physical therapist, etc." See Exhibit A annexed to the "NARRATIVE SUMMARY OF APPLICANT, 36A INDUSTRIAL WAY, LLC'S BASIS OF APPEAL".

34. Since the ordinance language of Section 42.30(d)(3) of the 2014 Rochester Zoning Ordinance clearly, precisely and unambiguously describes the existing circumstances with regard to the Building and its 2001 "special exception" "Office" use granted on September 12, 2001, the existing broad range of "Office" uses, including especially medical related office uses, permitted throughout the entire Building since September 12, 2001, "... shall continue to be allowed as long as it shall comply with all of its original requirements and approval", which the Building does. See Section 42.30(d)(3) of the 2014 Rochester Zoning Ordinance. Consequently, the December 6, 2017 administrative decision giving rise to this Appeal, is clearly contrary to the specific mandate of Section 42.30(d)(3) of the 2014 Rochester Zoning Ordinance, and is therefore illegal and must be set aside, and the Owner's pending Building Permit's issuance must be authorized and ordered by this Board.

35. On March 14, 2018, the Board held a public hearing on the Applicant's Appeal of the January 9, 2018 Administrative Decision of the James Grant, Director of Rochester's

Department of Building, Zoning and Licensing Services, at which public hearing the Board heard a presentation from the Appellant's counsel in favor of the Applicant's Appeal (and received Requests for Findings from the Appellant's counsel), as well as hearing a presentation from the Rochester City Attorney, Terrance O'Rourke, on behalf of the Rochester Department of Buildings, Zoning and Licensing Services, in support of Director Grant's January 9, 2018 Administrative Decision. The Board also took comments from a number of private citizens.

36. At the conclusion of the public hearing the, without relevant discussion of the legal and/or factual basis of the respective presentations of counsel, and without addressing any of the Appellant's Requests for Findings, the Board unanimously voted, without articulating any rationale for its decision, to deny the Appellant's Appeal of the January 9, 2018 Administrative Licensing Services, in essence claiming that, the process for obtaining a Conditional Use permit from Rochester Planning Board, before allowing "Office" uses such as that proposed to be made in the Building by the Applicant's prospective tenant, pursuant to the provisions of Section 42.21 of the 2014 Rochester Zoning Ordinance, was a "better" process than the "special exception" process granted with respect to the Building, by the "special exception" for "Office" uses to be made throughout the entirety of the Building, which "special exception" was granted to the Owner's predecessor in interest on September 12, 2001. Thus, the Board's written Notice of Decision, dated March 15, 2018, explained the Board's decision as follows: "*The Administrative Appeal was **denied** as presented.*" (See annexed Exhibit B)

III. LEGAL AND FACTUAL BASIS FOR "GOOD REASON", WITHIN THE MEANING OF RSA 677:2, FOR THIS BOARD TO GRANT APPELLANT A REHEARING/RECONSIDERATION OF THE MARCH 14, 2018 DENIAL OF APPELLANT'S APPEAL FROM DIRECTOR. GRANT'S JANUARY 9, 2018 ADMINISTRATIVE DECISION:

Given the relevant facts and law set forth throughout this Motion, the Appellant respectively submits that "good cause", within the meaning of RSA 677:2, exists for this Board to grant the Appellant a rehearing/reconsideration of the Board's March 14, 2018 denial of Appellant's Appeal of the January 9, 2018 Administrative Decision of the James Grant, Director of Rochester's Department of Building, Zoning and Licensing Services, and in support thereof states as follows:

- a. The January 9, 2018 Administrative Decision of Director James Grant, and this Board's denial of the Applicant's appeal therefrom on March 14, 2018, limits and/or eliminates the broad scope of "Office" uses that could previously be made within the Building pursuant to the September 12, 2001 "special exception" granted to the Applicant's predecessor in interest pursuant to the provisions of "PERMITTED USES-TABLE 1, APPENDIX A, ZONING DISTRICTS: ZONING USE CATEGORY, (B) COMMERCIAL USES, Sub-Par. (6), and Detail: Section 42.23(c)(8)" of the 2001 Rochester Zoning Ordinance (see annexed Exhibit A),

without first requiring the Owner, and/or prospective Tenant, to first obtain a Conditional Use permit from the Rochester Planning Board, pursuant to Section 42.21 of the 2014 Rochester Zoning Ordinance, and in doing so, constitutes an unreasonable, illegal (see also RSA 674:19) and unconstitutional “taking”, by the City of Rochester, of the Owner’s property rights, contrary to the provisions of the U.S. Constitution, Amendments 5 and 14, without the payment of required “just compensation” to the Owner;

- b. The January 9, 2018 Administrative Decision of Director James Grant, and this Board’s denial of the Applicant’s appeal therefrom on March 14, 2018, limits and/or eliminates the broad scope of “Office” uses that could previously be made within the Building, pursuant to the September 12, 2001 “special exception” granted to the Applicant’s predecessor in interest pursuant to the provisions of Section 42.14 APPENDIX A (B)(6) and Section 42.23(c)(8) of the 2001 Rochester Zoning Ordinance, within the Building without first requiring the Owner, and/or prospective Tenant, to first obtain a Conditional Use permit from the Rochester Planning Board, pursuant to Section 42.21 of the 2014 Rochester Zoning Ordinance, and, in doing so, constitutes an unreasonable, illegal (see also RSA 674:19) and unconstitutional “taking”, by the City of Rochester, of the Owner’s property rights, contrary to the provisions of the N.H. Constitution, Part I, articles 2 and 12, without the payment of required “just compensation” to the Owner;
- c. To the extent that the “Office” use “special exception” granted by this Board on September 12, 2001, has been consistently interpreted and applied and implemented over the ensuing years, by administrative officials of the City of Rochester charged with responsibility for interpreting and/or applying the provisions of the Rochester Zoning ordinance (until, at least, January 9, 2018, the date of the Administrative Decision giving rise to this appeal), in a manner so as to permit a broad range of “Office” uses throughout the Building, including specifically, the “Office” use of the Building for “... medical and health care practitioners such as a medical office, chiropractic officer (*sic*), massage therapist, physical therapist, etc.”, the Administrative Decision of January 9, 2018, unreasonably, illegally and/or unconstitutionally (see par. a and b immediately above) violates the judicially established “administrative gloss” doctrine in so far as it would put an end to such interpretive practice (particularly in light of the 2014 Rochester Zoning Ordinance’s specific adoption of the provisions of Section 42.30(d)(3)), which ordinance specifically provides for the continuance of pre-existing “special exception” uses. See Section 42.30(d)(3) 2014 Rochester Zoning Ordinance. See also Petition of Kalar, 162 N.H. 314, 321-322 (2011);

- d. To the extent that the “Office” use “special exception” granted by this Board on September 12, 2001, has been consistently interpreted and applied and implemented over the ensuing years, by administrative officials of the City of Rochester charged with responsibility for interpreting and/or applying the provisions of the Rochester Zoning ordinance (until, at least, January 9, 2018, the date of the Administrative Decision giving rise to this appeal), in a manner so as to permit a broad range of “Office” uses throughout the Building, including specifically, the “Office” use of the Building for “... medical and health care practitioners such as a medical office, chiropractic officer (*sic*), massage therapist, physical therapist, etc.”), the Administrative Decision of January 9, 2018, would unreasonably, illegally and/or unconstitutionally violate the provisions of RSA 674:19, which provides that: “A zoning ordinance adopted under RSA 674:16 (such as the 2014 Rochester Zoning Ordinance is) “... shall not apply to existing structures or to the existing use of any building. It shall apply to any alteration of a building for a use or purpose or in a manner which is substantially different from the use to which it was put before the alteration.”, as well as the Applicant’s right to due process under the both the U.S. and New Hampshire Constitutions;
- e. To the extent that the “Office” use “special exception” granted by this Board on September 12, 2001, has been consistently interpreted and applied and implemented over the ensuing years, by administrative officials of the City of Rochester charged with responsibility for interpreting and/or applying the provisions of the Rochester Zoning ordinance (until, at least, January 9, 2018, the date of the Administrative Decision giving rise to this appeal), in a manner so as to permit a broad range of “Office” uses throughout the Building, including specifically, the “Office” use of the Building for “... medical and health care practitioners such as a medical office, chiropractic officer (*sic*), massage therapist, physical therapist, etc.”), the Administrative Decision of January 9, 2018, would unreasonably, illegally and/or unconstitutionally violate, ignore and/or misinterpret the specific provisions of Section 42.30(d)(3) of the 2014 Rochester Zoning Ordinance, which simply, clearly and forthrightly provides that with regard to special exception uses existing immediately prior to the adoption of the 2014 Rochester Zoning Ordinance : “Any existing use which is not a permitted use but which was allowed as a special exception or a conditional use in a district shall continue to be allowed as long as it shall comply with all of its original requirements and approval”, which the Applicant’s 2001 “Office” use “special exception” with respect to the Appellant’s Building does;
- f. That the March 14, 2014 denial of the Applicant’s appeal of the January 9, 2018 Administrative Decision of Director James Grant, and this Board’s denial of the

Applicant's appeal therefrom on March 14, 2018, is unreasonable, illegal and/or unconstitutional, because in denying the Appellant's appeal on March 14, 2018, this Board failed, to make any findings of fact regarding the Appeal, despite being presented with written requests for such findings, thereby violating the Applicant's U.S. and N.H. State Constitutional rights to due process and equal protection of the laws, including the New Hampshire statutory provisions noted above.

- g. That the March 14, 2014 denial of the Applicant's appeal of the January 9, 2018 Administrative Decision of Director James Grant, and this Board's denial of the Applicant's Appeal therefrom on March 14, 2018, is unreasonable, illegal and/or unconstitutional, because in communicating its denial of the appeal to the Appellant, in its March 15, 2018 Notice of Decision (see annexed Exhibit B), this Board failed, in such written Notice of Decision, to articulate any explanation and/or rationale, for its decision, legal or otherwise, other than thereby violating the Applicant's U.S. and N.H. State Constitutional rights to due process and equal protection of the laws, as well as the New Hampshire statutory provisions noted above.
- h. That the March 14, 2014 denial of the Applicant's appeal of the January 9, 2018 Administrative Decision of Director James Grant, and this Board's denial of the Applicant's Appeal therefrom on March 14, 2018, is unreasonable, illegal and/or unconstitutional, because in denying the Appellant's appeal on March 14, 2018, this Board failed to deliberate the issues raised in the Appellant's Appeal documents and/or the Applicant's presentation to the Board in support of the appeal, but rather merely based its decision on the proposition that, the process for obtaining a Conditional Use permit from Rochester Planning Board, before allowing "Office" uses such as that proposed to be made in the Building by the Applicant's prospective tenant, pursuant to the provisions of Section 42.21 of the 2014 Rochester Zoning Ordinance, was a "better" process than the "special exception" process granted with respect to the Building, by the "special exception" for "Office" uses to be made throughout the entirety of the Building, which "special exception" was granted to the Owner's predecessor in interest on September 12, 2001 pursuant to the provisions of the "PERMITTED USES-TABLE 1, APPENDIX A, ZONING DISTRICTS: ZONING USE CATEGORY, (B) COMMERCIAL USES, Sub-Par. (6), and Detail: Section 42.23(c)(8)" of the 2001 Rochester Zoning Ordinance (see annexed Exhibit A), thereby violating the Applicant's U.S. and N.H. State Constitutional rights to due process and equal protection, as well as the New Hampshire statutory provisions noted above.

i.

III. CONCLUSION:

Given the factual and legal backgrounds set forth above, the Applicant respectfully submits that "good cause" exists for the Board to rehear and reconsider its denial of the

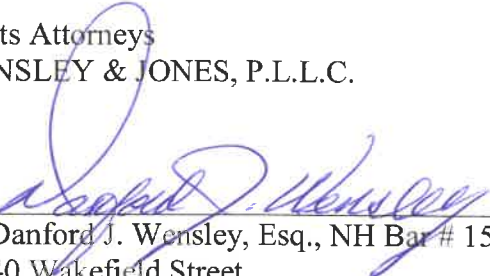
Appellant's appeal of the January 9, 2018 Administrative Decision of James Grant, the Rochester Director of Building, Zoning and Licensing Services, regarding the Building, and to set such Administrative Decision aside, and to order that the Applicant's requested Building Permit (TB-17-902 at 36 INDUSTRIAL WAY) must be issued in accordance with the "special exception" as to "Office" uses within the Building granted by this Board on September 12, 2001, under the provisions of the 2001 Rochester Zoning Ordinance.

Respectfully Submitted,

36A INDUSTRIAL WAY, LLC

By Its Attorneys
WENSLEY & JONES, P.L.L.C.

Dated: April 13, 2018

By: 
Danford J. Wensley, Esq., NH Bar # 1551
40 Wakefield Street
Rochester, NH 03867
Telephone 603-332-1234

CERTIFICATE OF SERVICE

I, Danford J. Wensley, Esq., hereby certify that the above "36A Industrial Way, LLC's Motion for Rehearing/Reconsideration Pursuant to RSA 677:2" has this date been delivered in hand to James Grant, Director of Building, Zoning and Licensing Services for the City of Rochester, and/sent by U.S. Mail, First Class, to James Grant, Director of Building, Zoning and Licensing Services for the City of Rochester, and to Terrance O'Rourke, Esq., Rochester City Attorney, and counsel for the Department of Building, Zoning and Licensing Services for the City of Rochester,

Dated: April 13, 2018


Danford J. Wensley, Esq.

EXHIBIT A

36A INDUSTRIAL WAY, LLC'S
MOTION FOR REHEARING/RECONSIDERATION
PURSUANT TO RSA 677:2

Section 42:14
“PERMITTED USES-TABLE 1, APPENDIX A,
ZONING DISTRICTS:
ZONING USES CATEGORY, (B) COMMERCIAL USES,
Sub-Par. (6) ‘Office’, Detail: Section 42.23 (c)(8)”

APPENDIX A
ZONING DISTRICTS [2] [3]

USES RESIDENTIAL USES (A)		A	R1	R2	BI	B2	II	12	13	14	14A	H	Detail
[1][86]	(1) Single-Family Dwelling	Y	Y	Y	Y	Y	N		NN	N	N	Y	
[1]	(2) Two-Family Dwelling	Y	N	Y	Y	Y	N		NN	N	N	N	42.15 (i)
[1]	(3) Multi-Family Dwelling	N	N	Y	Y	Y	N		NN	N	N	N	
[4]	(3a) Elderly Housing	E	N	E	E	E	N		NN	N	N	N	43.23 (c) (26)
[1]	(4) Lodging or Rooming House	N	N	Y	Y	Y	N		NN	N	N	N	
[1]	(4A) Group or Shared Home	E	N	Y	Y	Y	N		NN	Y	N	N	42.23(c)(24)
	(5) Hotel, Motel	N	N	N	Y	Y	E		EE	E	E	N	42.23(c)(3)
	(6) Inns, Cabins, Transient	E	N	N	Y	Y	N		NN	N	N	N	42.23(c)(3)
	(7) Cluster Development	Y	N	N	N	N	N		NN	N	N	N	42.24
	(8) Mobile Home	Y	N	N	N	N	N		NN	N	N	N	42.15(f)
	(9) Mobile Home Park or	Y	N	N	N	N	N		NN	N	N	N	42.15(g)
	(10) Modular Home	Y	Y	Y	Y	Y	N		NN	N	N	N	
	(11) Accessory Building or Use	Y	Y	Y	Y	N	N		NN	N	N	N	42.23(c)(28)
[94]	(12) Temporary Structure	Y	Y	Y	Y	Y	Y		YY	Y	Y	Y	42.15(n)
(B) COMMERCIAL USES													
	(1) Retail Store-Sale of Goods First Hand	N	N	N	Y	Y	E		EY	E	E	N	42.23(c)(22)
[5]	(1a) Adult-Oriented Establishments	N	N	N	Y	N	N		NN	N	N	N	42.15(1)
	(2) Grocery or Variety Store Not More Than 1,000 sq. ft	N	E	E	Y	Y	N		NY	N	N	N	42.23(c)(6)
	(3) Second Hand and Antique	E	N	E	Y	Y	N		NY	N	N	N	42.23(c)(10)
	(4) Manufacture of Goods Sold at	N	N	N	Y	Y	N		NY	N	N	N	42.15(d)
	(5) Monument Sales	N	N	N	N	E	N		NE	N	N	N	42.23(c)(15)
[11]	(6) Office	E	N	E	Y	Y	E		EY	E	E	N	42.23(c)(8)
	(7) Professional Office in Residence	Y	Y	Y	Y	Y	N		NN	N	N	N	42.15(c)
	(8) Service Establishment	N	N	N	Y	Y	N		NY	N	N	N	
	(9) Restaurant	E	N	N	Y	Y	E		EY	E	E	N	42.23 (c)(23)
	(10) Bank (Including Drive- In)	N	N	N	Y	Y	N		NY	N	N	N	
	(11) Laundry	N	N	N	E	Y	N		NY	N	N	N	42.23(c)(14)
	(12) Self-Service Laundry	N	N	N	Y	Y	N		NY	N	N	N	
	(13) Drive-In Business Service in	N	N	N	N	Y	N		NY	N	N	N	
	(14) Funeral Home	N	N	E	Y	Y	N		NY	N	N	N	42.23(c)(9)
	(15) Carpentry, Cabinet, Upholstery Sheet Metal and Sign Painting Shop		N	N	E	Y	N		NY	N	N	N	
[1]	(16) Filling Station	N	N	N	E	Y	N		NY	N	N	N	42.23(c)(11)
	(17) Auto and Truck Service Station, Sales, Repair Or Storage		N	N	N	Y	N		NY	N	N	N	
[95]	(18) Home Occupation	Y	Y	Y	Y	Y	N		NN	N	N	N	
	(18a) Bed and Breakfast	Y	N	Y	Y	Y	N		NN	N	N	N	42.15(c)(k)
	(19) Accessory Building or Use	Y	Y	Y	Y	Y	N		NY	N	N	N	

[continued, next page]

EXHIBIT B

36A INDUSTRIAL WAY, LLC'S
MOTION FOR REHEARING/RECONSIDERATION
PURSUANT TO RSA 677:2

**Rochester Zoning Board of Adjustment's
March 15, 2018 Letter, Re:**

**“Zoning Board of Adjustment Notice of Decision
Case No 2018-04”
Regarding March 14, 2018 Decision**



City of Rochester, New Hampshire

Building, Zoning & Licensing Dept.
33 Wakefield Street * Rochester, NH 03867
(603) 332-3508

Web Site: www.rochesternh.net

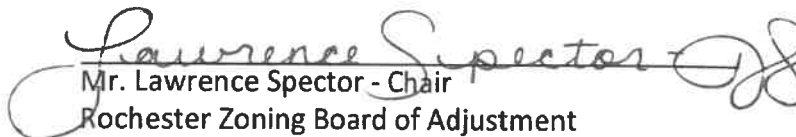
Zoning Board of Adjustment Notice of Decision Case No 2018-04

March 15, 2018

2018-04 36A Industrial Way LLC, applicants for a request to appeal an administrative decision according to Article 42.4 Section (a)(1).

Location: 36 Industrial Way, Rochester, NH 03867, 0230-0020-0000, in the Industrial Zone.

*The Administrative Appeal was **denied** as presented.*


Mr. Lawrence Spector - Chair
Rochester Zoning Board of Adjustment

It is the applicant's responsibility to obtain any applicable permits from local, state, and federal agencies. Contact the Department of Building, Zoning and Licensing Services at (603) 332-3508 ext. 1, to apply for any necessary permits and certificates. Any work completed within the thirty (30) day appeal period, explained below, is at your risk.

Note: Any person affected has a right to appeal this decision. A request for a rehearing is the first step of an appeal. The request must be submitted to the Department of Building, Zoning and Licensing within **thirty (30) calendar days**, starting the day after the decision is made. If a rehearing is not granted, the next step is to appeal to Superior Court within thirty (30) days. If a rehearing is granted, it is the responsibility of the original applicant to present the case to the Zoning Board, with the same obligations and following the same procedure used when the case was first heard.

cc: Danford Wensley
36 Industrial Way, LLC