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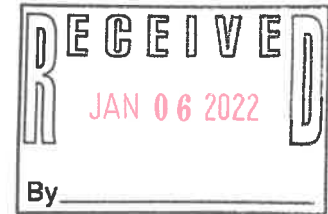
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January 3, 2022

City of Rochester
Department of Planning & Development
City Hall Annex
33 Wakefield Street
Rochester, NH 03867



RE: Case No. Z-21-30

**Tri City Consumers' Action Co-Op d/b/a Infinity Peer Support
55 Summer Street, Rochester, New Hampshire**

Motion for Rehearing Pursuant to RSA 677:2

To Whom It May Concern:

Please be advised, I represent Tri City Consumers' Action Co-Op in connection with its application for variance relative to 55 Summer Street, Rochester, New Hampshire.

On December 8, 2021, the Zoning Board of Adjustment conducted a hearing in the above-referenced matter and denied the application. Enclosed please find Infinity's Motion for Rehearing and related exhibits made pursuant to RSA 677:2.

If you have any questions or concerns, please feel free to reach out to me.

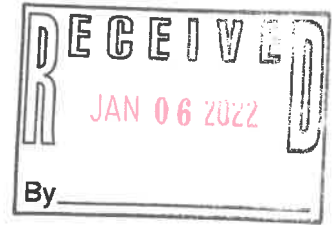
Sincerely,

A handwritten signature in blue ink, appearing to read "KfD".

Keith F. Diaz, Esq.

Enclosures
Cc: Client

**CITY OF ROCHESTER, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT**



Case No. Z-21-30

**Tri City Consumers' Action Co-Operative, d/b/a Infinity Peer Support's Motion
for Rehearing Pursuant to RSA 677:2**

On December 8, 2021, the Zoning Board of Adjustment (hereinafter "ZBA") conducted a hearing on Case No. Z-21-30 and denied Tri City Consumers' Action Co-Operative's (hereinafter "Infinity") application for variance. Pursuant to RSA 677:2, hereby submits this Motion for Rehearing. The ZBA's denial warrants a new hearing based on the following errors:

1. The ZBA committed reversible error in its mischaracterization of Infinity's variance application;
2. The ZBA's decision denying Infinity's application violates RSA 676:3;
3. The ZBA denied Infinity due process of the law when it precluded Infinity from meaningful access to the "Information and Recommendation" it relied upon in denying Infinity's application; and/or
4. The City erred in providing the ZBA incorrect information and recommendation upon which the ZBA erred in denying Infinity's application for variance.

1. The ZBA committed reversible error in its mischaracterization of Infinity's variance application

Evidenced by the text of the ZBA's December 8th Agenda (See Exhibit A), the ZBA fatally mischaracterized the basis of Infinity's variance: Infinity "seeks a Variance from Table 18-A to permit a Community Residence-1." The same text is identified in the first full sentence of the ZBA's Notice of Decision. (See Exhibit B). As a result, the ZBA committed reversible error

when it applied incorrect facts and analysis to all five criteria under 275-4.1B(1) of the City of Rochester Zoning Ordinance.

The ZBA's mischaracterization is a fatal error warranting a new hearing. The basis and origin of the error appears to originate from the City which provided the ZBA incorrect information and recommendation. The City mischaracterized Infinity's variance as a request to operate a Community Residence-1 in the Neighborhood Mixed Use District (hereinafter "NMU"). Since a Community Residence-1 is not allowed in the NMU District, the ZBA denied Infinity's variance application. However, Infinity did not request permission to operate a Community Residence-1 at its facility. Infinity requested permission to complement its current peer support program by adding another peer support program, STEP UP / STEP DOWN. For the reasons set forth in Infinity's variance application and further explained herein, STEP UP / STEP DOWN is neither a Community Residence-1 and/or any use identified in the City's zoning Table 18-A.

Infinity submitted its application for variance identified as case number: Z-21-30.

Infinity's application packet included the following items:

1. City of Rochester Variance Application;
2. Supplement to Variance Application;
3. Abutter's List;
4. Exhibits A-G;
5. Filing Fee; and,
6. Flash drive containing a .pdf of the foregoing items.

In its application, Infinity expressly requested a variance from the terms of the Rochester Zoning Ordinance, Ch. 275, Section 5.1 – 5.5. Section 5.5 pertains to the City's Neighborhood Mixed Use District ("NMU"), which is the zoning district under which Infinity since 2015 has been operating a free, non-medical, peer support based mental health wellness and recovery service to the public under contract with the State of New Hampshire. Infinity's variance

application concerns its request to add to its existing services STEP UP / STEP DOWN: a non-medical, peer support based mental health service created by the State of New Hampshire and favored by Governor Sununu as a solution to our state's need for the infusion of peer-based models to lessen the burden on medical facilities, including emergency departments. The program provides temporary lodging for participants qualified to receive peer support services. The lodging serves the purpose of providing qualified participants specialized peer support services while they await referral to mental health care facility and/or, upon discharge, provide services to integrate program participants back into the community.

One of the biggest problems facing health care today is mental health wellness care. More often than not, people dealing with a mental health crisis are quickly turned over to emergency personnel and emergency department care. In a recent case before our New Hampshire Supreme Court, Jane Doe v. Commissioner of the New Hampshire Department of Health and Human Services, __ N.H. __, Docket 2020-0454 (published May 11, 2021), the Court had the opportunity to address a legal issue arising out of our burdened health care system. In August 2020, Jane Doe was involuntarily admitted to the Dartmouth Hitchcock Medical Center in Lebanon, New Hampshire. Her admission to the emergency room lasted two weeks because Dartmouth did not have a receiving facility bed. According to Jane Doe, there were 60 people then waiting admission to the New Hampshire Hospital. Jane Doe was tenth in line. Jane Doe was eventually admitted to the New Hampshire Hospital and filed a petition for her release. Jane Doe eventually prevailed. Notwithstanding the particulars of Jane Doe's legal challenge at issue on appeal, the facts of the case underscore our state's need to infuse mental health services to lessen the burden on medical and/or clinical facilities and to find alternative ways to find placement for people in need of such care. The case highlights the obvious need to take action to remedy a long-standing challenge to address an underfunded and overstretched mental health

system. See NHPR Article: Following Loss In Court, Sununu Says N.H. Will Make Changes To Mental Health System May 13, 2021. See link to the actual article: <https://www.nhpr.org/nh-news/2021-05-13/following-loss-in-court-sununu-says-n-h-will-make-changes-to-mental-health-system>. Step Up / Step Down is designed to provide temporary lodging to accommodate the needs of qualified participants experiencing mental health crisis. Referrals to the program are made by area hospitals and must be screened by Infinity to ensure that participants can live independently, have a desire to participate in the program, and are capable of managing their medication. Participants cannot be homeless.

In its application, Infinity specifically asked the ZBA to grant it a variance to operate the STEP UP / STEP DOWN program in addition to its pre-existing peer support services operated in the NMU District. Due to the limited space afforded Infinity on the first page of the application form provided by the ZBA, Infinity expressly directed the ZBA to read an attached supplemental narrative to learn more information about STEP UP / STEP DOWN. The supplemental narrative provided the ZBA detailed information describing Infinity's existing permitted use within the NMU and further provided the ZBA detailed information it needed to properly characterize the operation of STEP UP / STEP DOWN as an extension of or complimentary service to Infinity's existing service. Infinity even included in its application a multipage contract defining STEP UP / STEP DOWN. See Infinity's Exhibit E, a six-page contract written by the State of New Hampshire which identifies in part the following material facts and conditions that characterize STEP UP / STEP DOWN:

3.5 Recovery Oriented Step-Up Step-Down Program

3.5.1 The Contractor shall operate a three (3) bed step-up / step-down program that provides short-term recovery-based transition services for individuals:

3.5.1.1 Transitioning from inpatient or institutional settings into the community; or

3.5.1.2 Who require more intensive supports to reduce the need for admission to an inpatient setting.

Further along, the contract provides:

3.5.5 The Contractor shall ensure Step-Up / Step-Down services are in place ... which include, but are not limited to:

3.5.5.1 Programs that are voluntary admission, short term, with overnight services.

3.5.5.2 Non-clinical peer supports, which includes access to a twenty-four (24) hour staff.

3.5.5.3 Policies that establish a ninety (90) day maximum stay limit per individual, per episode.

It is of vital importance to understand that foregoing description, while clothed in formal contract language, is about providing mental wellness services through peer support. STEP UP / STEP DOWN, like Infinity's current peer support services, is about establishing a connection and/or being in communion with trusted peers. This wellness model is proven to foster the ability to self-reflect and strengthen the individual in crisis (who often feels isolated) by creating a connection to community. In STEP UP / STEP DOWN, peers can work on and practice their wellness goals in a supportive setting while observing and learning from the goals of peers who have been through mental health challenges. STEP UP / STEP DOWN provides a supportive environment for people to develop their individual wellness plans. The program serves as a gradual and well-planned return to the community, increasing the chances of a successful recovery and reducing the risk of a psychiatric hospitalization. Staying locally allows an individual to remain connected to their support network.

Exhibit E also provides that a qualified participant in STEP UP / STEP DOWN is given their own private room with shared common areas. Qualified participants can come and go as they please, enabling them to continue work, school, and to visit their family and friends or attend groups outside of the home. Participants are expected to clean up after themselves, cook for themselves, and are in control of their own wellness plan. There are a variety of opportunities to try new things and explore methods of wellness that many not have been available to the person before. STEP UP / STEP DOWN is staffed 24 hours a day with trained

peer support specialists, all with their own unique lived experiences with mental health challenges. The program serves residents age 18 years or older who are ready to build mutually beneficial supportive relationships. Homeless people are not qualified to participate in the program.

The information provided in Infinity's variance application was purposed, in part, to inform the ZBA that the STEP UP / STEP DOWN program **did not** fall within any definition of a permitted use identified under Table 18-A and, therefore could not be characterized as a Community Residence-1 or Community Residence-2.¹ On the second page of Infinity's narrative, under the section "The Need for a Variance", Infinity informed the ZBA that STEP UP / STEP DOWN not fall under Table 18-A: "While the NMU District permits Infinity to use its building to provide daytime, peer support services, Table 18-A does not appear to provide a clear category of use matching BBH's [NH Bureau of Behavioral Health] SUSD [Step Up / Step Down] program contract requirements, including overnight stays not exceeding 90 days." Accordingly, it is patently clear that Infinity did not inform the ZBA that it sought a variance to operate a Community Residence-1 within the NMU District. Indeed, a Community Residence-1 (aka Boarding House) is a category of use within Table 18-A. Had Infinity entertained a belief that the STEP UP / STEP DOWN program was an activity consistent with a Community Residence-1, Infinity would have informed the ZBA that the STEP UP / STEP DOWN program is a use identified in Table 18-A. In consideration of Infinity's variance application read as a whole and, in particular, the foregoing quote, it is not clear what information or recommendation the City and/or the ZBA consulted to conclude that Infinity requested a variance to operate a Community Residence-1 within the NMU District.

¹ Community Residence-1 is a permitted use within the City of Rochester's Residential 2 District. It is not a permitted use in the NMU District.

At the outset of the December 8, 2021 hearing, when the ZBA clerk incorrectly announced to the ZBA and the public in attendance that Infinity sought a variance to operate a Community Residence-1 in the NMU District, undersigned counsel informed the ZBA that its public announcement evidenced a mischaracterization of Infinity's request for variance. Undersigned counsel informed the ZBA members that Infinity did not request a variance from Table 18-A to permit a Community Residence-1. Undersigned counsel further informed the ZBA members that the variance application was mischaracterized because the STEP UP / STEP DOWN program could never be characterized as a use consistent with Community Residence-1. Undersigned counsel explained that by definition a Community Residence-1 was a "dwelling" to which the City assigned a very narrow use that excluded lodging, transient, or short-term occupancy. Undersigned counsel also informed the ZBA that the City's definition of "dwelling" incorporated the term "dwelling unit" which involved the act of maintaining a household. See Article 2, City of Rochester Zoning Definitions Sec 275-2.2. Undersigned counsel explained to the ZBA members that STEP UP / STEP DOWN did not create a "dwelling" because the program afforded lodging, transient, or short-term occupancy that did not constitute the maintenance of a household. In response, the ZBA clerk indicated to undersigned counsel that she did not have access to the City regulations and/or immediate access to the City's attorney. The hearing proceeded notwithstanding the mischaracterization.

Therefore, a re-hearing must be granted as the ZBA was not properly informed of and/or did not understand Infinity's request for variance when it fatally mischaracterized STEP UP / STEP DOWN as a Community Residence-1.

2. The ZBA's Decision Denying Infinity's Application Does not Comply with RSA 676:3.

Pursuant to the requirements of RSA 676:3, the ZBA must issue a final written

decision which either approves or disapproves an application. If the application is denied, the ZBA “shall provide the applicant with written reasons for the disapproval.”

RSA 676:3, I. The ZBA’s Notice of Decision fails to comply with the statutory requirement as it does not reveal the “information and recommendation” the ZBA relied upon to deny Infinity’s application.

The ZBA’s Notice of Decision unambiguously states that it denied Infinity’s variance based on “information and recommendation” it received from the City. See Notice of Decision, p. 1. However, the Notice of Decision does not specifically cite, reference, identify, explain, and/or expound upon what “information and recommendation” it received from the City to justify its denial. Compounding the problem, the ZBA’s written decision on each of the five variance criteria resemble legal conclusions with no reference to factual findings and/or legal analysis (presumably from the City) to permit Infinity to understand what information and/or legal analysis the ZBA relied upon in its denial of the variance. See Cormier, Trustee of Terra Realty Trust v. Town of Danville ZBA, 142 N.H. 775 (1998)(ZBA denial reversed because it failed to support both its findings).

The failure of the ZBA’s written decision to provide reasoning for the basis of its denial is evident in its Notice of Decision. The following excerpts taken from the Notice of Decision state bald legal conclusions with no apparent connection to the “information and recommendation” of the City upon which the ZBA based its decision:

a. “The proposed use at the Property does not meet the character and function of a NMU District in General or of this one in particular.” The statement is mere legal conclusion and begs the question: why does Step Up ./ Step Down not meet the character of a NMU District? It is not apparent what “information and recommendation” the City provided the ZBA regarding “the proposed use of the Property.” If the City informed the ZBA that the facts it considered led it to

believe Infinity's proposed use was a Community Residence-1, then Infinity needs to know the facts and legal analysis to evaluate adequately the basis of the legal conclusion asserted by the ZBA.

b. Furthermore, the ZBA concluded: "The application fails to address the issue of the public health, safety, and welfare of the existing neighborhood." It is not apparent what information and recommendation the City provided the ZBA on the issue of public health, safety, etc... The ZBA again offers a legal conclusion with no reasoning to permit Infinity to evaluate the basis of same.

c. The ZBA next claims that the City informed and recommended that it should rely upon real estate experts to decide whether Infinity's STEP UP / STEP DOWN program diminished the values of surrounding properties. The ZBA concluded that Infinity failed to meet its burden on this element because it did not provide any expert testimony or evidence on this issue. The ZBA does not explain why an expert opinion was needed. Of note, the ZBA at the hearing granted a few other applicants' request for variances without any real estate expert testimony. Therefore, it is reasonable to infer that the ZBA does not believe that all applicants must provide expert opinions on the issue of property values. Given that the ZBA does not in every case require real estate expert opinions to evaluate property values, it is unclear in its written decision why Infinity needed to bring an expert to the hearing.

If the City provided the ZBA "information and recommendation" on the need for expert opinion, it is wholly absent from the ZBA's written decision. Infinity would like to believe that the City and the ZBA are acting in good faith in drawing lines of discrimination among applicants who may or may not require expert testimony. However, the ZBA's written opinion does nothing to explain the basis of their apparent belief that Infinity ought to have provided an expert.

d. The ZBA's finding relative to undue hardship is slightly more revealing than the conclusory findings evidenced in the foregoing variance criteria. Here, the ZBA premised its conclusion on a finding that Infinity failed to meet the undue hardship element because it deemed STEP UP / STEP DOWN to be a Community Residence-1 and, as such, is not permitted in the NMU District. The legal conclusion is incorrect because STEP UP / STEP DOWN is not a Community Residence-1. Notwithstanding, the finding is vague and unsupported because the ZBA did not explain in its decision what information and recommendation offered by the City supported a finding that Infinity requested a variance to operate a Community Residence-1 in the NMU District.

Given the conclusory nature of the ZBA's written decision, Infinity and/or a trial court on appeal cannot properly review whether the ZBA's stated legal conclusions, presumably an adoption of the City's take on Infinity's application, are in line with applicable law and sustainable as such. This is of particular consequence in view of the ZBA's mischaracterization of Infinity's variance and the fact intensive information and legal analysis upon which each of the five criteria must be evaluated and adjudicated.

The ZBA's written decision is conclusory and offers no reasoning to support its denial. Therefore, a re-hearing must be granted.

3. The ZBA denied Infinity Due Process of the Law When it Precluded Infinity from Meaningful Access to the "Information and Recommendation" it Relied Upon in its Decision to Deny Infinity's Application.

It is undisputed that the ZBA denied Infinity's variance application based on "information and recommendation" of the City. However, the "information and recommendation" it relied upon was not provided to Infinity prior to or during the ZBA hearing.

Furthermore, the City's "information and recommendation" is not apparent in the ZBA's written decision denying Infinity's application. It is unknown to what extent the City had private, non-public discussions with the ZBA regarding the City's "information and recommendation." It is unknown at this time to what extent the ZBA clerk and board members discussed among each other, prior to the hearing, the City's "information and recommendation." The failure of the ZBA to provide Infinity said "information and recommendation" is an arbitrary and capricious denial of Infinity's right to due process afforded it under statute, common law, and state and federal constitutions.

The procedural irregularities are even more evident when considering the conduct of the ZBA hearing in this matter. During the hearing, it became apparent that the ZBA clerk possessed a written document which was not provided to undersigned counsel before and/or during the hearing. It appeared to undersigned counsel that the ZBA clerk read from the document for the benefit of the ZBA. Undersigned counsel still does not know what document the ZBA clerk had in her possession. During the hearing, upon inquiry, the ZBA clerk publicly identified the document as something authored by the City attorney. The identity of the attorney was not made known to Infinity. Infinity's representative in attendance at the hearing, Director Melissa Silvey, asked the ZBA why the document had not been produced to Infinity or the public prior to the hearing. Ms. Silvey asked for a copy of the document. Undersigned counsel recalls that either the ZBA Chair or the ZBA clerk informed Ms. Silvey that the document was for ZBA use only. During the hearing, it was apparent to undersigned counsel that the document was not provided to Infinity under the guise that it was attorney-client work product. In any event, the document was not produced to Infinity.

It is not clear whether the document in the possession of the ZBA clerk is the source of the "information and recommendation" upon which the ZBA denied Infinity's application. If the

document is in any way connected to the ZBA's "information and recommendation" the ZBA ran afoul of its duty to afford due process when it chose not to provide Infinity meaningful access to the document which the ZBA relied on in denying Infinity's application. The procedural irregularity under the circumstances is particularly noteworthy given that the ZBA omits in its written decision the City's "information and recommendation" upon which it denied Infinity's application for variance. Such procedural irregularity goes beyond the pale of inadvertent mistake and is best characterized as arbitrary and capricious, especially given the fact that the ZBA's denial is based on "information and recommendation" which it chose not to share with Infinity. Reading parts of the document aloud in a summary fashion in the middle of a hearing, refusing to turn it over, and thereafter disclose to the public that the basis of denial was premised upon the same is not conduct worthy of a municipal board.

After the hearing, the following day, Ms. Silvey obtained a copy of a 4-page memorandum of law captioned "Application Z-21-30." See attached Exhibit C. It is unknown to what extent the memorandum of law is in whole or in part the source of "information and recommendation" relied upon by the ZBA in denying Infinity's application. It is unknown if the memorandum of law was in the possession of the ZBA clerk during the hearing. It is unknown who authored the memorandum. It may have been authored by the City attorney. The memorandum was not provided to Infinity prior to and/or during the hearing. Of note, the memorandum even accuses Infinity of being "deceptive" which is shockingly prejudicial given that the ZBA, conceding that it was influenced by the City's recommendation, refused to turn it over to Infinity at the hearing. Notwithstanding, review of the contents of the memorandum reveal unsustainable error and mischaracterization of the STEP UP / STEP DOWN program that will be addressed in the following section of this motion.

In view of the foregoing, Infinity requests a rehearing. When the rehearing is granted, the procedural irregularities occasioned at the last hearing cannot be repeated. The ZBA must disclose to Infinity and to the public, well in advance of the next hearing, ALL of the “information and recommendation” upon which the ZBA based its denial and disclose it well in advance of the next hearing.

4. The City erred in providing the ZBA incorrect information and recommendation upon which the ZBA erred in denying Infinity’s application for variance.

For the reasons set forth above, the ZBA fell short of its requirement to provide due process when in a capricious and arbitrary way it chose not to provide to Infinity the “information and recommendation” upon which it based its denial. Presently, Infinity is left to speculate what information and recommendation the City provided to each dissenting ZBA member. Out of the five votes, two members voted in favor of granting Infinity’s application, and two members voted in opposition. The ZBA Chair was the deciding vote in opposition of the application. Undersigned counsel recalls that the ZBA Chair, at a time prior to the vote, indicated on the record that he had decided the application based on the City’s position as he understood it. Undersigned counsel did not know at the time what information and recommendation the City provided the ZBA, let alone its Chair. As established above, the actual information and recommendation offered by the City and relied upon by opposition members is entirely unknown and absent from the record. Given that three dissenting members relied on the City’s information and recommendation, it is worth reviewing the contents of a certain legal memorandum authored by the City which the members likely consulted in one way or another. Therefore, Infinity offers the following in response and objection to the content of the City’s memorandum of law entitled: “Application Z-21-30.”

First, it is worth noting that the author of the memorandum² fatally mischaracterized Infinity's proposed STEP UP / STEP DOWN program as a Community Residence-1, which is a patent error given that a Community Residence-1 is a "dwelling" and the STEP UP / STEP DOWN program is not a "dwelling." Infinity explained in writing and at the hearing, and again in this motion, that STEP UP / STEP DOWN provides lodging, transient, or short-term occupancy, a use expressly excluded from the City's definition of "dwelling." In its application for variance, Infinity's Exhibit E, a six-page contract written by the State of New Hampshire, describes the STEP UP / STEP DOWN program identifying the facts and conditions that exclude consideration of Infinity's facility as a "dwelling" within the City's zoning regulations. An excerpt of Exhibit E's text was set forth earlier in this motion.

In operating the STEP UP / STEP DOWN program, Infinity would use 55 Summer Street to provide short-term lodging to voluntary participants. The overnight aspect of the program serves the purpose of providing voluntary participants a place to lodge while transitioning from inpatient services back into the community or lodging for participants awaiting referral to formal services. The use is not purposed for residency and/or maintaining a household. The STEP UP / STEP DOWN contract also requires Infinity to establish a written policy that limited lodging to no more than 90 days which means that Infinity could create a policy limiting lodging to a period less than 90 days. It is clear, therefore, that the STEP UP / STEP DOWN program is not purposed as a "dwelling" or a "dwelling unit" as such structures are not intended for transient or short-term occupancy. Accordingly, the STEP UP / STEP DOWN program cannot be characterized as a Community Residence-1. In error, the memorandum of law iterates through the five variance criteria premised upon this incorrect legal conclusion.

² The author is likely the City attorney.

Variance criteria 1-2 – Whether granting the variance is contrary to the public interest and the spirit of the ordinance.

The author of the memorandum argues that because Infinity seeks permission to operate the STEP UP / STEP DOWN program as a Community Residence-1 within the NMU District, the requested use is contrary to the policy considerations and/or public interest of the NMU District. In other words, taking into consideration the public interest and spirit of the NMU ordinance, the author concludes that a Community Residence-1 is zoned for operation in a Residential 2 or Agricultural District and, therefore, is outside the public interest and/or spirit of NMU zoning ordinance. See Table 18-A. However, the author's information and recommendation is premised on incorrect information that Infinity seeks a variance to operate a Community Residence-1 in the NMU District.

The author of the memorandum, proceeding under the incorrect assumption that Infinity sought a variance to operate a Community Residence-1, also provided the ZBA incorrect information and recommendation concerning the first to variance criteria when he/she argued that Infinity failed to address issues of public safety inherent in the definition of Community Residence-1:

COMMUNITY RESIDENCE-1 (or GROUP HOME)

A dwelling, licensed by or operated by a governmental agency, for the purpose of providing ongoing care and oversight to a special population of persons who are physically, mentally, or emotionally handicapped (as defined in Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988) or for orphans and neglected children. **Authorized supervisory personnel are present on the premises at all times.** A community residence-1 has no more than six individual residents. (See also "community residence-2" and "residential facility.") (emphasis added)

According to the memo, if Infinity were operating a Group Home it must show that "authorized supervisory personnel are present on the premises at all times." The memorandum misinforms

the ZBA because the STEP UP / STEP DOWN program is not a Group Home. Moreover, because the latter error was not disclosed to Infinity or the public prior to or at the hearing, Infinity was grossly disadvantaged because it could not correct the ZBA's misinformation, and/or Infinity was deprived of an adequate opportunity to explain any security concerns within the context of the STEP UP / STEP DOWN program. Of note, at the hearing, one of the ZBA members inquired about the dangerousness of the participants in the STEP UP / STEP DOWN program. Ms. Silvey explained that the program's admission policy is designed to exclude such people.

Adding to the foregoing misinformation and recommendation, the author of the City's memorandum at issue wrongly accused Infinity of being "deceptive" when Infinity in its variance application identified its present permitted use as a "personal services establishment." Having read the memorandum several times, undersigned counsel does not understand the import of the accusation within the context of the two variance criteria addressed at that point in the memorandum. The accusation, if considered by the ZBA as "information and recommendation" upon which it denied Infinity's application, is particularly prejudicial and even more so since the memorandum was deliberately kept from the Infinity and the public. It brings more emphasis to the aforementioned procedural irregularities occasioned by Infinity in this very public matter, and, quite frankly, leads one to question whether the author's inflammatory words and the secret nature of the memorandum were purposed to influence ZBA members. Under the circumstances, re-examination of the first two variance criteria is necessary to dispel the errors contained in the City's memorandum.

Public Interest and Spirit of the NMU Ordinance

A variance must not be contrary to the public interest and the spirit of the ordinance must be observed. Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577 (2005). The criteria

of whether a variance is contrary to the public interest should be construed together with whether the variance is consistent with the spirit of the ordinance. Id. at 580; see also, Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011). To be contrary to the public interest or injurious of public rights, the variance “must unduly, and in a marked degree” conflict with the basic zoning objectives of the ordinance. Chester Rod & Gun Club, at 581; and Harborside, at 514. “Mere conflict with the terms of the ordinance is insufficient.” Harborside at 514. To reach a determination, the ZBA should examine whether the variance would (a) alter the essential character of the locality or (b) threaten public health, safety, or welfare. Id. See also, Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102, 105-106 (2007); and Naser d/b/a Ren Realty v. Town of Deering Zoning Board of Adjustment, 157 N.H. 322 (2008).

Infinity, since 2015, has been operating as a Peer Support Agency under contract with the State of New Hampshire Bureau of Behavioral Health providing the public, free, non-medical, peer-support mental health services at 55 Summer Street. With the latter in mind, Infinity’s identified itself as a “personal service establishment” to describe its **present permitted use** of 55 Summer Street within the NMU District.³ Undersigned counsel examined Tables 18-A through 18-C and concluded that “personal service establishment” best matched Infinity’s **current use** of 55 Summer Street. See Sec. 275-2.2, Zoning Definitions (“Personal Services Establishments”). If the ZBA and/or the City have a different opinion regarding Infinity’s current, permitted use, then Infinity welcomes the discussion. However, Infinity’s current service -no matter what category it falls under within Table 18-B- is in line with the NMU District’s purpose and objectives: “The Neighborhood Mixed-Use District is established largely to serve adjacent

³ For reasons unclear, the author of the memorandum accused Infinity of being “deceptive” by identifying its present permitted use as a “personal service establishment.” There is nothing deceptive about the use of the term as it was intended to characterize Infinity’s present use of its property.

residential neighborhoods. The NMU District allows, for example, a small convenience store, laundry facility, real estate office, personal services establishment, and day-care center.” See Sec. 275-5.5 (NMU District)(emphasis added). Infinity’s present non-medical, peer-support mental health service, existing since 2015, is within the objective and function of the NMU. If this were not true, then Infinity would not have six years of evidence establishing otherwise.

With Infinity’s current services in mind, the ZBA should next consider whether the STEP UP / STEP DOWN program, the basis of Infinity’s variance application, is so different in character and use to its current operation within the NMU District that the STEP UP / STEP DOWN program falls outside the bounds of the public policy considerations and spirit of the NMU District. See Harborside at 514 (“Mere conflict with the terms of the ordinance is insufficient” to deny a variance”). The STEP UP / STEP DOWN program, the basis of Infinity’s variance, is purposed to be an extension of and/or complimentary operation of the peer support program Infinity presently operates within the NMU District. The STEP UP / STEP DOWN program is a free, non-medical, peer support mental health program. STEP UP / STEP DOWN is different from Infinity’s current services in that it provides short-term, transient lodging to no more than 3 program participants who need peer support to assist them in transitioning to formal medical care and/or out of clinical care and back into the community. The program works when such individuals are placed in direct contact with a group of peers – not medical professionals. Program participants are not just given temporary lodging. Instead, the participants are given lodging and direct access to Infinity’s day program participants as peer supports.

With the latter in mind, undersigned counsel looked to the City’s zoning tables to assess whether the STEP UP / STEP DOWN program squarely fit into any use category. The answer appears to be no; there is no perfect fit. The STEP UP / STEP DOWN program does closely resemble lodging:

LODGING FACILITY

A facility offering short-term overnight accommodations for paying transient guests. Visitors to a lodging facility have their primary residence elsewhere. See Sec. 275-2.2, Zoning Definitions.

The STEP UP / STEP DOWN program offers short-term overnight accommodation for paying transient guests participating in the program. The State of New Hampshire pays for the participant's lodging. However, the City's table of uses appears to identify "lodging" within the context of a "Bed-And-Breakfast", "Hotel", and "Motel" none of which are squarely in line with the STEP UP / STEP DOWN program. If the ZBA were to accept the STEP UP / STEP DOWN program generally as a use within the term "Lodging Facility" there is a direct connection between the STEP UP / STEP DOWN program and the purpose of the NMU District since Table 18-C indicates that types of lodging, like a bed-and-breakfast and a hotel, serve the NMU District. If the ZBA is not willing to characterize the STEP UP / STEP DOWN program as "lodging", the operation of the STEP UP / STEP DOWN program at 55 Summer Street, as an extension of Infinity's present peer support services, nevertheless, serves the public interest and/or spirit of the NMU District as a complimentary peer support service. The STEP UP / STEP DOWN program – like Infinity's current program – is part of the State of New Hampshire's 10-year goal to infuse meaningful non-medical, peer support services into communities throughout the state. Since the City acknowledges Infinity's present service to be in line with the purpose of the NMU District, then providing a complimentary extension of such services through the STEP UP / STEP DOWN is consistent with the public purpose and spirit of the NMU District.

Criteria 3 – Whether Granting the Variance Would Diminish Surrounding Properties

The author of the memorandum informed the ZBA that it “is encouraged to reply upon real estate experts, appraisers, economists, common sense, and the ZBA’s own knowledge of the area, observations, and experience.” Despite the list of options, the author informed the ZBA that Infinity “has not provided any expert testimony or evidence on this issue.” The author then wrote: “Common sense and experience can only lead to the conclusion that the value of these properties would be diminished if a Community Residence-1 opens next door.” The foregoing information and recommendation is confusing since on the one hand the author recommends expert testimony and on the other appeals to common sense and experience. In any event, the author’s information and recommendation regarding real estate value is erroneous as it is entirely premised on a mischaracterization that the STEP UP / STEP DOWN program is a Community Residence-1.

Moreover, Infinity does not understand what standard should be applied at the next hearing on this matter. During the December 8th hearing, all of the applicants that preceded Infinity did not present expert testimony. Some of the applicants had their variances approved without the aid of expert testimony. Guidance on the issue would be helpful.

At the hearing, undersigned counsel on two occasions provided the ZBA well thought out reasons why Infinity was not seeking a variance to operate a Community Residence-1 at 55 Summer Street. Based on the circumstances not known to undersigned counsel until after the hearing, ZBA was likely fixed on incorrect information and recommendation offered in the memorandum and/or through other misinformation and recommendation offered by the City that has not yet come to the surface. Of note, a ZBA alternate asked undersigned counsel if Infinity had a real estate expert. It is likely the case that this member asked the question based on the recommendation of the memorandum. Whatever the truth may be, undersigned counsel informed the ZBA alternate that Infinity did not have an expert and that one was not necessary

for two reasons: 1). Infinity was located within 700ft of every zoning district the City offered. That Infinity was located within 600ft of a busy United States Postal Service Distribution Center and other commercial and/or industrial establishments which, as a matter of common sense, were likely responsible for coloring the value of the residences located within NMU District. 2). For six years, and in full public view, Infinity has been providing public, non-medical, peer support mental health services at 55 Summer Street. The City would not have permitted Infinity to operate in the NMU District if its services were not in line with the District and/or in fact diminished surrounding property values in a meaningful way. In view of the foregoing, it is hard to grasp that a minimal expansion of Infinity's services (adding 3 short-term beds to complement existing non-medical, peer support mental health services) will have any impact at all on surrounding property values. As explained to the ZBA in the application and at the hearing, Infinity will not change the outside of its building. All changes will be made inside the building, are minimal, and in line with Infinity's present services as a Peer Support Agency. It is not apparent how such changes could change public perception and/or market values to warrant an expert, especially in a mixed-use district directly abutted by industrial facilities like a massive mail distribution center. If a buyer chose not to buy a home in the NMU, it's because the home is directly bordered by industrial and commercial uses far more conspicuous than three beds hidden within a building.

Criteria 4-5– Whether Infinity Failed to Prove an Unnecessary Hardship

On this issue, the memorandum, if it were considered as information and recommendation by the ZBA in denying Infinity's variance, provided misinformation warranting a new hearing. The author informed the ZBA that operating a Community Residence-1 inside the NMU District is not an unnecessary hardship. The premise of the argument is incorrect and,

therefore, the author's legal conclusion as it applies to the STEP UP / STEP DOWN program is also incorrect. The STEP UP / STEP DOWN program is not a dwelling and/or does not create a residence within the meaning of the City's zoning regulations. Accordingly, the memorandum erred when it concluded: "... the applicant has made no effort to demonstrate that the Property is different ... from the other properties in the area and, hence, uniquely burdened by Community Residence-1 not being permitted use in the NMU District."

Infinity, in its variance application and at the hearing, attempted to inform the ZBA that its current permitted use of 55 Summer Street as a facility providing free, non-medical, peer support mental health to the public was an important factor in evaluating the five variance criteria. By comparison to all other structures within the NMU, residential and commercial, 55 Summer Street has a central location among all other zoning districts, has a parking lot, and a building large enough to be modified from within to create the lodging needed to provide three bedrooms with storage, a bathroom, kitchen, and common room shared by peers and peer support staff. Infinity attached plans showing the new floor layout was feasible. In view of this, the building is uniquely situated and of such a unique physical construction to provide an important complimentary public service premised upon an existing peer service. To deny operation of the STEP UP / STEP DOWN program under the circumstances will result in an unnecessary hardship to Infinity. Perhaps overlooked by the City and the ZBA, the entirety of Infinity's services are premised on peer support, not clinical health care. The STEP UP / STEP DOWN program works when its participants are in communion with their peers, including the 20-25 day participants attending Infinity's peer programs. If not granted a variance, Infinity would have to split its peer support services into two separate, but related peer services buildings located in different zoning districts within the City or in a nearby municipality. Forcing Infinity to split up its programs by operating STEP UP / STEP DOWN in a different physical location is

expensive, impractical, and works against the purpose of peer support services backed by our state government.

For these reasons, the City's memorandum provides incorrect information and recommendation warranting a new hearing before the board.

Respectfully Submitted,

Tri City Consumers' Action Co-Operative
By Its Attorneys,

Nicholson Law Firm, PLLC

Date: January 3, 2022



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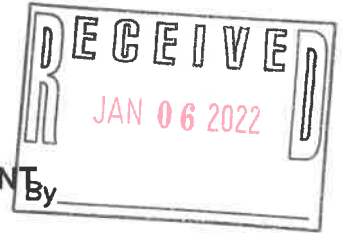
Board Members

Robert Gates, *Chair*
Larry Spector, *Vice Chair*
Leo Brodeur
James Hayden
Michael King
Paul Giuliano, *Alternate*
Matthew Winders, *Alternate*

Planning Board
Zoning Board
Conservation Commission
Historic District Commission
Arts and Culture Commission

AGENDA

CITY OF ROCHESTER ZONING BOARD OF ADJUSTMENT
Wednesday, December 8, 2021 at 7:00 p.m.
City Hall Council Chambers
31 Wakefield Street, Rochester, NH



1. Call to Order
2. Roll Call
3. Seating of Alternates
4. Approval of minutes from November 10, 2021
5. New Cases:

Z-21-27 Steven Hartford Seeks a *Variance* from Section 23.2 to permit the construction of a shed within the 10 foot setback. **Public Hearing**

Location: 5 Wilson Street, Rochester, Map 128 Lot 249 in the Residential-1 Zone.

Z-21-28 Patrick Casey Seeks a *Variance* from Table 19-A to permit the construction of an addition to a single family home within the side setback. **Public Hearing**

Location: 12 Orchard Street, Rochester, Map 117 Lot 5 in the Residential-2 Zone.

Z-21-29 Randi and Ryan Watson Seek a *Special Exception* from Table 18-C to permit a foodstand. **Public Hearing**

Location: 264 Pickering Road, Rochester, Map 257 Lot 59 in the Industrial Zone.

Z-21-30 Tri City Consumers' Action Co-Operative, d/b/a Infinity Peer Support Seeks a *Variance* from Table 18-A to permit a Community Residence-1. **Public Hearing**

Location: 55 Summer Street, Rochester, Map 117 Lot 68 in the Neighborhood Mixed Use Zone.

6. Other Business

7. Adjournment

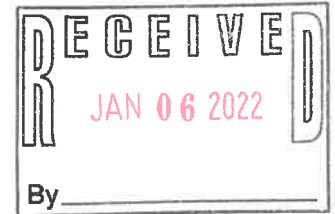


City of Rochester, New Hampshire

Zoning Board of Adjustment

December 14, 2021

Melissa Silvey
Tri City Consumers' Action Co-Operative d/b/a Infinity Peer Support
55 Summer Street
Rochester, NH 03867



Notice of Decision

Z-21-30 Tri City Consumers' Action Co-Operative, d/b/a Infinity Peer Support Seeks a *Variance* from Table 18-A to permit a Community Residence-1.

Location: 55 Summer Street, Rochester, Map 117 Lot 55 in the Neighborhood Mixed Use Zone.

At the December 8, 2021 meeting, the Zoning Board of Adjustment ***Denied*** the Variance based on the information and recommendation from the City, the applicant failed to prove all five criteria under 275-4.1.B(1) of the Zoning Ordinance including:

The proposed use at the Property does not meet the character and function of a NMU District in general or of this one in particular.

The application fails to address the issue of the public health, safety, and welfare of the existing neighborhood.

In determining if granting this variance would diminish the values of surrounding properties, the ZBA is encouraged to rely upon real estate experts, appraisers, economists, common sense, and the ZBA's own knowledge of the area, observations, and experience. The applicant has not provided any expert testimony or evidence on this issue.

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). 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). As the applicant has made no effort to demonstrate that the Property is different in any way from the other properties in the area and, hence, uniquely burdened by Community Residence-1 not being a permitted use in the NMU District, the application fails this criteria.

(cont. pg 2)

Shanna B. Saunders 12.14.21
Shanna B. Saunders,
Director of Planning & Development

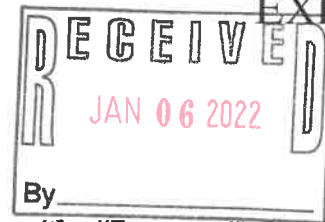
It is the applicant's responsibility to obtain any applicable permits from local, state, and federal agencies. Any work completed within the thirty (30) day appeal period, explained below, is at your risk.

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 Planning Department 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.

As Per RSA 674:33.I.a.(a)

Variances authorized by the Zoning Board of Adjustment, Rochester NH shall be valid only if exercised within 2 years from the date of this application.

Cc: View Point Z-21-28
File

Application Z-21-30

Criteria (a) and (b): Granting this variance to 55 Summer Street (the “Property”) would be contrary to the public interest and would violate the spirit of the ordinance.

The New Hampshire Supreme Court has suggested that ZBAs can consider these two conditions together. The Court directs ZBAs to consider two factor: 1. Whether granting the variance would alter the essential character of the neighborhood and 2. Whether granting the variance would threaten public health, safety or welfare. This requests fails both factors.

The function of a Neighborhood Mixed-Use (NMU) District is defined at §275-5.5 B (1) of the Zoning Ordinance: the NMU District is established largely to serve adjacent residential neighborhoods. The NMU District allows, for example, a small convenience store, laundry facility, real estate office, personal services establishments, and day-care center. The proposed use at the Property does not meet the character and function of a NMU District in general or of this one in particular. An overnight mental health facility would not serve the adjacent residential neighborhoods. It is clear that the applicant understood this because it chose to be deceptive in its application rather than confront this issue head on. In its application, the applicant states that NMU Districts allow for “personal services establishments to serve individual needs, including but not limited to mental health.” This is a deliberate mischaracterization of the City’s Zoning Ordinance. The Zoning Ordinance defines Personal Services Establishments as “establishments serving individual necessities, including but not limited to barber shops, beauty salons, and spas, massage services by masseurs/masseuses, personal laundry/dry-cleaning services, tattoo parlors, and travel agencies.” These types of uses would clearly serve the folks in the adjacent residential

neighborhoods. The proposed use here is Community Residence-1, specifically excluded from NMU Districts, with no service connection to the neighboring areas.

The application fails to address the issue of the public health, safety, and welfare of the existing neighborhood. The definition of Community Residence-1 states that “[a]uthorized supervisory personnel are present on the premises at all times.” From the vantage point of the City, this, at minimum, should mean that 24-hour security will be on site. The applicants only state that “peer certified staff will be on site 24 hours per day.” This peer certified staff, according to the applicant, provides peer support, education, wellness training, and short-term non-medical crisis programming. The applicant says nothing about security. The applicant says nothing about what happens in the middle of the night if a medical crisis occurs or if criminal behavior begins. This application does not adequately address any remediation efforts to be taken by the applicant to ensure the protection of the health, safety, and welfare of the existing neighborhood.

Criteria (d): Granting this variance would diminish the values of surrounding properties.

In determining this criteria, the ZBA is encouraged to rely upon real estate experts, appraisers, economists, common sense, and the ZBA’s own knowledge of the area, observations, and experience. The applicant has not provided any expert testimony or evidence on this issue. As such, the ZBA must ask itself the fundamental question: what effect will opening this facility most likely have on the value of surrounding properties? The applicant goes out of its way to name a handful of commercial/governmental uses near the Property. The applicant, however, is not giving the ZBA a true vision of the surrounding properties. 47, 47A, 48, 49, and 52 Summer Street are all single-family residences. 51 and 54 Summer Street are a four-unit multi-family and a duplex, respectively. The vast majority of the surrounding properties are residential. Common

sense and experience can only lead to the conclusion that the value of these properties would be diminished if a Community Residence-1 opens next door.

In the city, a Community Residence-1 is only allowed in certain zones by Special Exception. In analyzing a Special Exception application, the ZBA must consider whether the location is appropriate and if the proposed use would not be detrimental, injurious, obnoxious, or offensive to the neighborhood. Essentially, whenever this use is proposed, the ZBA must consider the impact on the existing neighborhood. In this case, the only conclusion one can reach is that the surrounding property values would be negatively affected by the approval of this variance.

Criteria (e): The Applicant has failed to prove an unnecessary hardship.

An applicant for a variance must show that its property is burdened by a special condition of the property itself, distinguished from others in the area, which make literal enforcement of the zoning ordinance an unnecessary hardship. In this case, the applicant would have to prove to the ZBA that the Property is different in some way from the surrounding properties and, because of that difference, not allowing it to operate the Community Residence-1 would cause it an unnecessary hardship. The applicant instead focuses entirely on the burden to the peer support program it is running. For the purposes of granting a variance, that appeal is entirely irrelevant. 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). 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).

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). As the applicant has made no effort to demonstrate that the Property is different in any way from the other properties in the area and, hence, uniquely burdened by Community Residence-1 not being a permitted use in the NMU District, the application fails this criteria.

As the applicant has failed to prove all five (5) criteria under §275-4.1.B (1) of the Zoning Ordinance, its Variance Application must be DENIED.