THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2017-0501

Rochester City Council

v.

Rochester Zoning Board of Adjustment, et al

Appeal Pursuant to Rule 7 from Judgment
of the Strafford County Superior Court

BRIEF FOR THE APPELLANT

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Oral Argument: Terence M. O'Rourke,
10 minutes

TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

1. Did the trial court err in affirming the decision of the Rochester Zoning Board of Adjustment to grant a variance to Donald and Bonnie Toy?

Issue preserved by Motion for Rehearing, Appeal pursuant to RSA 677:4, and Hearing on the Merits (App.77, App.99, and Tr. Trans.22-24).

2. Did the trial court abuse its discretion in denying the Rochester City Council's Motion and Supplemental Motion to Expand the Record?

Issue preserved by Motion to Expand the Record, Supplemental Motion to Expand the Record, and Motion to Reconsider (App.113. App.115, and App. 123).

STATEMENT OF THE CASE

On September 14, 2016, the Rochester Zoning Board of Adjustment (ZBA) granted two variances to Donald and Bonnie Toy (the "Toys") allowing the Toys to construct a new manufactured home park and to expand an existing manufactured home park. During the hearing, the Rochester City Council (the "City"), through its attorney, objected to the granting of the variance with particular emphasis on the applications failure to meet the "hardship" requirement of RSA 674:33, I (b) (5). In granting the variance, the ZBA specifically excluded a finding on the hardship requirement from its Motion to Approve and its Notice of Decision (NOD). The City subsequently filed a Motion for Rehearing which was denied by the ZBA without discussion. Thereafter, the City filed an Appeal of that denial with the Strafford Superior Court. After a Hearing on The Merits, the trial Court (Howard, J.) issued an Order affirming the decision of the ZBA. In affirming the decision, the trial Court erred by incorrectly stating and then incorrectly applying the standard of review, by misconstruing its obligations on appeal, by substituting the Court's judgment for that of the ZBA, by ignoring one of the City's causes of action, and by failing to find the ZBA's decision to be unlawful and unreasonable.

Also, prior to the Hearing on The Merits, the City filed a Motion to Expand the Record and a Supplemental Motion to Expand the record. The City sought to introduce evidence outside of the record to show that the ZBA, particularly Chairman Ralph Torr, impermissibly considered the wisdom of the Ordinance in granting the variance. Part of that evidence was a video of Chairman Torr stating that the only reason he voted for the variance was because he was upset about the change to the Ordinance. Torr made this statement AFTER the City filed its Motion to Expand the Record. The trial Court denied both Motions. In denying the Motions, the trial Court

abused its discretion by actively refusing to hear the truth as to why the ZBA issued an ambiguous and incomplete NOD.

STATEMENT OF THE FACTS

The Toys own a Manufactured Housing Park known as Addison Estates located at 414 Old Dover Road. The Toys purchased that property on July 30, 1996. App. 1. On April 22, 2014, the City Council passed an updated Zoning Ordinance. The updated Zoning Ordinance eliminated Manufactured Housing Parks from the Use Table and prohibited the development of new Manufactured Housing Parks in the City of Rochester. App.79.

On August 15, 2015, the Toys purchased 418 Old Dover Road (the "Property"). App.79. On September 16, 2015, undersigned counsel informed counsel for the Toys, Attorney Donald Whittum, that Manufactured Housing Parks were no longer a permitted use in the City of Rochester. App.79. On July 20, 2016, the Toys filed an Application for Variance to Table 18-A (the "Use Table") of the Rochester Zoning Ordinance (Chapter 42 of the General Ordinances of the City of Rochester) to allow for a Manufactured Housing Park to be developed on the Property even though that use is not allowed in the Use Table. App.77. On August 24, 2016, the Toys filed an Application for Variance to Chapter 42.30.c.1 to vary from the Zoning Ordinance dealing with expanding Non-Conforming Uses to allow the Toys to expand their Manufactured Housing Park, which is now a non-conforming use, onto the Property. App.1.

In the Toys' applications for Variances, under the section claiming an unnecessary hardship pursuant to RSA 674:33, I, (b) (5), the Toys claim it would be a hardship to force them to change their "existing, thriving business model"; that the Property abuts Addison Estates and "therefore expansion is organic"; and "[t]he hardship is that the ordinance is devoid of the ability to expand this high quality, style of development."App.4-5. The written application does not explain how the Property, as result of a specific condition or conditions of the property is burdened by the zoning restriction in a manner that is distinct from similarly-situated property.

On September 14, 2016, a Public Hearing was conducted by the ZBA on both variances. App. 29-76. In the oral presentation to the ZBA, the Toys, through their engineer Christopher Berry, reiterated that the "hardship" was caused by not being able to expand their "existing business style" (App.43); Mr. Berry claimed that lessees wanted to live in a park with a Manger (App.43); Mr. Berry stated that adjacent properties are of like kind (App.42); Mr. Berry stated that the variances would help the Toys' "business model" (App.42); Mr. Berry also questioned the wisdom of the change to the Zoning Ordinance which excluded Manufactured Housing Parks as a permissible use (App.32); and Mr. Berry explained how similar, **not different**, the Property was from the other properties around it. App.29-30,42. Mr. Berry never explained how the Property had a hardship as that term is understood in RSA 674: 33, I (b) (5).

During the Public Hearing, the City, through undersigned counsel, objected to the granting of both variances. App. 54. In particular, the City focused on the Toys' failure to prove the hardship element. App. 54. The City explained how the hardship requirement works and how the Toys had not met their burden of proof. App.54-55. The City also told the ZBA that it is not up to the ZBA to question the wisdom of a particular Ordinance; that is left to the governing body. App.58-59.

Following the City's presentation, members of the ZBA questioned why the City was present at the meeting. App.59. The City's Director of Building, Zoning, and Licensing Services (BZLS), James Grant, who also served as staff liaison to the ZBA, explained that the City Attorney was expressing the City's objection to the variance; Mr. Grant reiterated that the application failed to prove a hardship; and reiterated that the ZBA should not be hacking away at Ordinances with variances. App.60-61.

During deliberation on the application, ZBA Chairman Ralph Torr stated that "there's no hardship in any case" when granting variances. App.69. Chairman Torr provided the deciding vote in the 3-2 decision. App. 75. Chairman Torr also stated that "as far as that goes, we can bring up how this Chapter 42 was rewritten in the first place." App.66.

Chairman Torr expressed his displeasure with the elimination of manufactured home parks as an allowed use in the Zoning Ordinance, prior to the Toys' application and the hearing thereon, both privately and publicly, and on the record at City Council meetings and meetings of the Rochester Codes and Ordinances Committee. App. 113-114. Chairman Torr later, on February 21, 2017, on video during a City Council meeting, stated that he only voted to grant the variances to the Toys because he was upset with the changes to Chapter 42 and Chapter 43 of the Ordinance. App.115.

The ZBA issued its Notice of Decision (the "NOD") on September 14, 2016. App.108. In granting the variances, the NOD states that "[t]he variance will not be contrary to the public interest because: it will not negatively impact health and general welfare. The spirit of the ordinance is observed because: it will not compromise the provision of adequate light and air. If granted, the benefit to this individual applicant outweighs any harm to the community as a whole. The value of surrounding properties will not be diminished because: it will not generate levels of noise, light, activity or traffic that are significantly different from that which currently exists." App.108. The NOD specifically excludes any reference to the hardship requirement of RSA 677:33, I (b) (5) and makes no findings of fact which could support such a finding.

The NOD does not state that the Toys met all five requirements for receipt of a variance under RSA 677:33. Further, Ordinance 42.4.a.2 on Variances states that a variance can be granted only if the ZBA "determines that all" five criteria "are met." Further, the Toys did not

present adequate evidence for the ZBA to make a finding that unnecessary hardship would result from the literal enforcement of Table 18-A and Chapter 42.30 of the Rochester Zoning Ordinance.

On October 4, 2016, the City Council voted to authorize the City Attorney to file a Motion for Rehearing. On October 5, 2016, the City Council, by and through the City Attorney, filed a Motion for Rehearing pursuant to RSA 677:2. On November 9, 2016, the ZBA placed the Motion for Rehearing on their agenda. On that date, the City Attorney made a presentation to the ZBA seeking a Rehearing. App.86-90. On that same date, the ZBA opted to table the Motion until the next hearing in December, 2016. App.92. On December 14, 2016, the ZBA voted to deny the City Council's Motion for Rehearing without discussion. App.96. After the vote was final, ZBA Member Robert Gates utters "See you in Court. Waste of taxpayer's funds." App. 97. On January 3, 2017, the City Council voted to authorize the City Attorney to file an Appeal on the Denial of Motion for Rehearing pursuant to RSA 677:4. Said appeal was filed by the City on January 5, 2017.

Prior to the Final Hearing on the Merits, the City filed a Motion to Expand the Record and a Supplemental Motion to Expand the Record. App.113 and App.115. Both motions sought to introduce evidence of Chairman Torr's statements regarding the changes to the Zoning Ordinance surrounding manufactured home parks. The trial Court denied the motions and the follow-on Motion for Reconsideration. App. 117 and App.133. The Final Hearing was held on May 8, 2017 and the trial Court issued its Order affirming the ZBA's decision on July 18, 2017. App.134. This Appeal followed.

SUMMARY OF THE ARGUMENT

As to the first question presented, the trial Court erred in upholding the ZBA's decision because the decision to grant the variance was both a legal error and unreasonable. In coming to this conclusion, the trial Court incorrectly stated the legal standard for deference to ZBA decisions and then incorrectly applied that standard to the present case. Essentially, the trial Court conflated the findings of fact with the decision to grant the appeal and believed that case law required a judge to search for any evidence to justify the decision as case law requires for findings of fact. This lead the trial Court to play a game of "could have" to justify the ZBA's decision. Next, the trial Court misconstrued its obligation on appeal. The Court stated that it was obligated to simply examine the record before it, be as deferential as possible and then find any way to justify the ZBA's decision. The Court ignores the fact that it could have taken additional evidence or it could have remanded the case to the ZBA for clarification. Third, the Court substituted its judgment for that of the ZBA. The ZBA's judgment was encapsulated by the NOD. The NOD deliberately avoided making a judgment as to the hardship element. The trial Court then stepped in as a "super zoning board" to describe all the ways that the hardship element could have been met.

Fourth, the trial Court inexplicably ignored one of the City's causes of action. The trial Court only ruled on the City's contention that the decision was invalid for not finding the hardship element. The City also appealed the decision based upon the fact that the ZBA impermissibly considered the wisdom of the Ordinance in granting the variance. The trial Court did not address this issue at all in its Order. Finally, the trial Court could not have found the decision by the ZBA to be legal or reasonable based upon the record before it. The ZBA's decision was invalid on its face because they did not find that all five criteria under RSA 674:33,

I had been met. Without such a finding, a variance cannot be granted. As such, the ZBA's decision could not have been upheld.

As to the second question, the trial Court abused its discretion in denying the City's Motion and Supplemental Motion to Expand the Record. Granting a variance without determining that all five criteria are met is patently unreasonable. In this case, it was intimated on the record that Chairman Torr was voting for the variance due to an ideological difference he had with changes to the Zoning Ordinance regarding manufactured home parks. A trial court may hear additional evidence if it will assist it in evaluating the reasonableness of a decision. The additional evidence proffered by the City, i.e. Torr's admission that he only voted for the variance because he objected to the Ordinance change, would have assisted the trial Court in determining that the granting of the variance was unreasonable. Refusing to hear this evidence is a blatant abuse of discretion by the trial Court.

STANDARD OF REVIEW

On review of a trial court's rulings on an Appeal on Denial of Motion for Rehearing Pursuant to RSA 677:4, this Court has outlined its approach as follows:

> "We will uphold the superior court's decision on appeal unless it is unsupported by the evidence or legally erroneous. For its part, the trial court in reviewing the decision of a zoning board of adjustment, is limited to a determination of whether, on the balance of probabilities, the decision was unlawful or unreasonable. To the extent the ZBA made findings upon questions of fact properly before the court, those findings are deemed *prima facie* lawful and reasonable. The review by the superior court is not to determine whether it agrees with the zoning board of adjustment's findings, but to determine whether there is evidence upon which they could have reasonably based."

Lone Pine Hunters' Club, Inc. v. Town of Hollis, 149 N.H. 668, 669-670 (2003) (internal quotations and citations omitted)

I. THE TRIAL COURT'S DECISION TO DENY THE CITY'S APPEAL WAS UNSUPPORTED BY THE EVIDENCE AND LEGALLY ERRONEOUS

a) *The trial Court misconstrued the standard of deference to be given to ZBA decisions and then misapplied the standard to this case*

In *Lone Pine*, this Court stated that when a ZBA makes a finding of fact, a Superior Court judge is not allowed to determine whether it agrees with those findings, but is limited to determining whether there is evidence upon which those findings could have been reasonably based. *Id.* In the present case, the ZBA made a motion to grant the variance and in that motion made only three findings of fact. App. 72. That motion and findings of fact became the basis for the NOD issued by the ZBA. App.108. The ZBA did not determine that the Toys had met their burden regarding the fifth prong of the RSA 674:33, I (b) or the so-called "hardship element." In fact, the ZBA expressly made no determination on that prong after the City objected to the

issuance of the variance upon the failure of the Toys to provide adequate evidence of proof as to the fifth prong. App.59.

In its Order, the trial Court recognized that the ZBA had not made a determination as to the fifth prong or "hardship element" of RSA 674:33, I (b). App. 140. The trial Court then went a step too far in stating that it must assume that the ZBA made that determination, i.e. the ZBA found hardship because it granted the variance. App. 140.The trial Court then states that it must apply the "deferential standard" to the ZBA's phantom determination as to hardship. App. 240. Using this novel standard, the trial Court then proceeds to outline all the findings of fact the ZBA "could have reasonably" made based on the evidence before it to determine that the hardship element was met. App.140-141.

The process employed by the trial Court is not the state of the law in New Hampshire. In order to apply the "deferential standard" the ZBA must make a finding of fact. This Court has clearly articulated this standard by stating that when reviewing a land use board's decision, review of "factual findings is limited to determining whether there is evidence upon which the findings could have reasonably been based." *Ware v. Town of Wilmot*, 2017 N.H. LEXIS 99, page 1 (2017). Factual findings made by the board is what triggers the "deferential standard." In the present case, the ZBA made no factual findings regarding hardship and, in fact, made no decision regarding hardship at all. Even if the ZBA had stated that the hardship standard was met, the deferential standard applies to factual findings, not determinations of whether the five prongs have been met. Review of those determinations is limited to "whether, on the balance of probabilities, the decision was unlawful or unreasonable." *Lone Pine*, at 670.

Hence, the trial Court's explication of what the ZBA "could have" found to justify a determination that hardship was met was an incorrect understanding and use of the prevailing

legal standard. The trial Court's decision to affirm the ZBA's granting of the Toys' variance based upon its incorrect understanding and application of the "deferential standard" is legally erroneous and grounds for this Court to vacate the decision.

b) *The trial Court misconstrued its obligations and authority on appeal*

In the Order, the trial Court stated that "[i]n the absence of an express finding of hardship when the application is granted, this court's obligation on appeal is to examine the record, and employing the deferential standard articulated earlier, determine whether the evidence supports the decisions." App. 140. As stated above, the trial Court incorrectly states how the "deferential standard" is applied. However, the trial Court is also incorrect as to its obligation in the instant case. The trial Court had several options in the face of this decision by the ZBA. Both State law and local Ordinance require that the ZBA find that an applicant has met its burden on all five prongs before issuing a variance. In this matter, the ZBA issued a variance without making such a finding. That means the decision does not clearly match up with the actual record. This makes the ZBA's decision unclear at best.

The trial Court took this ambiguity and simply stated that the ZBA surely must have found all five elements. More than that, the trial Court stated it was "obligated" to do so. This is a legal fallacy. In *Kalil v. Town of Dummer Zoning Bd. of Adjustment,* 155 N.H. 307 (2007), this Court dealt with a situation in which a Superior Court judge in an Appeal case had found a decision unclear and remanded it back to the ZBA for clarification. In upholding the decision, this Court stated that when confronted with an appeal, a Superior Court judge can take "several" approaches including reviewing the case based upon the decision and record before it; taking additional evidence; or remanding the decision to the ZBA to permit clarification of an unclear decision. *Id.* at 310.

When the trial Court stated it was "obligated" to simply examine the record, that was not true. In fact, the City had attempted to get the Court to review additional evidence by way of Motions to Expand the Record, but the Court refused. App. 117. The Court could have remanded the obviously incongruent NOD back to the ZBA for clarification, but it did not. Instead, the trial Court simply amended the ZBA's NOD to include a determination that hardship had been met and then searched the record to justify such a determination. This course taken by the Court was premised on an understanding of its authority which is legally erroneous and, as such, the Order should be vacated.

c) *The trial Court impermissibly substituted its judgment for that of the ZBA*

The record in this case on exactly what the ZBA determined is clear. Their motion approving the variance is part of the record. App. 72. Their approval of the variance is memorialized in the NOD. App.108. The ZBA stated it was granting the variance because: "[t]he variance will not be contrary to the public interest because it will not negatively impact the health and the general welfare. The spirit of the ordinance is observed because it will not compromise the provisions of adequate light and air. If granted, the benefit to this individual applicant outweighs any harm to the community as a whole. The value of the surrounding properties will not be diminished because it will not generate levels of noise, light activity, or traffic that are significantly different from that which currently exists." App.108. The ZBA specifically made no determination that the hardship element or fifth prong of RSA 674:33, I (b) had been met.

This decision regarding the hardship element did not happen in a vacuum. The City attended the September 14, 2016 Public Hearing on the variance and vehemently objected to its issuance because the hardship element had not been met. App.28-33. Thereafter, members of the

ZBA questioned the authority of the City Attorney to represent the City, but never asked one question regarding the hardship element. App.33. In its Order, the trial Court claims that the ZBA "considered the hardship issue." App. 140. Here was the discussion:

> Vice Chairman Spector: I just want to say something that the--
> Member Gates: Go ahead.
> Vice Chairman Spector: The city attorney did bring up something.
> Chairman Torr: What's that?
> Vice Chairman Spector: That there is no hardship. There isn't.
> Chairman Torr: Well, when you look at that case, there has never been. Of the 17, 18 years I've been here, there's no hardship to any case if you want to look at it that way. If a guy wants to put a storage shed five feet from the line, there's no hardship there.
> Vice Chairman Spector: And we've cancelled cases because of hardship before, so.
> Chairman Torr: Well, anyway, enough talk.
>
> App.69-70.

The ZBA then voted to grant the variance without a hardship being found. App.75.

The decision to specifically omit a determination regarding the hardship element was just as much an affirmative decision as the ZBA's decision on the other four elements. The ZBA decided that they did not need to find hardship to issue a variance. Chairman Torr, the third and deciding vote on the variance, specifically stated that in his 17 or 18 years on the ZBA there has never been a hardship in any case. This was not a mere oversight or Scrivener's Error, the ZBA made the affirmative decision to NOT make a determination on the hardship element. Silence in the face of specific accusations has long been considered an admission in our State. *Corser v. Paul,* 41 N.H. 24 (1860). When faced with the City's objection, the ZBA simply remained silent on the hardship element, an admission by omission that the Toys had not met their burden of proof on that required prong.

A Superior Court review of a ZBA's decision is limited and it "may not engage in *de novo* review of the board's findings or otherwise act as a 'super land use board'." *Ware*, at1. In the present case, that is exactly what the trial Court did. The ZBA chose not to not include the hardship determination as part of their decision. That was their choice and decision to make. The

trial Court stepped in as a "super land use board" and decided that the hardship element had been met. Going even further, the trial Court lays out the findings of fact it would have made to uphold the hardship determination through a "could have" exercise within the Order. App.140-141.This is totally impermissible. The trial Court is not empowered to fix insufficient decisions of a ZBA; their task is only to review them for illegality and reasonableness. As shown herein, the ZBA's decision was both an error of law and unreasonable. The trial Court should have held them to account for their actions. Instead, the trial Court tried to justify their failure. That attempted justification is totally out of bounds and requires the Order to be vacated.

d) *The trial Court failed to address all of the City's causes of action*

While the main thrust of the City's argument against the issuance of the variance to the Toys was the failure to prove a hardship, it was not the only argument. The City also claimed that the ZBA had impermissibly granted the variance because the ZBA disagreed with the Zoning Ordinance concerning manufactured home parks. This claim was in the Motion for Rehearing (App.81) and the Appeal to the Superior Court. App.104-105. In fact, the Toys specifically argued that the City made a mistake when it amended its zoning ordinance to remove manufactured housing parks from the table of permitted uses. Christopher Berry, representing the Toys, stated that "Rochester has what I perceive as a problem in that somewhere along the way mobile home parks or manufactured housing parks were expressly eliminated from the table of permitted uses....by doing this, it's my opinion, and certainly my applicant's opinion, that you've completely eliminated the ability for existing age-restricted parks to be expanded reasonably. And by doing that, you are removing the ability for age-restricted housing to be developed in the city in this format." App.32.

The City responded to Toys argument in its presentation at the September 14, 2016 Public Hearing. Undersigned counsel stated "[a]nd just on a final note and this is not meant to insult you guys, but the ZBA cannot change or rewrite an ordinance. I think you all know that. And, as the courts have said, the wisdom of a particular ordinance, it's for the governing body. It's for the City Council to consider, not the ZBA. If one disagrees with this Ordinance, and I'm sure there are many out there who do, the correct path is to change the Ordinance through the Planning Board and through the City Council, not to hack away at it with variances. Again, Mr. Berry tonight questioned the wisdom of particular changes to Chapter 42 in his presentation. Again, that's a policy differential, folks, and that's not a problem to be solved by a variance." App.58.

Despite the City's admonition, the ZBA did consider the Ordinance itself in deciding the matter. Chairman Torr alluded to the Toys' argument and his agreement with it by stating that "and as far as that goes, we can bring up how this Chapter 42 was rewritten in the first place." App. 66. Chairman Torr then cast the deciding vote in favor of the variance. App.75.

It is not up to the ZBA to rewrite an ordinance. If one disagrees with an ordinance, the correct path is to change it through the Planning Board and the City Council, not to hack away at it with variances. This sort of second guessing of Ordinances by the ZBA is wholly inappropriate and an affront to our form of government. The ZBA cannot change or rewrite an ordinance. The wisdom of a particular ordinance is a consideration for the City Council and not for the ZBA, or, even for the Courts. The ZBA is only to be concerned with how a particular ordinance applies to a particular piece of property. *New Hampshire Practice Series*, 15-24 Land Use Planning and Zoning § 24.12, Matthew Bender & Company, Inc., 2015.

The City asked the trial Court to review the fact that the ZBA had considered the underlying Ordinance as part of their decision-making process in granting the variance. The City filed two Motions, which the trial Court denied, to expand the record to shed more light on the motivations underlying Chairman Torr's statement regarding the changes to the Zoning Ordinance. The City argued, at the Final Hearing on the Merits, that the variance was improperly granted based on the Ordinance change and not the five criteria. The City stated that "[t]he applicants specifically argue that the City made a mistake when it amended the Zoning Ordinance to remove manufactured housing from the table of permitted uses. Chairman Torr alluded to his agreement with this position by stating we can talk about how this thing was rewritten. It's not up to the ZBA to rewrite it. The wisdom of a particular ordinance is for the City Council to decide, not the ZBA. If one disagrees on an ordinance, the correct path is to change it through the Planning Board and City Council, not hack away at it with variances. In sum, the variance application amounts to no more than a policy disagreement with the City Council and the Planning Board. It should have been denied by the ZBA. They failed to do their jobs." Tr. Trans.24.

Despite this cause of action being part of the City's argument in front of the ZBA, in the Motion for Rehearing, in the written Appeal, and during oral argument at the Final Hearing on the Merits, the trial Court completely ignored it. It is not mentioned anywhere in the trial Court's Order. The trial court is supposed to review the ZBA's decision to see "whether, on the balance of probabilities, the decision was unlawful or unreasonable." *Lone Pine*, at 670. Voting to approve a variance because one disagrees with the underlying Ordinance is neither lawful nor reasonable. That is exactly what happened with the vote of Chairman Torr, the deciding vote.

Yet, the trial Court did not address the issue at all. Failing to address this cause of action renders the trial Court's decision clearly erroneous.

e) *The evidence and the law do not support the trial Court's decision*

The Superior Court is tasked with reviewing a ZBA decision for lawfulness and reasonableness. The bare record in this case shows, without question, that the ZBA's granting of the Toys' variance was unlawful and unreasonable. For the trial Court to uphold the decision despite its infirmities makes the trial Court's Order legally erroneous and unsupported by the evidence. Both areas will be dealt with in turn.

There is only one way for a ZBA to legally grant a variance: the ZBA must find that the applicant has met ALL five criteria required by RSA 674:33, I, (b). Rochester Zoning Ordinance 42.4.a.2[1] explicitly states that the ZBA "may authorize..a variance...if it determines that all of the" criteria are met. The ZBA "may grant a variance **only** if the applicant has satisfied [the] five conditions" contained in RSA 674:33. *Saturley v. Hollis*, 129 N.H 757, 759 (1987)(emphasis added). In the present case, the ZBA did not find that all five criteria had been met. It is clear from the record, that the decision by the ZBA to grant this variance was unlawful and unreasonable. The ZBA is required to find that each and every one of the five criteria under RSA 674:33, I (b) are met. The ZBA clearly did not find that the hardship criteria of RSA 647:33, I (b), (5) was met because it specifically omitted such a finding from the Motion of Approval which became the NOD. Further, Chairman Torr stated, before the vote of approval, that they never find hardship. As clearly demonstrated in the Public Hearings related to the application

[1] Rochester Zoning Ordinance 42.4.a.2 states: The board may authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if it determines that all of the following conditions are met:

A. The variance will not be contrary to the public interest;
B. The spirit of the ordinance is observed;
C. Substantial justice is done;
D. The values of surrounding properties are not diminished; and
E. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

and the subsequent Motion for Rehearing, the ZBA never took the City's objections seriously and never seriously considered the merits of the application; in fact, as evidenced by the statement of Member Gates, they were flippant. They did not think the law applied to them. It does.

On top of the behavior of the ZBA, the Toys did not present sufficient evidence which would have allowed even a neutral board, following the law, to make a hardship finding. A party seeking a zoning variance bears the burden of establishing each requirement of RSA 674:33, I, (b). *Simplex Tech., Inc. v. Town of Newington*, 145 N.H. 727 (2001). The Toys written application was insufficient. The written application made the following hardship arguments displayed below in italics:

1. *Property is vacant, adjacent to other vacant parcels and an existing park* (App.4): The fact that it is vacant is not a special condition; all land starts that way. Moreover, it's no different than the other vacant parcels around it. As to the existing park, that is not a special condition of THIS property; it has nothing to do with the conditions on this property. 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).

2. *Same owner runs a "thriving" park next door* (App.4): Again, this has nothing to do with the conditions on the property; this is an appeal to the plight of the individual owner. 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).

3. *Location of wetlands makes park style preferable* (App.4): Application does not say that these wetlands make the property distinct from others in the area; it looks the same as next door properties. Conservation Subdivision or Cluster Subdivision, 42.33 of the Zoning Ordinance, which is permitted, would accomplish the same thing without a variance. Christopher Berry in the Applicants' presentation to the ZBA even discusses this type of subdivision which he calls a "Open Land Subdivision" and admits that this project could be completed as an Open Land Subdivision. App.41. The fact that the use the Toys want to make of the Property is not permitted does not amount to a hardship. Claiming a hardship based upon the fact that a sought use is not allowed in any of the city's zoning districts does not meet the requirements of RSA 674:33, I, (b) (5) without demonstrating that the property is unique and that the property is burdened by the zoning restriction in a manner that is distinct from similarly-situated property. *Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 752 (2007).

The Toys presentation at the September 14, 2016 Public Hearing did nothing to meet their burden as to hardship either. During the portion of the Toys presentation specifically dealing with RSA 674:33, I, (b) (5), the following arguments, displayed in italics, were put forth for the Toys by Mr. Berry:

1. *Topographics are congruent with the next door property* (App.32): That's the exact opposite of a special condition. The Toys argued they had a hardship because the Property was the same, not different, from the property abutting it.

2.*Eliminated ability to expand existing mobile home parks* (App.32): This questions the changing of the Ordinance, not a condition of the property and this is not a valid argument; "The policy of zoning law is to carefully limit the enlargement and extension of nonconforming uses. The ultimate purpose of zoning regulations contemplates that nonconforming uses should be

reduced to conformity as completely and rapidly as possible." *New London Land Use Ass'n v. New London ZBA*, 130 NH 510, 518 (1988). Being a Nonconforming use is not a hardship to the property at all, but rather a reality the owner must deal with going forward.

3. *Surrounding properties are of like kind* (App.42) Again this is not a special condition of the Property. The Applicant is saying the Property is actually the same as those surrounding it.

4. *Hardship* (App.43): "Existing business style is unable to continue"; "Places burden on applicant and potential lessees." "Potential lessees want to live in a park with a manager." This argument, again, is about the owner, not the property.

5.Adjacent to an existing park (App.44): This is simply not a special condition of the property. All properties that abut mobile home parks are in the exact same position. It nothing to do with the conditions ON the property.

6.Existing business model of the owner (App.44): Yet again, this has nothing to do with the property; it pertains only to the owner and his business and is, thus, not a hardship for the purposes of granting a variance.

After being presented with the Toys applications, their Public Hearing arguments, and the objection of the City, the ZBA voted to grant the variance and made three findings of fact to support that action:

1. The proposed use will not negatively impact health and the general welfare.

2. The proposed use will not compromise the provision of adequate light and air.

3. The proposed use will not generate levels of noise, light, activity or traffic that are significantly different from that which currently exists.

App.72

Those are the only findings of fact made by the ZBA. There is not a single finding of fact that would support the conclusion that the Toys established the hardship criteria of RSA 647:33, I (b), (5). There was not a single statement in the hearing of September 14, 2016 that indicated that the members of the board believed that the Toys had a hardship, which makes sense, because the Toys have no hardship related to the property. In fact, as noted above, Chairman Torr does not think hardships ever exist; he clearly thinks the requirement is superfluous. App.69.

Had the ZBA done its job, it would not have been able to find that the applicants met the criteria of RSA 647:33. The applicants have no hardship as the term is understood in RSA 674:33, I (b) (5). When you boil it all down, the applicants just want to expand their lucrative mobile home park and feel put upon by the City because they are not allowed to do so. The applicants made no arguments that the property in question had an "unnecessary hardship" owing to special conditions of the property that distinguish it from other properties in the area. In fact, the applicants went out of their way to tell the ZBA how similar the property was to others in the area which made it just perfect for expansion of the existing park.

The applicants specifically argued that the City made a mistake when it amended its zoning ordinance to remove manufactured housing parks from the table of permitted uses. Chairman Torr alluded to his agreement with this position by stating that "we can talk about how this thing was re-written." App.66. It is not up to the ZBA to rewrite an ordinance. The wisdom of a particular ordinance is for the City Council to decide, not the ZBA. If one disagrees with an ordinance, the correct path is to change it through the Planning Board and the City Council, not hack away at it with variances.

In sum, this variance application amounts to no more than a policy disagreement with the City Council and the Planning Board. It should have been denied by the ZBA. They failed to do

their job and the trial Court failed to do its job to carefully review the record and find by the balance of probabilities that the actions of the ZBA were unlawful and unreasonable. As evidenced by Member Gates Motion to Approve and the NOD, the ZBA did not find that the applicants had met the hardship requirement of 674:33, I (b) (5). The trial Court should have respected that finding and relied upon it to vacate the granting of this variance.

Instead, the trial Court, as discussed above, decided to act as a "super land use board" and wrote the Order, not confirming the ZBA's decision, but instead creating an entirely new decision. This new decision issued by the Court found that the hardship requirement was met and specified findings of fact to support that conclusion. As noted above, the trial Court is not allowed to substitute its judgment for that of the ZBA. To do so is legally erroneous. *Kalil* at 309. Furthermore, the conclusions reached by the trial Court are not supported by the evidence of the law. On page 6 of the Order, the trial Court writes that "the lot essentially requires the type of development proposed by the Toys." App. 140. There are numerous other permitted uses that could be made of the Property. The City pointed those out in its presentation to the ZBA at the September 14, 2016 Public Hearing. App. 56. Moreover, at the same hearing, the Toys themselves, through Mr. Berry, admitted that the project could have been accomplished by way of an "open space subdivision" which the Rochester Zoning Ordinance permitted. App.34-35. It is inexplicable, based upon the record before it, that the trial Court could have concluded that a manufactured home park was "required."

The trial Court then writes that being next to another manufactured home park "renders [the Property] unique." The law in this area is clear. Uniqueness has to do with the property itself, not the surrounding area. 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. *Harrington v. Town*

of Warner, 152 N.H. 74 (2005). Finally, the trial Court writes, on page 7 of the Order, that "the proximity to existing manufactured home parks is a special condition that renders this property unique in Rochester for purposes of a variance." App. 141. Again, the area in general does not render a single property unique, but furthermore, it is unclear where is the trial Court getting is this contention. There was no evidence presented that being located next to a mobile home park in Rochester is "unique." In fact, there are Twenty-Seven (27) mobile home parks in Rochester. Being located next to one is the exact opposite of unique.

The trial Court's Order is legally erroneous and not supported by the evidence. A full and fair reading of the record could only lead to the conclusion that the ZBA granted the variance to the Toys in an illegal and unreasonable manner. The trial Court did not follow the law regarding Superior Court review of ZBA decisions and, as such, this Court should vacate the Order.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE CITY'S MOTION/SUPPLEMENTAL MOTION TO EXPAND THE RECORD

In general, on appeal from the ZBA, a Superior Court should rely on the record before it when reviewing the merits of the ZBA's decision. However, a "trial court may hear any and all additional evidence presented that will assist in evaluating the reasonableness of a zoning board decision." *Shaw v. Manchester*, 120 N.H. 529, 532 (1980) (internal quotations and citations omitted). In the present case, as discussed above, one of the City's claims regarding the ZBA's decision was that it was unreasonable because the ZBA, particularly Chairman Torr, impermissibly considered the changes to the underlying Ordinance when granting the variance. As stated above, Chairman Torr alluded to this on the record before issuing the variance on a 3-2 vote. On appeal, the City filed a Motion to Expand the Record and a Supplemental Motion to Expand the Record. App.113 and App. 115. The original Motion sought to admit into evidence

statements Chairman Torr had made regarding changes to the mobile home park ordinance prior to the issuance the Toys' variance. App.113. The Supplemental was filed when Chairman Torr, on the record, on video at a City Council meeting, in response to the filing of the first Motion to Expand, stated that he only voted for the Toys because he was upset by with how the Zoning Ordinance had changed to eliminate mobile home parks as a permitted use. App.115.

In denying both motions, the trial Court stated that the City was trying to make a bias argument when it had not done so in its original Motion for Rehearing. App.121. In response, the City filed a Motion for Reconsideration which attached the City's original Motion for Rehearing, which specifically included the issue of the ZBA "second guessing" the changes to the Zoning Ordinance. App. 123. This was not a "bias" argument. The City was arguing that the granting of the variance was "unlawful and unreasonable" because of the impermissible second guessing. App.124. The trial Court denied the Motion for Reconsideration in one sentence. App.133.

In reviewing a trial Court's decision for abuse of discretion, this Court must decide "whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." *State v. Lambert*, 147 N.H. 295, 296 (2001). The vote to grant the variance to the Toys on September 14, 2016 was 3-2 in favor. The last, and deciding, vote was Chairman Torr in favor of the application. App.123-124. Prior to the hearing, Chairman Torr had stated on numerous occasions that he was upset that the City had changed the mobile home park Zoning Ordinance, had threatened litigation against the City over the changes, and spoke in support of the Toys' efforts to expand their mobile home park. App.113. At the hearing on September 12, 2016, right before casting the deciding vote, Torr stated "and as far as that goes, we can bring up how this Chapter 42 was rewritten in the first place." App. 66. The City made the impermissible consideration of the changes part of its case in the original Motion for Rehearing. App.81.

After the City filed its appeal and after it filed its Motion to Expand the Record, Chairman Torr let loose again. The City filed its Motion on February 17, 2017 and at the City Council meeting on February 21, 2017, Torr specifically addressed the Motion and stated that the only reason he voted to approve the variance to the Toys was because he was upset with the change to the Zoning Ordinance. Torr confessed that he did not follow the law when granting the variance. Torr confessed that he acted unreasonably when granting the variance. App.115.

When confronted with this confession, the trial Court chose to close its ears. The trial Court did not want to hear the truth. The trial Court did not want to hear evidence which would provide context for Torr's statement at the September 14, 2016 Public Hearing. Worse yet, when the City presented Torr's statement during the Hearing on the Merits, the trial Court pretended that Torr was confirming that he was not considering the ordinance change as part of his vote or that the statement was somehow ambiguous. Tr. Trans.15. Intentionally creating a closed world where Torr's true reason for how he voted is shielded and then pretending that Torr's vote was legitimate, is inexcusable.

The trial Court did not want to hear how the ZBA could have granted a variance without finding that all five RSA 674:33, I (b) criteria had been met. Chairman Torr's statements provided all the answers and all the background, yet the trial Court chose to block them. The City is simply at a loss. There is no objective basis for the trial Court to disregard this evidence. This was not minor or tangential to the case at hand; it was the "smoking gun" the City needed to prove its case. This Court must find that the trial Court abused its discretion in denying the City's Motion/Supplemental Motion to Expand the Record and vacate the Order.

CONCLUSION

WHEREFORE, The City of Rochester respectfully requests that this Honorable Court vacate the trial court's Order upholding the ZBA's issuance of the variances to the Toys and remand this case for proceedings consistent with the Honorable Court's Order. Pursuant to Supreme Court Rule 16, (3) (i), the City has included the trial Court's Final Order as part of the Appendix to this Brief.

REQUEST FOR ORAL ARGUMENT

Undersigned counsel requests ten (10) minutes of oral argument before this Court.

Respectfully submitted,

CITY OF ROCHESTER

Dated: December 27, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of the Plaintiff has been delivered this 27th day of December, 2017 to Plaintiffs' Counsel:

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Terence M. O'Rourke, Esquire

2017-0501

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Rochester City Council v Rochester Zoning Board of Adjustment, et al**
Case Number: **219-2017-CV-00003**

Enclosed please find a copy of the court's order of July 18, 2017 relative to:

Court Order (re: 5/8/17 hrg on the merits)

July 28, 2017

Kimberly T. Myers
Clerk of Court

(277)
C: Terence M. O'Rourke, ESQ; Donald F. Whittum, ESQ

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

Rochester City Council

v.

Rochester Zoning Board of Adjustment

and

Donald Toy and Bonnie Toy

Docket No.: 219-2017-CV-003

ORDER

In this zoning appeal from a denial of a request for rehearing, *see* RSA 677:4, the Rochester City Council challenges the decision of the Rochester Zoning Board of Adjustment (ZBA) to deny the City Council rehearing on the ZBA's grant of a variance to allow the expansion of an existing manufactured housing park. The court held a hearing on May 8, 2017. Upon consideration of the record, the arguments of counsel, and the applicable law, the court finds that the decision of the ZBA was not unreasonable or unlawful, and therefore the decision is AFFIRMED.

Procedural Background

Donald and Bonnie Toy own a manufactured housing park known as "Addison Estates" located on Old Dover Road (Route 16B) in Rochester. In or about August 2015, the Toys purchased an abutting parcel of land, and in July and August 2016 applied for a variance to expand their manufactured housing park on to the abutting parcel. A variance was required because in April 2014, the City Council passed an updated zoning ordinance which eliminated manufactured housing parks from the inventory of permitted uses in Rochester.

The ZBA conducted a public hearing on the Toy's variance requests on September 14, 2016. The City Council, through the City Attorney, opposed the variance. After hearing, the ZBA voted 3-2 to grant the variance. The City Council filed a motion for rehearing on or about October 5, 2016, in which it challenged the evidentiary bases for the "unnecessary hardship" prong of the variance requirements. The ZBA denied rehearing on December 14, 2016. This appeal followed on January 5, 2017.

Facts of the Case

The record supports the following facts. The Toys' existing manufactured home park known as Addison Estates is situated on 14.5 acres, more or less, on Old Dover Road near the city line with Somersworth. It is designated as Lot 53 on Tax Map 256. (*See*, Lot Merger & Subdivision Plan, Berry Surveying and Engineering, dated June 14, 2016, page 1 of 9). The homes are located on two connecting cul-de-sacs known as Alexandria Lane and Ashleigh Way. The development contains 25 approved lots; 15 are built out and occupied.

In or about 2015, the Toys purchased the neighboring lot, Lot 54-1, Tax Map 256. Lot 54-1 is located in the agricultural zone and is comprised by 22 acres, more or less. It is irregularly shaped. The southern edge of the lot runs along Old Dover Road for a distance of approximately 74'. The lot extends northerly a distance of 480' while maintaining its width of approximately 74', forming a "panhandle." The lot then widens and narrows in various places over the course of the next approximately 2100', and ultimately borders on Whitehouse Road a length of approximately 525'. The lot contains significant wetlands in the northern third of the lot. The wetlands and the challenging topography render the northern third of the lot difficult to develop.

Addison Estates is situated to the west of the subject lot. Most of the land to the northwest and east of the property is undeveloped. However, there is another mobile home park, Amazon Park, located on the northeasterly border of the subject property. There is a small lot in the southeast corner of the property, which is described as containing a single family dwelling that is in the process of being razed. There is another, older style mobile home park approximately 565' to the east of the property which appears to be almost entirely in the City of Somersworth.

According to the evidence presented by the Toys at the hearing on September 14, 2016, they propose to construct a cul-de-sac originating at a point on Alexandria Lane in the existing Addison Estates and extending on to the proposed lot. The project would include 14 lots, all in excess of 10,000 square feet, and all serviced by private utilities and services, except for water. The water supply would connect to a main from the City of Somersworth. During the hearing, the Toys agreed to restrict ownership of the units to age 55 or older to limit the likelihood that school age children would live in the development, which further minimizes the potential impact on city services.

Analysis

Any person aggrieved by a ZBA decision may appeal to the superior court. RSA 677:4 (2016). "Judicial review in zoning cases is limited." Town of Bartlett Bd. of Selectmen v. Town of Bartlett Zoning Bd. of Adjustment, 164 N.H. 757, 760 (2013). The appealing party bears the burden of proving that the ZBA's decision was unlawful or unreasonable. RSA 677:6; 47 Residents of Deering v. Town of Deering, 151 N.H. 795, 797 (2005). It is the province of the ZBA, not the trial court, to resolve conflicting evidence and determine issues of fact. Lone Pine Hunters' Club, Inc. v. Town of Hollis, 149 N.H. 668, 671 (2003). Accordingly, all findings of

fact made by the ZBA are considered *prima facie* lawful and reasonable. RSA 677:6; Simplex Technologies v. Town of Newington, 145 N.H. 727, 729 (2001); Korpi v. Town of Peterborough, 135 N.H. 37, 39 (1991). The trial court will affirm the zoning board's decision unless the board made an error of law or the court finds, based upon a balance of probabilities, that the decision was unreasonable. RSA 677:6; Greene v. Town of Deering, 151 N.H. 795, 797 (2005). Further, "[t]he review by the superior court is not to determine whether it agrees with the zoning board of adjustment's findings, but to determine whether there is evidence upon which they could have been reasonably based." Lone Pine Hunters' Club, 149 N.H. at 670 (quotation omitted). The burden here, therefore, is on the City Council to demonstrate that the ZBA's decision granting a variance to the Toys was unlawful or, "by the balance of probabilities," was unreasonable. See RSA 677:6.

Under RSA 674:33, I(b), a ZBA is empowered to authorize a variance from a zoning ordinance if: "(1) [t]he variance will not be contrary to the public interest; (2) [t]he spirit of the ordinance is observed; (3) [s]ubstantial justice is done; (4) [t]he values of surrounding properties are not diminished; and (5) [l]iteral enforcement of the provisions of the ordinance would result in an unnecessary hardship." RSA 674:33, I(b); Nine A, LLC v. Town of Chesterfield, 157 N.H. 361, 365 (2008) (citing Garrison v. Town of Henniker, 154 N.H. 26, 30 (2006)). The statute defines unnecessary hardship:

> (A) For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:
>
> (i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
>
> (ii) The proposed use is a reasonable one.
>
> (B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will

> be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

RSA 674:33, I(b)(5)(A) and (B). In order to obtain a variance, the applicant bears the burden of proving all five elements. Bacon v. Town of Enfield, 150 N.H. 468, 473 (2004); see also RSA 674:33, I(b). In this case, however, the City Council focuses its challenge on the "unnecessary hardship" prong of the analysis. Although the City Council makes general references to the requirement to prove all five prongs, it does not make any argument on the other four prongs, and therefore has waived any challenge to the evidence supporting those prongs. Even if the City Council had challenged any of the other four prongs, the court would find that the evidence supports the ZBA's decision the other four prongs.

With respect to the unnecessary hardship prong, the City argues that the Toys did not prove the threshold requirement that "special conditions of the property distinguish it from other properties in the area[.]" The City Council argues that, if anything, the property is similar to other properties in the area and not distinct because there exist other manufactured home parks nearby. The City Council also argues that the Toys' position that they should be allowed to pursue a successful business model by expanding their existing park is simply not relevant to the hardship inquiry. The City Council also argues that the ZBA did not seriously consider the unnecessary hardship prong, and indeed made no findings with the respect to unnecessary hardship in its notice of decision.

Taking the last issue first; the ZBA is not obligated to make specific findings of facts where, as here, none have been requested. Kalil v. Town of Dummer Zoning Bd. of Adjust., 155 N.H. 307, 310 (2007); Thomas v. Town of Hooksett, 153 N.H. 717, 724-25 (2006). Although

the ZBA's notice of decision included an articulation of the first four prongs of the variance requirements, and was silent on the hardship issue, the record demonstrates that the ZBA considered the hardship issue. In the absence of an express finding of hardship when an application is granted, this court's obligation on appeal is to examine the record and, employing the deferential standard articulated earlier, determine whether the evidence supports the decision. Thus, the failure to make specific findings of fact on hardship is not error in and of itself.

With regard to the "business model" or financial hardship argument, the City Council is correct that the financial plight of the owner is not the pertinent inquiry in a hardship analysis. The statute clearly requires the focus to be on the "special conditions of the property . . . ." RSA 674:33, I(b)(5)(A). The City Council, however, overstates the significance of the "business model" evidence presented by the Toys. The Toys simply made the point to the ZBA that to force them to develop the land in a single lot format was incompatible with their "thriving business model." The Toys did not argue that this, in and of itself, constituted the unnecessary hardship. Instead, the record shows that the Toys clearly focused on the characteristics of the property and its location to establish unnecessary hardship.

With respect to unnecessary hardship, the court finds that, on the balance of the probabilities, the ZBA's decision was not unreasonable. The ZBA could have reasonably concluded that, because the lot is irregularly and uniquely shaped, and contains wetlands and challenging topographical features, the lot essentially requires the type of development proposed by the Toys in the central to southern portions of the lot. The ZBA could have also concluded that the location and configuration of the lot itself, positioned as it is near other manufactured home parks, renders it unique in comparison to other properties in the area. The record also supports the conclusion that the ZBA could have reasonably determined that because the new

zoning ordinance removes manufactured housing parks from the inventory of permitted uses city-wide, the proximity to existing manufactured home parks is a special condition that renders this property unique in Rochester for purposes of a variance.

The City Council does not develop significant argument regarding the "no fair and substantial relationship" and "reasonable use" sub-prongs of the unnecessary hardship analysis. Nevertheless, the court finds that the ZBA could have reasonably concluded that there exists no fair and substantial relationship between the purpose of the new zoning ordinance removing manufactured home parks from the inventory of permitted uses, and its application to this specific property. Further, the ZBA could have concluded reasonably, without difficulty on this evidence, that the proposed use is a reasonable one. Although the City Council argues that there exist other potential uses for the property, the statute requires only that the proposed use be reasonable.

Accordingly, the decision of the ZBA is AFFIRMED.

So Ordered.

Date: July 18, 2017

Mark E. Howard
Presiding Justice