

CITY OF MANCHESTER

PLANNING AND COMMUNITY DEVELOPMENT

Planning & Land Use Management
Building Regulations
Community Improvement Program
Zoning Board of Adjustment

Jeffrey D. Belanger, AICP
Director

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Deputy Director Planning & Zoning

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Deputy Director Building Regulations

REQUEST FOR REHEARING APPLICATION

Complete the following and attach any supplemental material to support your appeal.

Property Location: 141, 163 and 173 Queen City Avenue and 28 Vernon Street

Owner's Name: Lusso Realty, LLC and Hyrize Holdings, LLC

Owner's Address: P.O. Box 2167, Concord, NH 03302

Phone number: _____ Email: _____

Applicant: Robert A. Curry and Robert A. Curry, Jr.

Address: 21 Senter Farm Road, Hudson, NH 03051

Phone number: 978-804-8483 Email: bobc@delivery-now.com

1. Zoning Board of Adjustment, Case Number: 2024-082

2. Date when the decision was made: October 11, 2024

The applicant's claim of technical error or new evidence must be submitted as justification for the requested rehearing. Proof must be submitted, along with this application, to support any claims or evidence being considered by the board. All applications shall be governed by Section 14.03 of the City of Manchester, Zoning Ordinance.

The appeal is made for the following reasons:

Opposition to variances.

Applicant's Signature:
A. Eli Leino, Esq. for

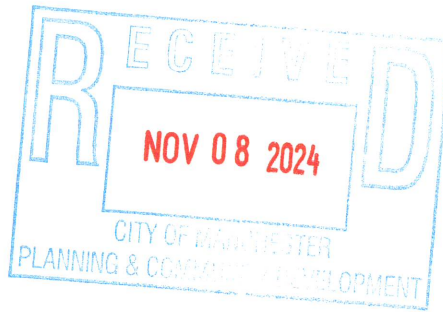
Date: 11/8/2024

Printed Name: Robert A. Curry, LLC and Hyrize Holdings, LLC

ZBA motions for rehearing are governed by New Hampshire Revised Statutes Annotated, Chapter 677:2.
If the request for rehearing is granted, an application fee, variance fee and abutter notification fees must be paid to the Planning & Community Development Department prior to processing the case for public hearing.

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Revised: 01/08/16



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HAND-DELIVERED

November 8, 2024

Zoning Board of Adjustment
City of Manchester
One City Hall Plaza
Manchester, NH 03101

**Re: Request for Rehearing Pursuant to RSA 677:2
Case No.: ZBA 2024-082
141, 163, and 173 Queen City Ave, and 28 Vernon Street**

Dear Chairman Powers and Members of the Board:

As the Board is aware, this office represents the interests of Robert A. Curry and Robert A. Curry, Jr. (collectively, "Curry"), who own the properties located at 70 and 72 Vernon Street that directly abut applicant's property in the above-captioned matter. The applicant is proposing to construct a mixed-use structure with 75 residential units, a daycare and retail on the first floor, and a multilevel parking structure. On October 10, 2024, the Board voted 3-2 to grant the applicant's request for fifteen (15) disparate variances from Zoning Ordinance Sections 6.03(A) Front Yard Setback (Queen City Ave.), 6.03(C) Side Yard Setback (4 counts), 6.04 Lot Coverage, 6.05 Height in Feet and Stories (2 counts), 6.06 Floor Area Ratio, 10.05(2) Number of Off-Street Loading Spaces, 10.06(C) Loading Maneuvering, 6.08(A) Screening and Buffers, 10.07(G) Landscaping, 8.29(A)1 Accessory Structures and Uses, and 10.02(F) Business Parking in a Residential District. For the reasons set forth herein, Curry submits that the Board erred in granting the variances and requests that the Board grant the within Request for Rehearing and reconsider its decision. The Board may grant such rehearing if in its opinion good reason is stated in this request. *See* RSA 677:2.

As demonstrated by the extensive list of relief required for the applicant's proposal, with the exception of needing a variance to allow commercial parking in a residential zone, all of the other variances related to dimensional requirements. As demonstrated by the requested relief, the proposed uses are generally allowed. However, the Board generally justified granting the variances because it felt the use(s) are compatible with the

neighborhood. In sum, the Board granted fifteen variances because it determined that multi-family housing was a good use in a neighborhood where it is already allowed by right. The Board failed to determine whether this lot, given its actual setting, can handle the significant dimensional increases proposed by the applicant particularly given that an established quiet residential neighborhood serve as a major access and egress to this project.

The Board should grant this Request for Rehearing to correct several errors. First, the applicant has not satisfied the hardship criteria. Applicants for a variance are required to show 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. *See* RSA 674:33(I)(5)(A).

There are no special conditions of the applicant's property that distinguish it from others in the area. The applicant suggests that special conditions on its property include the preexisting nonconforming nature of some of the lots and that the "hustle and bustle" of Elm Street has been making its way south of Lake Avenue." However dire the housing crisis may be, each of the applicant's claimed hardships relate simply to the proposed uses, which are all allowed in the zone and therefore reasonable. *See Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102 (2007). The applicant's desire to increase profits by dramatically increasing density is not a hardship, especially one that allows the project to deviate from nearly all the zoning ordinance's dimensional requirements (including lot coverage, height, setbacks, etc.). The City's need for additional housing is not a license to build a project larger and denser than is allowed by the zoning ordinance. Furthermore, the mere impact of the zoning ordinance on all properties in this zone is not in itself a hardship. *See Harrington v. Town of Warner*, 152 N.H. 74, 81 (2005) (While the property need not be the only such burdened property, "the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district.")

Moreover, even assuming, *arguendo*, that the applicant could demonstrate special conditions of its property that distinguish it from others in the area, it must also show that there is no fair and substantial relationship between the purpose of the Zoning Ordinance's various dimensional requirements and the specific application of each requirement to its property. The applicant has not made such a showing and the Board erred by considering such a broad range of variances *en masse* without requiring the applicant to demonstrate how it meets the statutory burden. The purpose of the setback requirement is to prevent overdevelopment and overcrowding. The applicant has argued, essentially, that its property lacks sufficient area to comply with the setbacks given the intensity of the proposed development and therefore it should not have to comply with the setbacks, height, buffers, parking, and maneuvering requirements. This argument is specious. Rather than serving no purpose here, the tight configuration of the applicant's property, and narrow surrounding streets, is the exact reason why the buffer requirement exists – to

prevent overdevelopment and overcrowding on lots that cannot accommodate such intense development. Accordingly, there is a fair and substantial reason to apply the setback requirement to the applicant's property, and the hardship criteria has not been satisfied. As such, the Board erred when it granted the variances because the applicant has only met one prong of the hardship criteria.

The applicant's presentation about substantial justice was effectively that the applicant could not receive a maximum return on its investment without the variances, including from the parking requirements. However, the ability of the applicant to obtain a return on its investment is not a proper consideration in the context of the substantial justice prong. To the extent zoning boards could ever consider investment expectations, it was under the hardship criteria. Under *Simplex Techs., Inc. v. Town of Newington*, 145 N.H. 727, 731 (2001), in the context of deciding hardship on a variance request, zoning boards were required to determine "whether the zoning restriction as applied interferes with a landowner's reasonable use of the property." Part of that analysis included "consideration of the landowner's ability to receive a reasonable return on his or her investment." *Harrington* at 80 (2005). Reasonable return does not mean maximum return, and this factor requires showing more than mere inconvenience. *Id. Simplex* was superseded by RSA 674:33(I) which no longer requires the Board to determine whether the zoning restriction as applied interferes with a landowner's reasonable use of the property. Thus, the economic considerations of the landowner that were once relevant under *Simplex* are no longer applicable. Even when such considerations were relevant, the analysis was on the ability of the landowner to obtain a reasonable return, not a maximum return. Accordingly, the Board erred when it found that the applicant satisfied the substantial justice criteria.

In considering the public interest and spirit of the ordinance, our Supreme Court has indicated that "cumulative impact is a proper consideration in the variance context." *See Perreault v. Town of New Hampton*, 171 N.H. 183, 188 (2018). The court has further "recognized that preventing overcrowding may be a legitimate purpose of a zoning ordinance." *Id.* (citing *Nine A, LLC v. Town of Chesterfield*, 157 N.H. 361, 368 (2008); *see also* RSA 674:17, I(e) (2016) (listing "preventing the overcrowding of land" as a statutory purpose of zoning ordinances).

Here, the applicant has asserted that this proposal will not alter the character of the neighborhood, and comically claims that a six-foot fence surrounding the property will mitigate any and all safety concerns. If all landowners received 16 distinct variances, the cumulative impact would overwhelm the purposes of the zoning ordinance entirely. While the applicant's lots are minimally burdened with existing non-conformities, the proposed lot merger provides an opportunity to enhance conformity in furtherance of the spirit of the ordinance. *See e.g.* MZO §11.01(A) ("The purpose of this Article is to encourage the discontinuance of non-conforming uses, and to provide for the transition of non-conforming uses to conforming or more conforming uses.") The Board heard

significant testimony from abutters about the narrow roads and crowded parking situation. Upon rehearing, the Board should ask the applicant specifically how a fence is going to promote the public health, safety, and welfare when a project that requires 193 spaces by zoning provides only 68. The applicant has not met the first two variance criteria, and the Board erred by not requiring proof of each element for all the applicant's 16 variance requests.

For the foregoing reasons, Curry respectfully requests that this Board grant this Request for Rehearing to reconsider its decision granting the variances.

Sincerely,

/s/ Roy W. Tilsley, Jr., Esq.

Roy W. Tilsley, Jr., Esq.