



For a thriving New England

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By Electronic Mail

City of Providence
Zoning Board of Review
J. Dorley Municipal Building
444 Westminster Street
Providence, RI 02903-3215

**RE: Application of Narragansett Improvement Co. for a Use Variance at
338 Allens Avenue**

Dear Members of the Zoning Board of Review:

Thank you for the opportunity to provide comment on Narragansett Improvement Co.'s ("Narragansett" or the "Applicant") application for a use variance to use the property at 338 Allens Avenue (the "Property") for non-waterfront dependent use. Conservation Law Foundation ("CLF") is a nonprofit, member-supported, regional environmental advocacy organization working to conserve natural resources, protect public health, and promote thriving communities for all in the New England region.

Narragansett's application fails to satisfy the requirements for a use variance under Rhode Island law. Additionally, granting the variance would impose additional pollution burdens on neighboring communities that are already environmentally overburdened. For these reasons, CLF urges the Zoning Board of Review (the "Board") to deny Narragansett's application for a use variance.

1. Background

Narragansett currently uses the Property for storage and processing of concrete, stone, and asphalt. The Property is located in the W-3 Port/Maritime Industrial Waterfront District, which "is intended to promote maritime industrial and commercial uses within the areas of Providence's waterfront, protect the waterfront as a resource for water-dependent industrial uses, and facilitate the renewed use of a vital waterfront." Providence Zoning Ordinance, § 900(B). In the W-3 District, "all permitted and special uses shall be a part of a marine enterprise or dependent on access to the waterfront." Id. at § 901.

Narragansett acknowledges that its usage of the Property is in violation of the City of Providence Zoning Ordinance and seeks a use variance from the Board.

2. The Applicant has failed to satisfy the requirements for a use variance under Rhode Island law.

The standard for granting a variance to a municipal zoning ordinance is found out at R.I. Gen. Laws § 45-24-41(d):

In granting a variance, the zoning board of review, or, where unified development review is enabled pursuant to § 45-24-46.4, the planning board or commission, shall require that evidence to the satisfaction of the following standards is entered into the record of the proceedings:

- (1) That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; and is not due to a physical or economic disability of the applicant, excepting those physical disabilities addressed in § 45-24-30(a)(16);
- (2) That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;
- (3) That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based; and
- (4) That the relief to be granted is the least relief necessary.

Additionally, because the Applicant is seeking a use variance, it must enter evidence into the record showing “that the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of the zoning ordinance.” R.I. Gen. Laws § 45-24-41(e)(1).

In order to grant Narragansett’s application, the Zoning Board of Review must find that it has satisfied all five of these requirements. In its application Narragansett fails to demonstrate that any of these five criteria are met, and instead demonstrates conclusively that at least several of the criteria are not met. Each of these criteria are discussed below.

i. The hardship from which the applicant seeks relief must be due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area.

Firstly, Narragansett is required to show that “the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area.” The Board’s application form asks the Applicant to “[s]pecify any and all unique characteristics of the land or structure that cause the hardship[.]” Narragansett responds only by stating that “[t]he land has been utilized for non water [sic]

dependent uses for decades.” Narragansett Application, App. A, Question 2. The fact that a property has previously been used in ways that violate a zoning ordinance is clearly not a “unique characteristic of the land or structure” causing a hardship, and the law does not cease to apply simply because it has been violated in the past.¹ Narragansett thus fails to demonstrate any hardship caused by the unique characteristics of the Property.

ii. The hardship must not be the result of any prior action of the applicant and must not result primarily from the desire of the applicant to realize greater financial gain.

Secondly, the Applicant must show that “the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain.” Here, Narragansett fails on both counts. When asked whether it took “any prior action with respect to the Property that resulted in the need for the variance requested,” Narragansett ticks the box marked “Yes.” Narragansett Application, App. A, Question 4. This is an admission that this requirement is not met, and because all requirements must be met in order for a variance to be granted, it alone is fatal to the application.

When prompted to state “any and all facts to support [its] position that [it] is not seeking the variance primarily in order to obtain greater financial gain,” Narragansett responds:

The applicant is seeking a variance simply to continue and [sic] already existing use on the Property, and does not stand to re-develop or re-shape their business in any way. There would be no greater financial gain should the variance be granted. Simply, the granting of the variance would allow the applicant to continue its current use of the property.

Narragansett Application, App. A, Question 5. This answer is an attempt to sidestep the question. Here Narragansett says, essentially, that being granted a variance will not benefit it financially because it’s already acting as if it has a variance. That Narragansett’s “hardship . . . results primarily from the desire of the applicant to realize greater financial gain” is clear from its answer to another question on the form. Describing the “specific hardship from which [it] seeks relief,” Narragansett says that “[i]n the event that it cannot continue to store and produce materials at this site for reuse and manufacturing of its asphalt it will have to truck in all of these materials from offsite at great cost which will reduce its ability to compete with other producers...” Narragansett Application, App. A, Question 1. In other words, not having to comply with the zoning ordinance reduces Narragansett’s costs and allows it to realize greater financial gain.

¹ See, e.g., Bd. of Purification of Waters v. Town of E. Providence, 47 R.I. 431, 133 A. 812, 815 (1926) (finding evidence of practice contrary to the plain meaning of statute “entirely immaterial”); Lemke v. Mueller, 166 N.W.2d 860, 867 (Iowa 1969) (“It is settled law * * * in a majority of * * * states, that a custom or usage repugnant to the express provisions of a statute is void, and whenever there is a conflict between a custom or a usage, and a statutory regulation the statutory regulation must control * * *.”) (ellipses as in original).

iii. The granting of the requested variance must not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based.

Narragansett must also demonstrate that its requested variance will “not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based.” Its application does not address this requirement at all. According to the Providence Zoning Ordinance, the W-3 Port/Maritime Industrial Waterfront District “is intended to promote maritime industrial and commercial uses within the areas of Providence's waterfront,” and to “protect the waterfront as a resource for water-dependent industrial uses.” Providence Zoning Ordinance, § 900(B). Non-maritime, non-water dependent usage of a property within the W-3 District therefore runs directly counter to the explicit intent of the zoning ordinance.

iv. The relief to be granted must be the least relief necessary.

Next, Narragansett must show “that the relief to be granted is the least relief necessary.” Here it once again tries to sidestep the issue by referencing its ongoing violation of the Providence Zoning Ordinance, saying that:

The applicant has established this use as the use for the property for more than three years and continues to use it for such. This relief would not add, nor enhance the use of the property, or the economic gain of the applicant. It would simply allow the applicant to continue a use which is substantially similar to the use utilized by the surrounding properties.

Narragansett Application, App. A, Question 6. In essence, Narragansett’s argument here is that the relief it is requesting is the “least relief” because it is only asking for that which it has already taken without permission. Narragansett does not discuss any alternate forms of relief or prove that there is no lesser relief available to lessen or eliminate the hardship. And as discussed above, the only “hardship” Narragansett establishes in its application is its desire to cut costs by not complying with the zoning ordinance.

v. The subject land or structure must not yield any beneficial use if it is required to conform to the provisions of the zoning ordinance.

Finally, because Narragansett seeks a use variance rather than a dimensional variance, it must demonstrate that “the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of the zoning ordinance.” This is a very high standard. “Use variances are extremely rare because the applicant must prove loss of all beneficial use if the variance is denied . . . This essentially amounts to a confiscation standard equivalent to the finding of a regulatory taking or an inverse condemnation.” George W. Watson III, A Practical Guide to Land Use Law in Rhode Island § 3.3.2 (2017). “It is well settled that a mere showing of a more profitable use that would result in a financial hardship if denied does not satisfy the requirements of our law. Unnecessary hardship exists only when *all* beneficial use has been lost and the grant of a variance becomes necessary to avoid an indirect confiscation.” Rhode Island Hospital Trust

Nat. Bank v. East Providence Zoning Bd. of Review, 444 A.2d 862, 864 (R.I. 1982) (emphasis in original) (internal citations omitted).

On the application form, Narragansett sets forth the following facts to demonstrate that the Property cannot have any beneficial use if it is required to use it in a manner allowed in the zoning district:

The applicant is in the business of storing these products and has been for many years. There are no water dependent uses that the applicant is involved with that would be beneficial to their business. This property would be essentially useless to the applicant if the variance were not granted.

Narragansett Application, App. A, Question 7. Even assuming that the factual representations in this answer are accurate, it does not satisfy the standard. It suggests only that complying with the zoning ordinance would prevent Narragansett from using the Property in a manner “beneficial to their business,” not that it would result in the loss of all beneficial use. It is not enough to show that complying with the zoning ordinance would deny Narragansett its preferred use for the Property, or the most profitable use, or the use that best matches its chosen industry or business plan. In order to grant the requested use variance, this Board must find that all beneficial use would be lost—i.e., that requiring this Property to be used for a water-dependent use renders it unusable for any beneficial purpose. Narragansett has not entered any evidence into the record to demonstrate that that is the case. Without such evidence, the Board cannot grant a variance.

3. Granting the application would impose additional pollution burdens on neighboring communities that are already environmentally overburdened.

The Property is located near the South Providence and Washington Park neighborhoods of Providence, much of which are designated by the Rhode Island Department of Environmental Management (“DEM”) as part of an Environmental Justice² (“EJ”) Area.³ According to 2014-2018 U.S. Census and American Community Survey data, people of color make up 86 percent of the population in the area within one mile of the Property. The same data shows a per capita income for the same area of \$17,576, with 64 percent of the population categorized as low-income. Using EJSCREEN⁴—an EPA-developed mapping and screening tool designed to show environmental indicators, demographic indicators, and an EJ Index, which summarizes how the indicators come together in a location—to examine the same area produces EJ Index results

² EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.” *Learn About Environmental Justice*, U.S. Env’tl. Prot. Agency, <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> (last visited October 12, 2021).

³ Following an approach developed by EPA Region 1, DEM has designated EJ areas in Rhode Island by using the 2000 Census Block Group Boundary layer to identify Census block groups with percentages in the top 15 percent of the region for low-income residents and/or non-white populations. Based on this analysis, DEM classifies much of the area near the Facility as part of an EJ area. *See Static Map of EJ Areas*, R.I. Dep’t of Env’tl. Mgmt., <http://www.dem.ri.gov/envequity/graphics/ejareas.jpg> (last visited October 12, 2021).

⁴ *See How Does EPA Use EJSCREEN?*, U.S. Env’tl. Prot. Agency, <https://www.epa.gov/ejscreen/how-does-epa-use-ejscreen> (last visited October 12, 2021).

above the 75th percentile in the U.S. in all variables, above the 85th percentile statewide in all variables, and above the 90th percentile in EPA Region 1 in all variables.⁵

All residents of Rhode Island have a right to a clean and healthy environment. Yet, too often, polluting facilities are concentrated in communities where people of color, low-income people, and limited English proficient speakers live and work. These EJ populations experience higher rates of pollution, disease, and other public health emergencies. For example, residents of low-income communities of color like South Providence and Washington Park represent the majority of asthma-related emergency room visits in Providence.⁶ The COVID-19 pandemic has further demonstrated that high concentrations of pollution can lead to increased mortality from respiratory disease.

Zoning plays a critical role in managing pollution and safeguarding communities. Because the Applicant's intended use for the Property is not water-dependent, there's no reason that it needs to be located in the Port, adjacent to neighborhoods that are already severely overburdened by pollution. There is a long history of environmental problems in and around the Port of Providence, concentrating many of Rhode Island's most concerning pollution and safety issues in neighborhoods that are economically and racially disadvantaged. Residents of these neighborhoods have submitted comments opposing this application, attempting to prevent the approval of yet another nearby source of air, water, and noise pollution. CLF urges the Board to listen to their concerns.

4. Conclusion

Narragansett's application fails to satisfy any of the five requirements for a use variance under Rhode Island law. Additionally, granting the variance would impose additional pollution burdens on neighboring communities that are already environmentally overburdened. CLF therefore respectfully requests that the Board deny the application.

Sincerely,



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⁵ See EPA's *Environmental Justice Screening and Mapping Tool (Version 2020)*, U.S. Env'tl. Prot. Agency, <https://ejscreen.epa.gov/mapper> (last visited October 12, 2021).

⁶ City of Providence, *Climate Justice Plan 17* (2019), available at <https://www.providenceri.gov/wp-content/uploads/2019/10/Climate-Justice-Plan-Report-FINAL-English.pdf>.