

THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

SUPERIOR COURT

DOCKET NO.
THE BOOK CELLAR, LLC
100 Factory Street
Nashua, New Hampshire 03060

v.

Town of Durham
8 Newmarket Road
Durham, New Hampshire 03824

**EX PARTE VERIFIED PETITION FOR TEMPORARY RESTRAINING ORDER
PREVENTING IMPLEMENTATION OF DURHAM ORDINANCE #2017-3**

NOW COMES The Book Cellar, LLC by and through its attorneys, HOEFLE, PHOENIX, GORMLEY & ROBERTS, P.A., and submits this Motion for Ex Parte Temporary Restraining Order.

In support thereof, Book Cellar states as follows:

1. A temporary restraining order may be granted in this matter pursuant to Superior Court Rule 48(a), where the Verified Petition establishes that immediate and irreparable injury will result to Book Cellar before The Town of Durham ("Durham") or its attorney can be heard.
2. Book Cellar, LLC ("Book Cellar") is a single member New Hampshire limited liability company formed by Allard Deu, a resident of Milford, New Hampshire. Book Cellar is a used book dealer with two storefronts in Nashua and Manchester. Book Cellar purchases used books, including college textbooks, and resells them. Book Cellar maintains a website where customers can purchase books or sell books to Book Cellar, but also has a mobile presence on location at colleges and universities once or twice a year for purposes of a "book buyback".

3. Book Cellar has been traveling to the University of New Hampshire and buying back textbooks since the spring of 2012 and will usually appear at the conclusion of the fall semester and the conclusion of the spring semester. (See attached as Exhibit A, an example of Book Cellar's mobile presence). Upon information and belief, Book Cellar most recently did not include an umbrella base or A-frame signage on the sidewalk at Durham's request. In the spring of 2016, Book Cellar purchased back \$30,102.00 worth of textbooks, and the University of New Hampshire ("UNH") comprises 17% of the gross profits in Book Cellar's mobile book buyback business, which includes buybacks at Dartmouth, Keene State, and universities throughout New England. Upon information and belief, there are other vendors engaged in similar business at UNH.

4. Book Cellar qualifies as a street vendor under the Chapter 124 of the Town Code of Durham. Accordingly, Book Cellar has historically applied for a permit to conduct its book buybacks in compliance with the process set out in Chapter 124 of the Town Code. Until April 17, 2017, this process included a prohibition on street vending in a rather limited area, as indicated in Durham Town Code 124-4, D:

A vendor shall not [...] engage in vending in the Downtown area between Tax Map Numbers 4-1-0 and 4-7-0, and Tax Map Number 2-14-4, and Jenkins Court between Main Street and Pettee Brook Lane.

(See attached Exhibit B, Chapter 124 of the Durham Town Code, Street Vending, Peddling and Soliciting Durham, revised 9/24/2012; see also attached Exhibit C, Durham Tax Map 2 depicting properties listed on both referenced tax maps and Jenkins Court and Pettee Brook Lane).

4. Book Cellar's business is very popular with students and competes directly with the Official UNH Bookstore and with the Durham Book Exchange at 36 Main Street. The Town of Durham ("Durham") claims that the popularity of Book Cellar and other competing book

vendors have resulted in loss of parking spaces, increased congestion in the downtown area, student jaywalking, and student queuing in the travel lanes and sidewalks. As a result of book buyback vans, Chief David Kurz recently offered Ordinance #2017-3 amending Durham Town Code 124-4 to preclude all vendors from Main Street, Madbury Road, Garrison Avenue, Pettee Brook Lane and Jenkins Court. (See Ordinance #2017-3 attached as Exhibit D; see also Durham Tax Map 2 depicting the prohibited streets attached as Exhibit E). This ordinance was moved to first reading by the Durham Town Council on April 3, 2017, coincidentally the same date Book Cellar Business Manager Lorelee Reyes submitted a permit application. This amendment greatly expanded the prohibited area and effectively bans vendors from the entire downtown area because the named streets are the streets that offer metered parking. (See attached Exhibit F, Durham Parking Map and Master Fee Schedule).

5. Aware that the Town Council planned to review his proposed ordinance, Durham Police Chief David Kurz did not act on Ms. Reyes' application upon receipt. On April 3, 2017, the Durham Town Council moved the proposed ordinance on First Reading, and submitted a public hearing notice on the Foster's Daily Democrat/Seacoast for April 6, 2017. On April 17, 2017, the Durham Town Council unanimously approved the ordinance amending Durham Town Code Chapter 124 (See attached Exhibit G, Chapter 124 of the Durham Town Code, Street Vending, Peddling and Soliciting Durham revised 4/17/2017).

6. After the ordinance was passed, Book Cellar's permit application was denied. (See attached Exhibit H, Book Cellar Durham Permit Application). Book Cellar appealed to the Durham Town Council who denied any reconsideration. (See attached Exhibit I for information submitted to the Durham Town Council). Given that final examinations begin this week, Book Cellar has scrambled to explore alternatives that provide sufficient visibility for its book

buybacks. Upon information and belief, Book Cellar contacted the Durham Mill Plaza to ask if it could occupy space in its lot, but the owner denied access. Through Counsel, Book Cellar has contacted UNH and learned that it would be unable to offer assistance. Lastly, Book Cellar has inquired about parking in a Town owned parking lot off Pettee Brook Lane and off Madbury Road, but the Town has orally advised that these areas presented similar safety concerns to parking directly on the street and were therefore unacceptable.

7. As of this writing, Book Cellar continues to explore locations that might be both permissible and commercially reasonable, but the number of prohibited streets leaves permissible spaces with insufficient visibility that are not commercially reasonable. The time frame of the ordinance passing also leaves little time to make alternative arrangements or advertise an alternate location to its customers.

8. Book Cellar qualifies as an itinerant or street vendor and may be regulated by Durham as an exercise of its police powers. Woolf v. Fuller, 87 N.H. 64 (1934). A regulation that results in a classification is reviewed under a rational basis scrutiny unless it burdens “a fundamental right, an important substantive right, or application of a suspect classification.” In re: Sandra H., 150 N.H. 634 (2004). Book Cellar is entitled to acquire and possess property pursuant to the New Hampshire Constitution, Part 1, Article 2. Book Cellar is also engaged in solicitation of commercial transactions, a form of commercial speech that enjoys limited protection pursuant to the First Amendment to the United States Constitution and is applicable to the States through the Fourteenth Amendment. Finally, Book Cellar is entitled to equal treatment under the law by virtue of the Part 1, Article 2, and the Fourteenth Amendment to United States Constitution. Because Book Cellar is engaged in protected conduct and treated differently from other brick and mortar businesses in Durham conducting book buybacks, this Honorable Court

should apply intermediate scrutiny to Durham Ordinance #2017-3. Even if this Court declines to apply any heightened scrutiny to the ordinance, a rational basis review of the ordinance renders it unconstitutional as it has no rational relationship to a legitimate government interest. Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), Petition of State Employees Ass'n of New Hampshire, Inc., 129 N.H. 536 (1987).

9. Commercial speech is “expression related solely to the economic interests of the speaker and its audience.” Central Hudson Gas and Elec.v. Public Service Comm’n, 447 U.S. 557, 561 (1980). The test articulated in Central Hudson was applied by the New Hampshire Supreme Court in Carlson’s Chrysler v. City of Concord, 156 N.H. 399 (2007). The analysis determines (1) whether the advertising is neither unlawful nor misleading and therefore entitled to First Amendment protection; (2) whether the ordinance seeks to implement a substantial governmental interest; (3) whether the ordinance directly advances that interest; and (4) whether the ordinance reaches no further than necessary to accomplish its stated goals. Id. at 402, Citing Central Hudson at 566. Similarly, a review of the economic regulation of a right afforded by Part 1, Article 2 is to examine how the government sought to achieve its constitutional objective, and “whether the restrictions it imposes on rights secured to individuals by the bill of rights are unreasonable.” Woolf v. Fuller, 87 N.H. 64, 174 A. 193 (1934).

10. Applying the tests above to the facts in this case, “Cash for books”, “We buy current text, previous editions”, or “The most cash for your books” are neither unlawful nor misleading statements soliciting business. Durham’s stated purpose in enacting this ordinance is to minimize students queuing on busy streets and overtaking sidewalks whilst waiting to engage in the solicited transactions. While the ordinance can be said to directly advance those interests on the prohibited streets, it ordinance fails to address jaywalking generally, and at best shifts

jaywalking relating to vendors to another location. The ordinance reaches further than necessary and is entirely overbroad because it prohibits all street vendors or itinerant vendors all year without regard to whether other vendors present a safety problem. The effect of the ordinance is a prohibition of vendors from the entire downtown area because public parking downtown is largely only available on the streets which are now prohibited. Notably, the prohibition at hand will do nothing to minimize student jaywalking or queuing at any brick and mortar store in Downtown Durham, such as the University Bookstore or the Durham Book Exchange at 36 Main Street, both of whom also conduct book buybacks.

11. Similarly, while regulation related to pedestrian safety may be constitutionally permissible, it must be balanced against the right to acquire and possess property guaranteed by the New Hampshire Constitution at Part 1, Article 2. The ordinance unreasonably restricts the ability of all street vendors seeking to do business in a commercially reasonable location in Downtown Durham. It also unreasonably restricts Book Cellar's protective activities when there are certainly more reasonable ways to achieve these safety goals. For example, Durham could identify a limited number of spaces strategically located near crosswalks or other locations deemed appropriate and offer permits to those spaces on a first-come, first-served basis. Similarly, Durham could require vendors to have additional staff available to minimize lines, or require vendors to hire a police detail or place ropes to designate a safe waiting area. Any of the above measures would address the safety concerns articulated by the Town of Durham in a manner that does not unconstitutionally restrict Book Cellar's commercial speech or protected conduct.

12. Even if the Court declines to apply heightened scrutiny to this ordinance, a rational basis review of the ordinance reveals an ordinance that seeks to regulate the behavior of

customers through regulation of the businesses serving them – in the case of Book Cellar, for less than one month each year. While there is certainly no shortage of issues Durham faces with the presence of many young people, cars, and businesses in the Downtown area, regulation of street vendors serving students is not rationally related to reducing student jaywalking or sidewalk congestion.

13. New Hampshire Superior Court Rule 48(a) provides that a temporary restraining order may be granted without notice if the applicant can demonstrate through specific facts that immediate and irreparable injury will occur to the applicant before the adverse party can be heard in opposition. In the instant case, UNH begins final examinations this week. Historically students dispose of their textbooks immediately after completing finals. Book Cellar will incur substantial financial damages if it is unable to conduct a book buyback in the prohibited area. Alternatively, the Town will not suffer any harm if it is unable to be immediately heard in opposition to this Petition.

14. Undersigned Counsel has conferred with the Police Chief David Kurz and Town Manager Todd Selig regarding the problems Book Cellar will experience by virtue of this ordinance; Undersigned Counsel also emailed them regarding this Petition and copied Town Counsel.

WHEREFORE, The Book Cellar, LLC respectfully requests that this court:

- A. Issue the Temporary Restraining Order as set forth in the attached Proposed Order;
- B. For such other and further relief as may be just.

Respectfully submitted,
The Book Cellar, LLC

By its Attorneys,

HOEFLE, PHOENIX, GORMLEY &
ROBERTS, P.A.



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Dated: May 9, 2017

VERIFICATION

I, Allard Deu, hereby depose and say that I am the single member of The Book Cellar, LLC, the plaintiff herein and that I have read the foregoing Petition and that the content of the same is true of my own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.

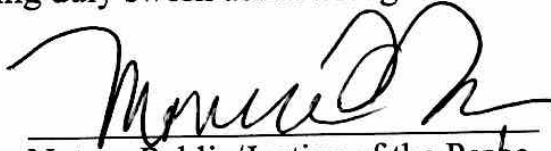


Allard Deu, Member
The Book Cellar, LLC

STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD

Personally appeared Allard Deu, member of The Book Cellar, LLC, the person signing the above petition and certification, and being duly sworn acknowledged that it is true to the best of her knowledge and belief.

Dated: May 9, 2017



Notary Public/Justice of the Peace
My Commission Expires: 8/2021
Print Name: Monica F. Kieser