

# City of Rochester, New Hampshire Zoning Board of Adjustment

#### **Variance Application**

The undersigned alleges that the following circumstances exist which prevent the proper enjoyment of his land under

TO: BOARD OF ADJUSTMENT **CITY OF ROCHESTER** 

717 Rochester Holdings, LLC

Property Owner: 717 Columbus Avenue, LLC

Map Lot and Block No: Map 131, Lot 7

E-mail: jcronin@cbzlaw.com and dmuller@cbzlaw.com (counsel)

Applicant Address: 321 Lafayette Rd., Unit D, Hampton, NH 03842

Property Owner Address: 112 Gates Street, Portsmouth, NH 03801

Proposed use or existing use affected: Convenience Store and Gas Station

.of NMU zoning district is well screened parking lots in rear yard of property.

Signed: Gernel Muller (Counsel)

the strict terms of the Zoning Ordinance and thus constitute grounds for a variance.

Variance Address: 717 Columbus Avenue, Rochester, NH

Applicant:

DATE FILED ZONING BOARD CLERK Phone: 603-624-4333 (counsel) JAN 2 2 2020 By Description of Property: 1.779 acre unimproved lot in NMU zoning district bounded by three public streets and asks that said terms be waived to permit establishment of off-street parking spaces in the proposed front yard of property when stated objective

\_\_\_\_\_\_\_\_Date: 1/22/2020

DO NOT WRITE IN THIS SPACE

CASE NO.



# City of Rochester, New Hampshire

# Zoning Board of Adjustment

#### Variance Criteria

1) Granting the variance would not be contrary to the public interest because: See attached.
2) If the variance were granted, the spirit of the ordinance would be observed because: See attached.
3) Granting the variance would do substantial justice because: See attached.
4.) If the variance were granted, the values of the surrounding properties would not be diminished because:  See attached.
<ul> <li>5.) Unnecessary Hardship: <ul> <li>a. Owning to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in an unnecessary hardship because: <ul> <li>i. No fair and substantial relationship exists between the general public purposes of the ordinanc provision and the specific application of that provision to the property because:</li> </ul> </li> <li>See attached.</li> </ul></li></ul>
And: ii. The proposed use is a reasonable one because: See attached.
b. Explain how, if the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owning to the special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in the strict conformance with the ordinance, and a variance is therefore necessary to enable reasonable use of it.  See attached.

#### **ATTACHMENT TO VARIANCE**

717 Columbus Avenue, LLC is the record owner of an approximately 1.779 acre parcel known as 717 Columbus Avenue and identified in the City of Rochester assessing records as Tax Map 131, Lot 7 (the "Property"). The Property is bounded by public streets on three sides; namely, Old Gonic Road to the west, Brock Street to the north, and New Hampshire Route 125 a/k/a Columbus Avenue to the east. The Property is located within the Neighborhood Mixed Use zoning district, but the back portion of the Property borders the Residential-2 zoning district to the south and west. There are existing trees along the rear lot line of the Property and the Property slopes downhill from Old Gonic Road to a small wetland. The Property currently may be accessed from Old Gonic Road.

717 Rochester Holdings, LLC (the "Applicant") intends to construct a convenience store and gas station on the Property with access from Columbus Avenue. The Board approved a variance for this use on November 14, 2018 and the proposed development contemplates the elimination of access from Old Gonic Road. The proposed convenience store and gas station would be served by 34 off-street parking spaces, the majority of which would be located in the front yard of the Property. In reviewing the preliminary parking plan, City staff suggested that the parking area would not be screened as contemplated by the Zoning Ordinance.

As an initial matter, the Board has the authority to pass on the issue of whether a variance is required in the first instance in the context of a variance application. Bartlett v. City of Manchester, 164 N.H. 634 (2013). City staff has suggested that a variance from Section 275-5.5(B)(3) is required because the parking areas are not screened. Section 275-5.5(B)(3) is a part of a provision entitled "Objectives" and provides:

The NMU District calls for thoughtful design of parking, lighting, signage, architecture, location of entrances, location of dumpsters, and other matters. Parking should be located on street (parallel or diagonal) or through well located and screened small lots in side or rear yards. Parking should be located on street (parallel or diagonal) or through well located and screened small lots in side or rear yards.

Section 275-5.5(B)(3) does not establish a substantive standard, but rather sets forth aspirations for development in the zoning district. Section 275-5.5(C) establishes development standards for the zoning district, but does not include any substantive standard relative to screening for parking lots. In short, Section 275-5.5(B)(3) does not establish any substantive standard from which one can or must seek a variance and, therefore, no relief is required from that provision.

Assuming that the Board determines relief is required, the Applicant seeks variances from the following provisions of the Zoning Ordinance:

Section 275-5.5(C)(3)(a)-Parking in Front Yard Section 275-5.5(B)(3)-Off-Street Parking Areas Should Be Screened

#### **VARIANCE ELEMENTS**

## 1. Granting the variance would not be contrary to the public interest because:

The grant of the requested variance will not alter the essential character of the area or threaten the public health, safety or welfare. The Property is bounded on three sides by public streets. The front yard of the Property is bounded to the south by another property in the MNU zoning district. That property is improved by a non-residential use with parking in the front yard. Indeed, other non-residential uses in the immediate area have parking spaces in the front yard, be it Wild Willy's or Advanced Auto Parts. While the Zoning Ordinance speaks of the use of on-street parking in the NMU, this particular area of the NMU zoning district appears to lack on-street parking spaces, especially adjacent to the Property itself. As such, the allowance of parking in the front yard of the Property will not alter the essential character of an area where parking in the front yard appears to be the rule rather than the exception.

The allowance of parking spaces in the front yard of Property also will not threaten the public health, safety or welfare. Parking for convenience stores is typically on the same side as the entrance to the store itself and the entrance to the proposed convenience store faces Columbus Avenue. Having patrons circle the building to enter is neither convenient nor necessary safe. Similarly, while the Zoning Ordinance prefers parking in the rear yard in the NMU zoning district, requiring the same here would lead to more traffic, lighting and the like closer to residential properties. Parcels used for residential purposes lie towards the rear of the Property or across Old Gonic Road. By allowing the parking in the front yard, the effects of commercial traffic will generally be mitigated or minimized with respect to the residential properties as the same will principally be on the other side of the store itself and away from the residential properties. The properties from which such parking would be visible themselves have parking in their respective front yards and are put to non-residential uses. In short, allowing parking in the front yard of the Property would actually benefit the public interest in this particular case.

## 2. The variances would not be contrary to the spirit of the ordinance because:

Whether a variance would be contrary to the spirit of the ordinance is related to the requirement that it not be contrary to the public interest and, therefore, elements may be addressed together. Farrar v. City of Keene, 158 N.H. 684, 691 (2009) (addressing the public interest and spirit of the ordinance elements together). As such, for the reasons set forth above, the variances would not be contrary to the spirit of the ordinance.

## 3. By granting the variance, substantial justice would be done because:

The loss to the Applicant, in the event that the variances are denied, outweighs any gain to the general public. Accordingly, substantial justice would be done by granting the requested variance.

The Applicant seeks to use the Property for a gas station and convenience store. A convenience store requires adequate and convenient parking for patrons. Parking in the rear yard (i.e. behind the store and away from the store entrance) would not serve this purpose and would undermine the long-term feasibility of the proposed use. Harrington v. Town of Warner, 152 N.H. 74 (2005). [Landowner is entitled to a reasonable return on their investment in a property.]. Furthermore, between the existing trees on the back portion of the Property and the topography of the Property, the parking areas will be screened from the nearby residential properties.

By contrast, the public interest is minimal at best in this case. As discussed above, front yard parking appears to be the rule rather than the exception in this particular area of the NMU zoning district, with adjacent and nearby businesses having parking in the front yard. The area also does not appear to possess the on-street parking contemplated in the NMU zoning district. Moreover, in this particular case, parking in the rear yard would bring the commercial traffic and the lighting, etc. associated with it closer to the residential properties off of Old Gonic Road. In short, requiring strict compliance with the Zoning Ordinance in this case would not be in any party's interest.

### 4. The proposed use would not diminish surrounding property values because:

While the Zoning Ordinance may contemplate on-street parking or small screened off-street parking spaces in the rear yard of parcels in the NMU zoning district, the particular area in which the Property is located is characterized by parking in the front yard with such spaces being visible from the public streets. Moreover, parking spaces in the front yard of the Property not only serve the business interests of the Applicant, but serve to minimize any potential impact on nearby residential properties from traffic, lighting, etc. by moving parking away from those properties. The residential properties near the Property are located off of Old Gonic Road towards the rear of the Property. Furthermore, the features of the Property, such as the existing trees along Old Gonic Road and the topography of the Property which slopes down from Old Gonic Road would further minimize the impact from parking in the front yard of the Property. As such, consistent with the goal of preserving surrounding property values, the variances would allow for the establishment of parking and the potential impacts associated with the same further away from residential properties and in a location consistent with what is found in the immediate area in terms of commercial parking. Therefore, granting the variance would likely not only not result in a diminution of surrounding property values, but would help to preserve the same.

# 5. Denial of the variance would result in unnecessary hardship to the owner owing to the special conditions of the land because:

The Property lies at the edge of the NMU zoning district. Properties adjacent to or across the street from its rear lot line are located in the Residential-2 zoning district. The Property is bounded on three sides by public streets and there do not appear to be parking spaces on either

Columbus Avenue or Brock Street adjacent to the Property. The third street, Old Gonic Road, serves residential properties and is located the furthest from the proposed convenience store. The Applicant is indeed proposing to eliminate the access to the Property from Old Gonic Road. The Property slopes downward steeply from Old Gonic Road (i.e. its rear lot line) and there is a small wetland at the base of the sloped area. There are existing trees along the Property's rear lot line and that portion of its southern boundary adjacent to a residentially zoned property. The front of the Property is generally flat and old pavement lies over portions of the same. Next to and across the street from the front portion of the Property are other non-residential uses which have parking at least, in part, within the front yards of their respective properties. those parking area are not screened from the public street or neighboring properties. Given all of these features of the Property and its immediate environs, there is no fair and substantial relationship between the general purposes of the relevant sections which seek to establish parking areas behind the principal building screened from sight. Allowing the variance in this case would better protect those properties, the residential properties, which might be affected by nearby commercial parking by allowing the same to be moved further away from them. Additionally and alternative, a denial of a reasonable return on an investment may serve as an unnecessary hardship. Harrington, supra. A convenience store with customer parking in the rear will not last as it is contrary to the very notion of convenience underlying such a business. In short, the proposed use may not be a feasible venture if its parking is not convenient to the entrance of the store and parking spaces in the front yard provide for that convenience. While parking spaces may be established in the side yards by conditional use permit, the side yards are insufficient to provide the necessary parking as well as the necessary loading area for the convenience store use. As such, parking in the front yard is necessary to allow the Applicant to obtain a reasonable return on its investment in the Property.

The proposed use is a reasonable use of the Property. The Board has already deemed the convenience store with gas station to be a reasonable use of the Property with the prior grant of the variance. The parking in the front yard, as discussed above, will minimize any arguable impact on residential properties, while allowing the Applicant a reasonable opportunity to pursue the convenience store/gas station use of the Property with adequate parking for the same.

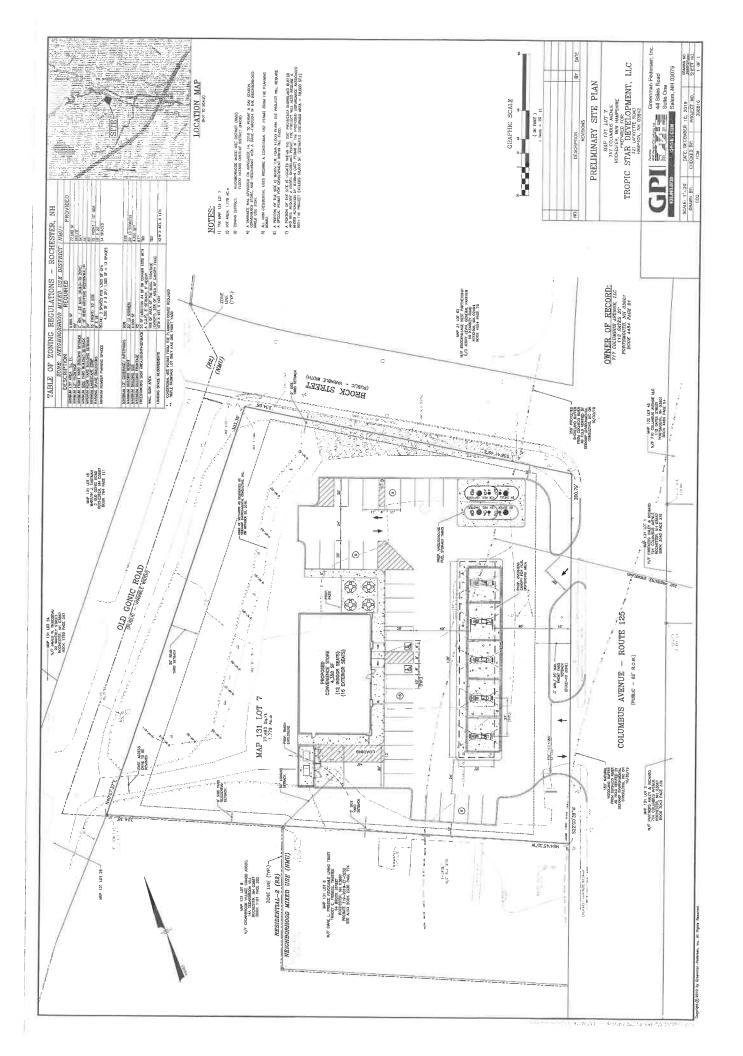
#### LETTER OF AUTHORIZATION

717 Columbus Avenue, Rochester, NH

I, Mary Beth Herbert of 717 Columbus Avenue, LLC, as current owner of the property at 717 Columbus Avenue, Parcel ID: 0131-0007-000 (the "Property"), do hereby authorize 717 Rochester Holdings, LLC and/or Tropic Star Development and its engineers (GPI) and attorney (Cronin, Bisson & Zalinsky, P.C.) to act on our behalf and as our agent concerning applications for any local or state approvals.

Mary Beth Herbert

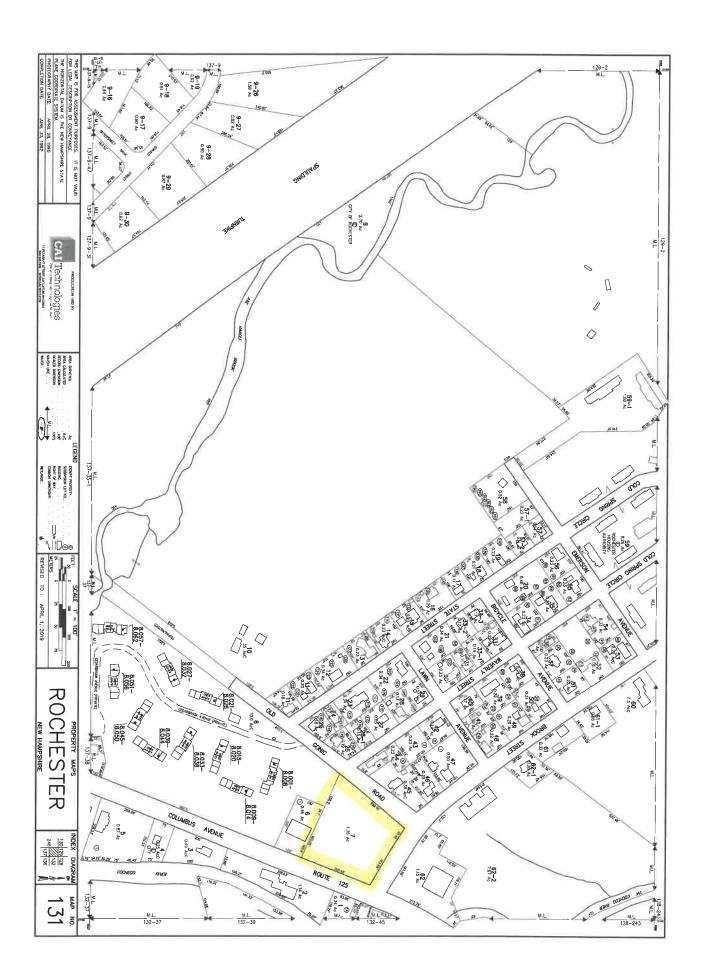
Heckert Date: Jan 21 2020 717 Columbus Avenue, LLC



#### § 275-5.5 Neighborhood Mixed-Use District (NMU).

- A. District location. This district is located in various areas throughout the City.
- B. Objectives. The objectives of the district include:
  - (1) Function. The Neighborhood Mixed-Use District is established largely to serve adjacent residential neighborhoods. The NMU District allows, for example, a small convenience store, laundry facility, real estate office, personal services establishment, and day-care center.
  - (2) Character of district.
    - (a) Smaller in scale, in area of coverage, size of buildings, and scope of operations.
    - (b) Located at the edge of neighborhoods, on or in very close proximity to collector and arterial roads.
    - (c) Well connected to those neighborhoods.
  - Design. The NMU District calls for thoughtful design of parking, lighting, signage, architecture, location of entrances, location of dumpsters, and other matters. Parking should be located on street (parallel or diagonal) or through well located and screened small lots in side or rear yards.
  - (4) Appropriate locations. The NMU District might also be located close to public institutions like schools, churches, day-care centers, senior citizen centers, and recreation centers, as well as at transit stops.
- C. Development standards.
  - (1) Uses.
    - (a) Drive-through facilities. Drive-through facilities are permitted in the district by conditional use.
    - (b) Outdoor uses. Outdoor uses, such as dining, cafes, and seating (all of which shall be accessory to an allowed primary approved use), may be established within the public right-of-way or on other City property by approval of the City Council.
    - (c) Nonresidential uses are permitted by right in existing buildings only; nonresidential uses are permitted as new construction only by conditional use.
  - (2) Setbacks.
    - (a) Build-to zone. There is a build-to zone between zero and 20 feet. This zone may be altered by conditional use where appropriate for civic uses, where not practical, or for other design considerations.
    - (b) Side/rear setbacks. There are no minimum side setbacks except for spacing between buildings as specified in the Building/Fire Code. The Planning Board may alter the rear setbacks by conditional use, where appropriate, such as to accommodate rear decks for dining, to accommodate pedestrian-oriented facilities, or to allow for optimal uses of lots consistent with the intent of this section, provided that any reduction does not interfere with or negatively impact abutting properties, particularly residential properties.
  - (3) Parking areas.
    - (a) Rear setbacks. Within the NMU District parking is allowed in rear yards but may be permitted in side yards by conditional use. Parking is not allowed in front yards.



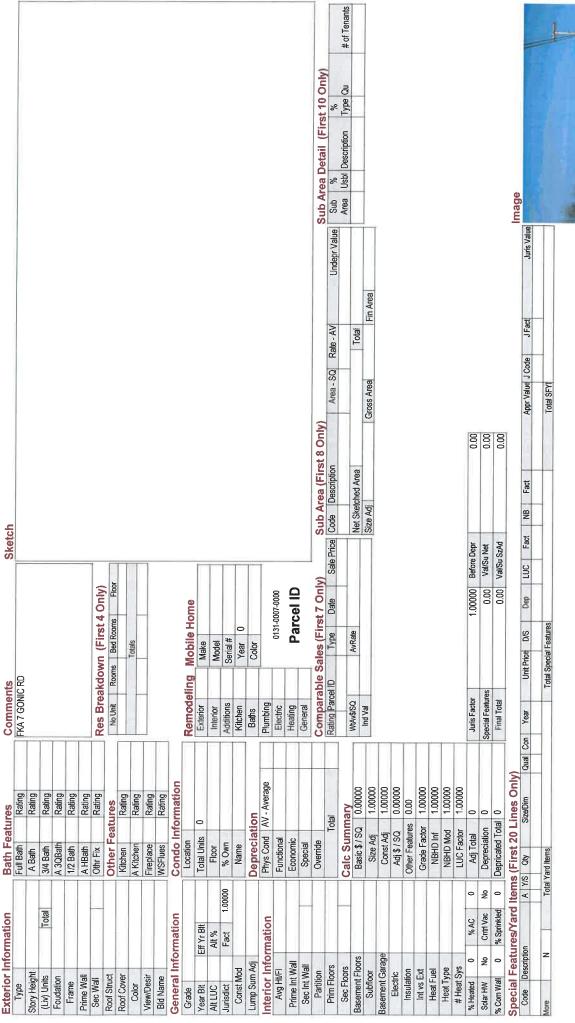


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Database: Assess50Rochester

User: ROCHESTER\dee.mondou

Parcelld: 0131-0007-0000







# Abutters List Report

Rochester, NH January 21, 2020

#### **Subject Property:**

Parcel Number: 0131-0007-0000

CAMA Number: 0131-0007-0000

Property Address: 717 COLUMBUS AVE

Mailing Address: 717 COLUMBUS AVENUE LLC

112 GATES ST

PORTSMOUTH, NH 03801-4608

Abutters:

1/21/2020

Parcel Number: 0131-0001-0000 Mailing Address: PARTNERS HALEY & RICHARD

CAMA Number: 0131-0001-0000 724 COLUMBUS AVE
Property Address: 716 COLUMBUS AVE ROCHESTER, NH 03867

Parcel Number: 0131-0002-0000 Mailing Address: PARTNERS HALEY & RICHARD

CAMA Number: 0131-0002-0000 724 COLUMBUS AVE
Property Address: 724 COLUMBUS AVE ROCHESTER, NH 03867

Parcel Number: 0131-0006-0000 Mailing Address: FRISBEE DIANE L REV LIV TRUST

CAMA Number: 0131-0006-0000 FRISBEE TRACEY E TRUSTEE

Property Address: 725 COLUMBUS AVE 64 BROCK ST

ROCHESTER, NH 03867-4415
Parcel Number: 0131-0007-0000 Mailing Address: 717 COLUMBUS AVENUE LLC

CAMA Number: 0131-0007-0000 112 GATES ST

Property Address: 717 COLUMBUS AVE PORTSMOUTH, NH 03801-4608

Parcel Number: 0131-0008-0000 Mailing Address: CEDARBROOK VILLAGE CONDO ASSOC CAMA Number: 0131-0008-0000

Property Address: 0 CEDARBROOK AVE 14A CEDARBROOK VILL

ROCHESTER, NH 03867

Parcel Number: 0131-0026-0000 Mailing Address: LAMBERT GAYDEN & MARTIN JENNIFER

CAMA Number: 0131-0026-0000 JENNIFER
Property Address: 9 OLD GONIC RD P O BOX 646

BARRINGTON, NH 03825

Parcel Number: 0131-0044-0000 Mailing Address: THIBODEAU JAMES W 22 WAVERLY ST

Property Address: 22 WAVERLY ST ROCHESTER, NH 03867-4430

Parcel Number: 0131-0045-0000 Mailing Address: CILLEY MARILYN J % EASTMAN

CAMA Number: 0131-0045-0000 MARILYN J
Property Address: 3 OLD GONIC RD 3 OLD GONIC RD

ROCHESTER, NH 03867-4416

Parcel Number: 0131-0062-0000 Mailing Address: BROOKVILLAGE WEST PARTNERSHIP

CAMA Number: 0131-0062-0000 %JERRY LEVIN GENERAL

Property Address: 703 COLUMBUS AVE 56 KEARNEY RD

Parcel Number: 0132-0045-0000 Mailing Address: 710 COLUMBUS AVENUE LLC

CAMA Number: 0132-0045-0000 Maining Address: 710 COLOMBOS AVENUE LLC

Property Address: 710 COLUMBUS AVE PORTSMOUTH, NH 03801-4608



LISA KIMBALL CEDARBROOK VILLAGE CONDO ASSOC 14A CEDARBROOK VILL ROCHESTER, NH 03867

CAROLINE LEWIS
CEDARBROOK VILLAGE CONDO ASSOC
14A CEDARBROOK VILL
ROCHESTER, NH 03867

AMANDA YORK
CEDARBROOK VILLAGE CONDO ASSOC
14A CEDARBROOK VILL
ROCHESTER, NH 03867

717 ROCHESTER HOLDINGS, LLC 321 LAFAYETTE RD, UNIT D HAMPTON, NH 03842

JOHN G. CRONIN, ESQUIRE CRONIN, BISSON & ZALINSKY, P.C. 722 CHESTNUT ST MANCHESTER, NH 03104