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John G. Cronin
Admitted in NH and MA

March 6, 2020

James Grant, Director/Electrical Inspector
City of Rochester
Building Department
31 Wakefield Street
Rochester, New Hampshire 03867

Re: Request for Zoning Review – 717 Columbus Avenue, Rochester, New Hampshire

Dear Mr. Grant:

Our office represents 717 Columbus Avenue, LLC and 717 Rochester Holdings, LLC in connection with their efforts to develop the Property for a convenience store and gas station. As you are aware, we recently attended a hearing before the Zoning Board of Adjustment (“ZBA”) on February 12, 2020 seeking a variance to allow parking in the front yard. This hearing followed a hearing on November 14, 2018 at which time the ZBA granted a variance to allow a convenience store, gas station and restaurant with a drive through.

At the recent hearing, the ZBA denied the request for a variance to allow parking in the front yard, as they claimed the hardship prong of the variance standard was not satisfied. We think the decision was in error as there was ample evidence to support a finding of hardship. In addition, the recent decision contradicts the decision made in 2018. We filed a Request for Rehearing as a protective measure and to preserve our right to appeal. On further review of the case, the prior decision, the ordinance and the law, we believe a variance was not even required. Our belief is based on the following:

1. In the 2018 case, a plan was attached to the application. The application and plan were subject to a zoning review. There was never a decision made that a variance was required for front yard parking and there was no appeal of the administrative decision calling out only the need for a variance to allow the use ((42:5(e))). Accordingly, we contend the City is estopped from requiring any additional variances to allow the project to proceed.
2. The recent variance sought was to allow parking in the front yard. The ordinance does not define the term “front yard.”

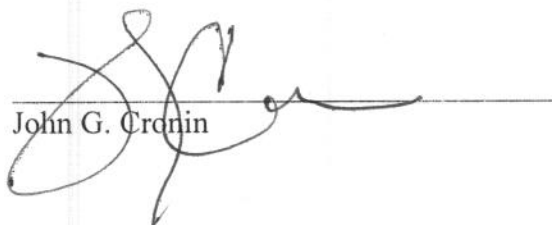
3. Front yard parking is specific to the NMU Zone.
4. Most of the neighboring uses have parking between the street and their buildings.
5. The NMU has a "Build To" zone between 0' and 20'. The "Build To" area essentially establishes the front yard. It makes sense that if you build a building along the street or even 20' back from the line, there is little of no room for parking. In our project, you could not maintain a convenience store and gas station development within the "Build To" zone and a Conditional Use Permit will be required. In our view, the "Build To" zone of 0' to 20' establishes the front yard. Accordingly, there is no parking proposed in the front yard and no variance is required.
6. Notwithstanding the "Build To" zone, the fueling canopy is a structure. The intent of the zoning provision is to put parking behind a structure. In our proposal, the parking is behind the fueling canopy structure and not in the front yard. Hence, a variance is not required.

We respectfully request that you review the proposal, the ordinance and our reasoning and determine a variance is not required. We are including a copy of our Request for Rehearing for your ready reference.

Thank you for your consideration.

Sincerely,
CRONIN BISSON & ZALINSKY, P.C.

By:


John G. Cronin

JGC/csm
Enclosure



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Zalinsky P.C.
Attorneys at Law

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March 4, 2020

Larry Spector, Chairman
City of Rochester
Zoning Board of Adjustment
31 Wakefield Street
Rochester, New Hampshire 03867

Re: Request for Rehearing – Case No # Z-20-01
717 Columbus Avenue, Rochester, New Hampshire 03867, MLB 0131-0007-0000

Dear Chairman Spector:

This letter follows my appearance at the Zoning Board of Adjustment on February 12, 2020. The application sought a variance from the zoning ordinance for front yard parking. We respectfully request the matter be scheduled for re-hearing for the following reasons:

1. The decision was unlawful and unreasonable due to a biased panel.

The request was denied in a split decision. One member of the Board admittedly failed to consider the merits of the application. The member held a bias to the application as he was not in favor of the variance that was previously granted allowing the convenience store and gasoline station use. See, Case No. 2018-12 (variance allowed to permit, gasoline station, convenience store and restaurant with drive through). Variance Application attached as Exhibit 1. It is well settled that an applicant should have an unbiased panel, free of bias, to evaluate the application on its merits. The ZBA acting in a judicial capacity must be “impartial as the lot of humanity will admit.” NH RSA 42:1; N.H. Const. Pt. 1, art. 35; see Winslow v. Holderness Planning Board, 125, N.H. 262,267 (1981) The member should have disclosed his bias and recused himself prior to the hearing. The involvement of a biased member, is reason alone, to grant the request for rehearing.

2. The Board failed to conduct a Bartlett analysis to determine whether a variance was required in the first instance. See, Bartlett v. City of Manchester, 164 N.H. 634 (2013) (Court and ZBA can determine whether a variance is required).

The Applicant sought a variance to allow a convenience store, gasoline station and convenience store with drive through. See, Case No 2018-12. The Decision and Minutes are attached as Exhibit 2. The application clearly shows the layout of the store and location of the primary building, fueling structure and parking locations. The application was subject to a

zoning review. The Parking areas, as shown on the plan were never called out as requiring an additional variance or mentioned as being inconsistent with the Ordinance. Although primarily an administrative exercise for the building official, there is ample evidence to demonstrate a variance is not required for this use to proceed as originally proposed. According to the Ordinance, there is no parking allowed in the front yard. The front yard is not specifically defined but is considered the area that is 20 feet from the right of way. The goal is for the parking to be behind a structure and not directly adjacent to the roadway. The ZBA overlooked or misinterpreted the fact the parking is not proposed in the front yard or that area that is 20 feet from the right of way. The fueling canopy is considered a structure. The proposed parking is behind the fueling structure. We will be seeking further review from the building official. The other aspect to consider is municipal estoppel. The Applicant filed an Application to allow the use. The use was approved by variance in accord with the layout on the plan which showed the location of parking. The applicant reasonably relied on the zoning review and the variance and started to market the property for sale. It is unreasonable to now require a variance for an element clearly shown on a prior plan where the Applicant has detrimentally relied on the prior variance granting the uses. The Applicant raises this issue to preserve its right to appeal with the expectation the building official will make a preliminary review of the parking, as proposed, and the need for a variance.

3. To the extent the Board denied the variance on hardship grounds, its decision was unlawful and unreasonable.

The ZBA overlooked or misapprehended the facts and the law regarding hardship. The Applicant demonstrated the Property has special conditions, including frontage on three streets, an area of wetlands, steep topography and proximity to residential uses. More importantly, the ZBA previously made a finding of hardship to allow the use. See, minutes attached as Exhibit 3. A hardship exists if, owing to special conditions of the property that distinguish it from other properties in the area, there is no fair and substantial relationship between the general public purposes of the ordinance provision and the application to the property at issue and the proposed use is reasonable. In this case, the parking is not in the front yard area as it is on neighboring properties and the proposed parking is behind the fueling structure. The layout as proposed meets the goals of the ordinance. As demonstrated by the prior variance, the proposed use is reasonable. Another compelling fact that supports the finding of hardship is the parking status of the area properties. Many of the commercial properties in the immediate area have parking in the immediate front yard (within 20 feet of the right of way) without any screening or buffer. See, view of neighboring uses, Exhibit 4.

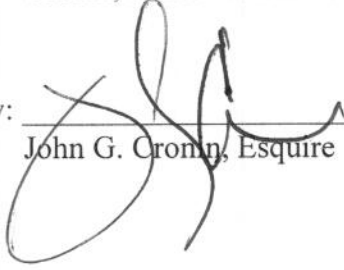
4. The denial violates NH RSA 676:3 and the duty to make findings.

State statute requires that a board, in the event of a denial of an application, issue a written decision with reasons for that denial. NH RSA 676:3. Despite caution by the staff and instructions to make specific factual findings supporting the denial, no findings were made to support the denial. The minutes of the meeting, currently in draft form, provide no explanation of the presentation or the deliberations. The minutes simply provide the conclusion that the

variance was denied based on the hardship. The minutes are summary in form with no detail of the reasons for denial. See, draft minutes attached as Exhibit 5. The failure to provide any reasons for the denial and the lack of discussion on the merits warrants a rehearing.

The Applicant respectfully requests a rehearing at the earliest possible date.

Sincerely yours,
Cronin, Bisson & Zalinsky, P.C.

By:  _____
John G. Cronin, Esquire

JGC:esm
Enclosures

EXHIBIT 1



City of Rochester, New Hampshire

Department of Building, Zoning and Licensing Services
31 Wakefield Street * Rochester, NH 03867
(603) 332-3508

Variance Application

TO: BOARD OF ADJUSTMENT
CITY OF ROCHESTER

DO NOT WRITE IN THIS SPACE

CASE NO. _____

DATE FILED _____

ZONING BOARD CLERK

Applicant: 717 Columbus Avenue, LLC
E-mail: jcronin@cbzlaw.com (counsel) Phone: 603-624-4333 (counsel)
Applicant Address: 112 Gates Street, Portsmouth, NH 03801
Property Owner: 717 Columbus Avenue, LLC
Property Owner Address: 112 Gates Street, Portsmouth, NH 03801
Variance Address: 717 Columbus Avenue
Map Lot and Block No: Map 131, Lot 7
Description of Property: Vacant Land
Proposed use or existing use affected: gas station, convenience store and restaurant with drive-through

The undersigned hereby requests a variance to the terms of Article _____, Section ^{42:5(E)} _____ and asks that said terms be waived to permit the proposed use stated above in the Neighborhood Mixed Use Zone.

The undersigned alleges that the following circumstances exist which prevent the proper enjoyment of his land under the strict terms of the Zoning Ordinance and thus constitute grounds for a variance.

Signed: Wendy B. K. Herbert Date: October 13, 2018

Variance Criteria

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

Please see attached narrative.

2) If the variance were granted, the spirit of the ordinance would be observed because:

Please see attached narrative.

3) Granting the variance would do substantial justice because:

Please see attached narrative.

4.) If the variance were granted, the values of the surrounding properties would not be diminished because:

Please see attached narrative.

5.) Unnecessary Hardship:

a. Owing 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:

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 because:

Please see attached narrative.

And:

ii. The proposed use is a reasonable one because:

Please see attached narrative.

b. Explain how, if the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing 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.

Please see attached narrative.

Attachment to Variance Application 42:20 and 42:21
717 Columbus Avenue, LLC ("Applicant")
Map 131, Lot 7 ("Property")
717 Columbus Avenue, Rochester, New Hampshire

BACKGROUND

This subject property ("Site") is a vacant lot, approximately 76,666 square feet, located in the Neighborhood Mixed Use zone ("NMU"). 717 Columbus Avenue, LLC ("Owner") is the current record owner and of the Property. The Applicant seeks to obtain permit and approvals to improve the Property with a convenience store, small restaurant, and fuel dispensary. The Applicant engaged the services of Frank Monteiro, a Professional Engineer to undertake an initial feasibility analysis for the proposed use. The results were positive and it appears the Property is ideally suited for the proposed use other than its zoning classification. In the past, the proposed use was allowed without the need for a variance.

The objective of the NMU zone is largely to serve adjacent residential neighborhoods. Uses allowed as a matter of right include convenience stores, cafes, restaurants and retail uses up to 5,000 square feet. Other than the fuel dispensaries, the convenience store and restaurant appear to be allowed as permitted uses. The drive through lane for the restaurant will require a conditional use permit as per the development standards applicable to the NMU. Gas stations, as defined by the ordinance, are allowed only in three zones. The zones in which gas stations are allowed include the Downtown Commercial zone ("DC"), Highway Commercial zone ("HC"), and the Granite Ridge Development zone ("GR").

Although the NMU is generally classified as residential zone, the Property fronting on Columbus Avenue is not suitable for residential development. Columbus Avenue is a busy street with high traffic counts. Neighboring uses include Advanced Auto Repair and a Restaurant. Although there is an abutting apartment property at the rear, most of the uses along Columbus Avenue are commercial in nature. The general reference to gas stations and the related definition contemplates gas stations in general. The method of sale and delivery of fuel for the driving public has changed markedly in the past several decades. In years gone by, a mechanic usually operated a service station with a small number of gas pumps and a few service bays. The operator sold fuel, but was primarily in business as a mechanic. In those times, an attendant would fill up the gas, check the oil and tire pressure, and wash windows. The next phase was dominated by self-service fuel stations that included a small payment kiosk and several pumps. The current trend is to pair fuel dispensers with convenience stores and restaurants that cater to the needs of the residents in the community and passersby. The full service convenience development as proposed here is a staple in New Hampshire and throughout the United States.

RELIEF REQUESTED

The Applicant met with the Planning Staff to discuss the Project and the required approvals. A variance to permit the proposed use is required due to the inclusion of the fuel dispensers.

1. Section 42:5(E) – To permit proposed mixed used a convenience facility, including fuel dispensers in the Neighborhood Mixed Use Zone.

VARANCE CRITERIA

1. Granting the variance will not be contrary to the public interest:

According to the Supreme Court, the public interest and spirit and intent prongs of the variance test are essentially the same and should be considered together. Farrar v. City of Keene, 158 N.H. 684 (2009). The commercial uses proposed are consistent with the essential character of the neighborhood and there will be no harm to the public interest. The convenience store and restaurant fit the express goals of the Ordinance. The fuel dispensers are a convenience to neighbors and the public in general. It is rare to find a convenience store today that does not provide fuel to meet the demand of its customers. The location is proper for the retail sale of fuel as it is located on a busy street with significant traffic. Although not expressed, fuel dispensers could be considered an accessory use for a modern convenience store. Moreover, the public interest will be enhanced as the Property will provide greater convenience and utility for the public in general, and customers in particular.

2. If the variance were granted, the spirit of the ordinance would be observed because:

When the uses proposed are consistent with the essential character of the neighborhood, there will be no harm to the public interest. Here, the project is consistent with the zoning objectives and is in harmony the goals of providing services to the neighborhood. Moreover, the public interest will be enhanced as the Site will provide greater convenience and utility for the public in general, and customers in particular. The spirit and intent of the ordinance is to protect the health, safety, and welfare of the community. A review of the Zoning Ordinance is in order to determine whether the proposed variances, if granted, are consistent with the spirit and intent of the ordinance. Chester Rod and Gun Club v. Town of Chester, 152 N.H. 577 (2005). The ordinance contemplates retail; restaurant and service uses in this area and the proposed use will not cause harm or injury to the public interest. To be contrary to the spirit and intent of the ordinance or injurious to the public rights of others, the variances must unduly, and in a marked degree, conflict with the ordinance's basic zoning objectives. *Id.* at 581, citing, Coderre v. Zoning Board of Review of City of Pawtucket, 105 R.I. 266 (1969). In New Hampshire, an applicant may satisfy this prong, and the related public interest prong, by

showing the variances, if granted, will not alter the essential character of the neighborhood. *Id.*; see also, Harrington v. Town of Warner, 152 N.H. 74 (2005); and, K. Young, Anderson's American Law of Zoning, Section 20.43. A variance will also not be contrary to the spirit of the ordinance if it does not threaten the public health, safety, or welfare.

Here, the relief requested will in no way harm or impact the essential character of the neighborhood. The area will be essentially the same before and after the proposed improvements. The Property, however, will be improved and the curb appeal and functional utility of the Property will be enhanced consistent with the public interest.

3. Granting the variance would do substantial justice because:

The substantial justice prong is subjective and requires a showing that the harm to the Applicant if the variance is denied is greater to the harm to the public if the variance is granted. The Applicant contends there will be no harm to the public if the variance is granted. The variance, if granted, will allow this mixed use to proceed and provide services to the neighbors and the community. If the variance is denied, the Applicant will not move forward to improve the property and the opportunity to improve the tax base with a new, efficient and properly designed service facility will be lost.

4. If the variance were granted, the values of the surrounding properties would not be diminished because:

The neighborhood is commercial in nature and the Property is located in the area of diversified commercial uses. The Property maintains frontage on Columbus Avenue, a busy street with commercial uses. The daily traffic counts are substantial and consistent with meaningful and successful commercial uses. The variance requested, if granted, will have no impact on the surrounding properties and will not diminish their value. See, Daniels v. Town of Londonderry, 157 N.H. 519 (2008). The proposed variances will provide for improvement of the Property to meet the service needs of the community. The proposed use will not have the stigma attached to historical gas stations. The tanks and safety systems are state of the art and will be installed under close supervision and best practices. Similarly, there will be no outside storage of cars in disrepair waiting repair. The facility will dispense fuel only and vehicle service will not be available.

5. Literal Enforcement of the ordinance will result in an unnecessary hardship.

A. Owing to special conditions of the property, there is no fair and substantial relationship between the general purposes of the relevant ordinances and their application to the Property. The Property has special conditions such as a corner lot location and its existence among other commercial properties. The terms of the ordinance that lump gas stations into one class and do not distinguish for fuels dispensaries incident to a convenience store suggest the drafter did not include such a

use as a prohibition in their consideration. The proposed facility fits the goals of the zone for providing services to the neighboring residences. Traffic for residences in the area flow to the intersection. A convenience store with mixed uses is typical for the current state of our society and such a use is not expressly defined in the ordinance.

- B. The proposed use is reasonable. The use proposed is reasonable as it is consistent with similar successful facilities throughout the region. The project engineer is very experienced completing the design and approval of over one hundred similar facilities.

Abutters List
Variance Application
717 Columbus Avenue, Rochester, NH

ABUTTERS:

Map/Lot 0131-0001-0000
Haley & Richard Partners
724 Columbus Avenue
Rochester, NH 03867

Map/Lot 0131-0002-0000
Haley & Richard Partners
724 Columbus Avenue
Rochester, NH 03867

Map/Lot 0131-0006-0000
George & Diane Frisbee
Quick Cash
725 Columbus Avenue
Rochester, NH 03867-3926

Map/Lot 0131-0008-0000
Amanda York, President
Cedarbrook Village Condominium Association
14A Cedarbrook Village
Rochester, NH 03867

and

Lisa Kimball, Secretary & Treasurer
Cedarbrook Village Condominium Association
14A Cedarbrook Village
Rochester, NH 03867

Map/Lot 0131-0026-0000
Gayden Lambert & Jennifer Martin
PO Box 646
Barrington, NH 03825

Map/Lot 0131-0044-0000
James W. Thibodeau
22 Waverly Street
Rochester, NH 03867-4430

Map/Lot 0131-0045-0000
Marilyn Cilley
3 Old Gonic Road
Rochester, NH 03867-4416

Map/Lot 0131-0062-0000
Brookvillage West Partnership
56 Kearney Road
Needham, MA 02494-2507

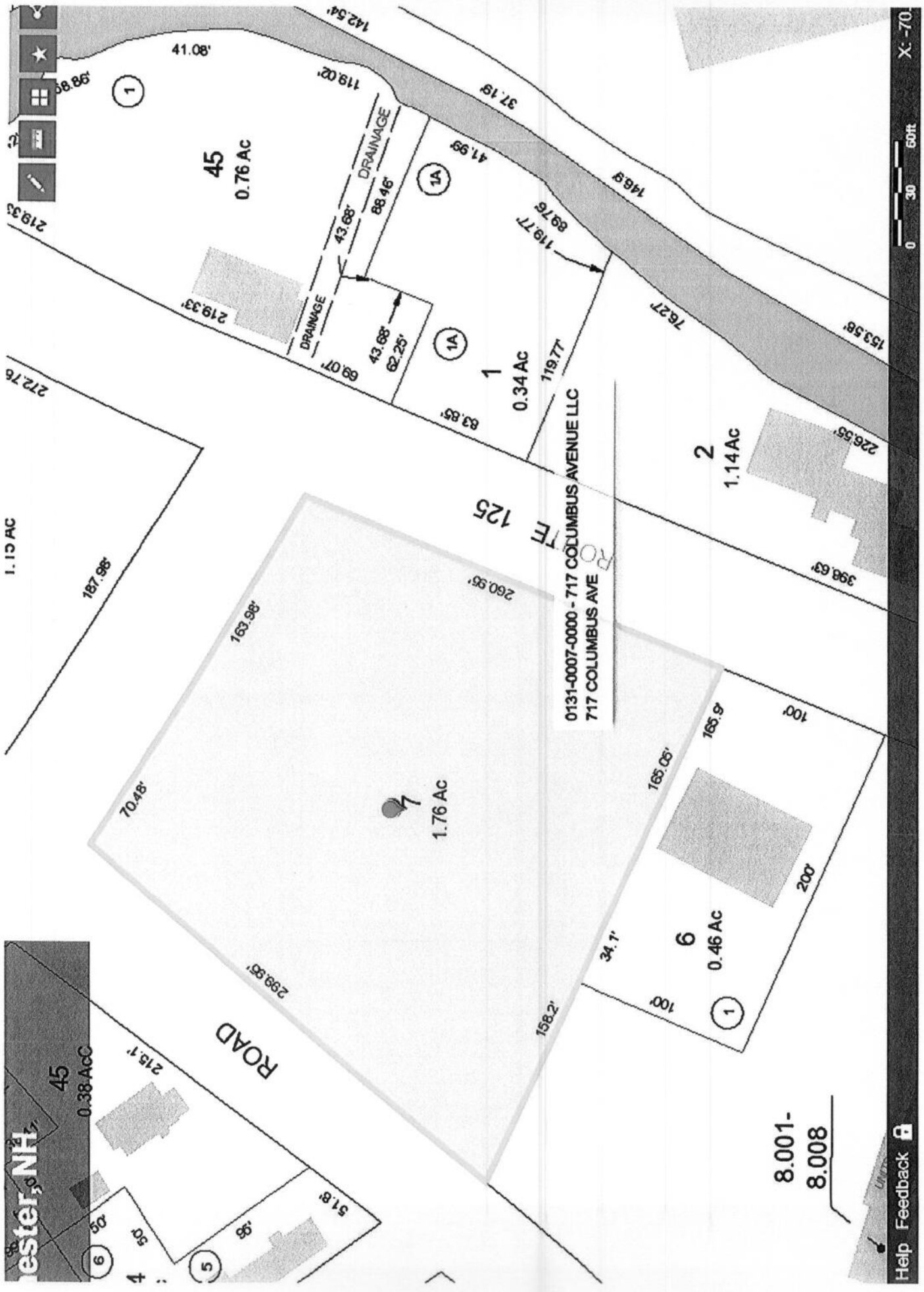
Map/Lot 0131-0062-0002
Marsh View Housing, LP
77 Olde Farm Lane
Rochester, NH 03867

Map/Lot 0132-0045-0000
710 Columbus Avenue, LLC
112 Gates Street
Portsmouth, NH 03802-1240

SUBJECT LOT:
Map/Lot 0131-0007-0000
717 Columbus Avenue, LLC
112 Gates Street
Portsmouth, NH 03801-4608

COUNSEL:
John G. Cronin, Esquire
Cronin, Bisson & Zalinsky, P.C.
722 Chestnut Street
Manchester, NH 03104

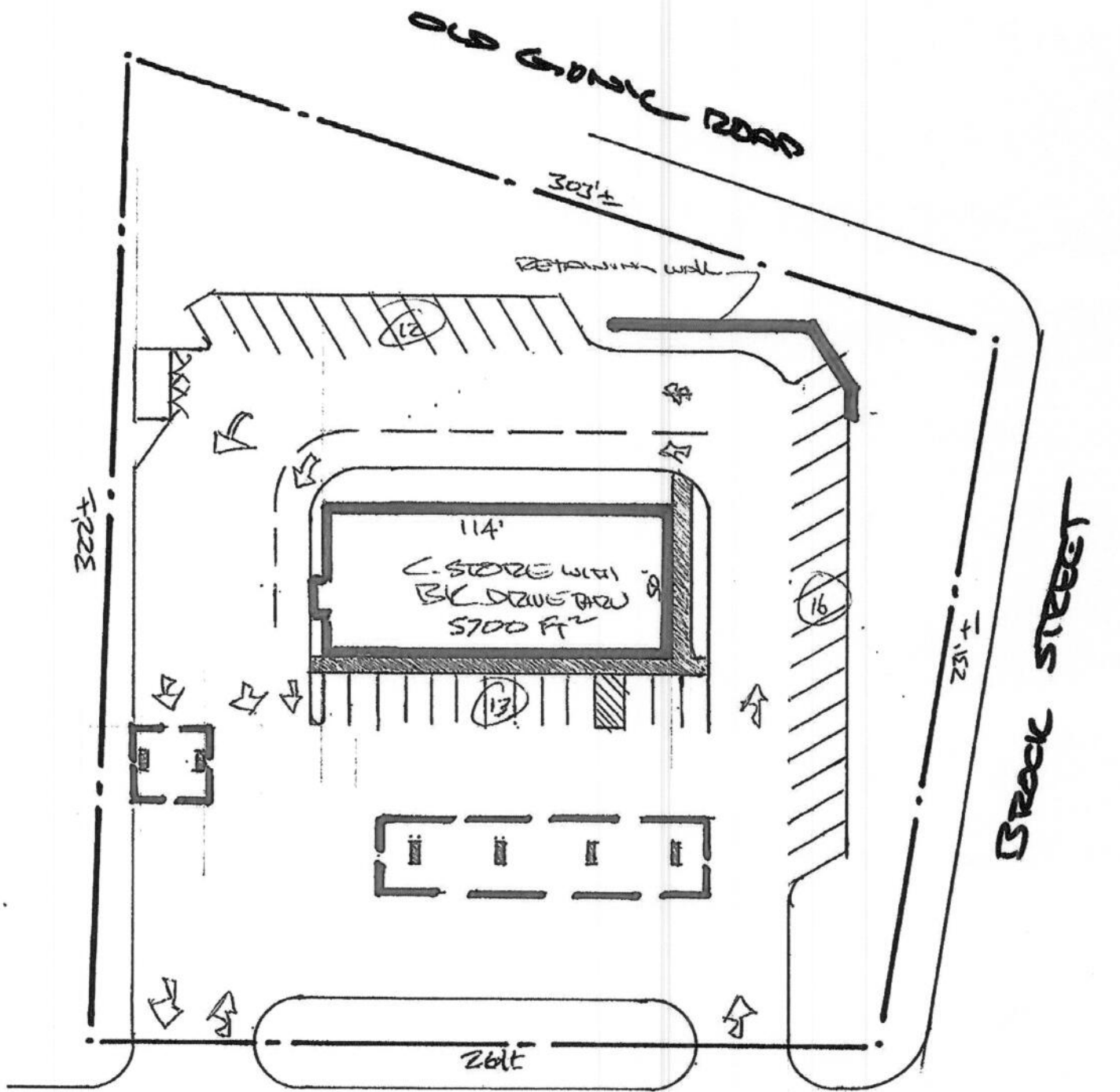
ENGINEER:
Frank C. Monteiro, PE
MHF Design Consultants, Inc.
44 Stiles Road, Suite One
Salem, NH 03079





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43°17'22.31" N 70°58'33.73" W



RT 125 COLUMBUS AVE

ROCHESTER NH ②

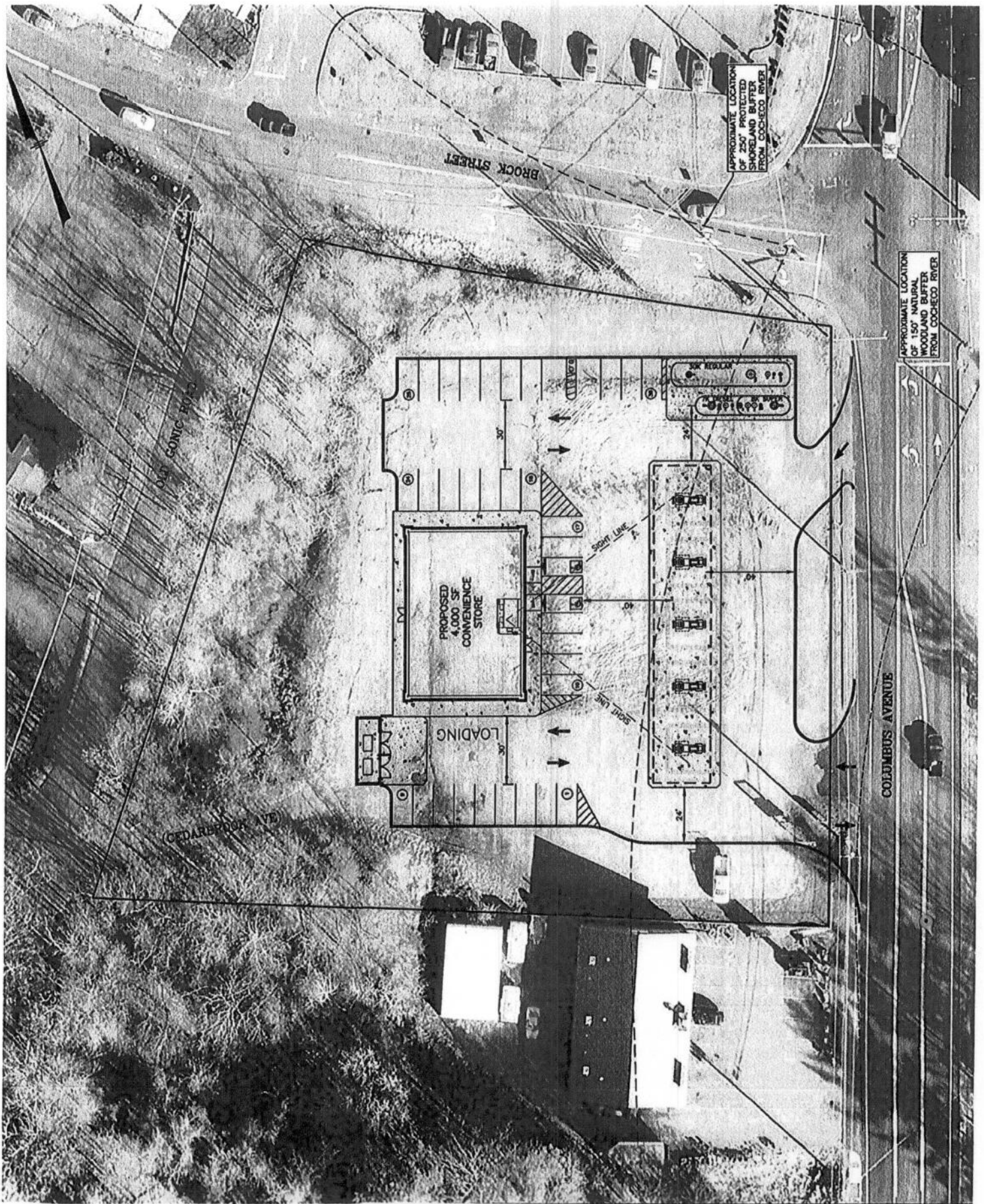


EXHIBIT 2



City of Rochester, New Hampshire

Building, Zoning & Licensing Dept.
33 Wakefield Street * Rochester, NH 03867
(603) 332-3508
Web Site: www.rochesternh.net

Zoning Board of Adjustment Notice of Decision Case No 2018-12

November 14, 2018

2018-12 717 Columbus Avenue, LLC applicant for a Variance to permit a gas station, convenience store and restaurant with a drive-through in the Neighborhood Mixed Use Zone. According to Article 42, Table 18-B and Table 18-C.

Location: 717 Columbus Avenue, Rochester, NH 03867, 0131-0007-0000, in the NMU Zone.

*The Variance was **approved** because it met all five criteria based on what the applicant presented.*


Mr. Lawrence Spector - Chair
Rochester Zoning Board of Adjustment

It is the applicant's responsibility to obtain any applicable permits from local, state, and federal agencies. Contact the Department of Building, Zoning and Licensing Services at (603) 332-3508 ext. 1, to apply for any necessary permits and certificates. Any work completed within the thirty (30) day appeal period, explained below, is at your risk.

Note: Any person affected has a right to appeal this decision. A request for a rehearing is the first step of an appeal. The request must be submitted to the Department of Building, Zoning and Licensing within **thirty (30) calendar days**, starting the day after the decision is made. If a rehearing is not granted, the next step is to appeal to Superior Court within thirty (30) days. If a rehearing is granted, it is the responsibility of the original applicant to present the case to the Zoning Board, with the same obligations and following the same procedure used when the case was first heard.

cc: 717 Columbus Ave LLC
John Cronin, Esq
File



City of Rochester, New Hampshire

Building, Zoning & Licensing Dept.
33 Wakefield Street * Rochester, NH 03867
(603) 332-3508 * Fax (603) 330-0023
Web Site: www.rochesternh.net

MINUTES OF THE ROCHESTER ZONING BOARD OF ADJUSTMENT MEETING OF November 14, 2018

The Chair called the meeting to order at 7:01 p.m. in the Council Chambers.

Roll Call:

The Zoning Secretary conducted the roll call.

Members Present

Lawrence Spector
Randy Lavallee
Robert Goldstein
Robert Gates
Shon Stevens
Leo Brodeur, Alternate

Members Excused

Also present: Julia Libby, Secretary of Building, Zoning, and Licensing Services
Joe Devine, Code Compliance Officer for Building, Zoning, and Licensing Services

These minutes are the legal record of the meeting and are in the format of an overview of the Zoning Board of Adjustment meeting. It is neither intended nor is it represented that this is a full transcription. A recording of the meeting is on file in the Building, Zoning, and Licensing Office and online at www.rochesternh.net for a limited time for reference purposes. It may be copied for a fee.

Approval of Minutes:

The minutes of September 12, 2018 were reviewed; Mr. Goldstein made a motion to accept the minutes with a change to a typo on the third page, Mr. Gates seconded the motion. The motion passed unanimously by a voice vote.

Seating of Alternates:

Chair Spector announced that the five regular members would be voting.

New Cases:

2018-09 Corey & Gary MacKoul applicants for an Administrative Appeal, allege that an error has been made in the decision, determination, or requirement of Joe Devine on September 20, 2018 for a notice of violation for an illegal home occupation in relation to Article 42.24 section A of the Zoning Ordinance.

Location: 147 Wakefield Street, Rochester, NH 03867, 0113-0055-0000, in the Residential 2 Zone.

Jennifer Hoover introduced herself as a representative for Corey and Gary MacKoul. Corey introduced himself as the applicant. Ms. Hoover began by presenting the applicants case in regards to the administrative appeal.

Chair Spector asked the Board members if they had questions for Ms. Hoover. Mr. Stevens asked who lives upstairs and Ms. Hoover stated that Mr. MacKoul and his father live upstairs. Mr. Stevens also asked who owns the insurance business; Ms. Hoover replied that from what she understands, the insurance business is a sole proprietorship that employs two agents and a staff person. Mr. Stevens wanted to know who the sole proprietor was and Ms. Hoover stated that Peggy Lynch was and Corey MacKoul is an agent with her.

Chair Spector asked Mr. Devine to present his case for the appeal. Mr. Devine passed out photos from a site visit at the property on May 31, 2018. He briefed the Board of each photo from the visit. He stated that they ultimately sent the violation because the residential use of the property had essentially dwarfed the commercial use.

The Chair asked the Board if they had any questions for Mr. Devine, Mr. Stevens asked if there was a shower there. Mr. Devine responded that during the site visit with the Board that day there was a stand up shower in the downstairs.

Ms. Hoover stated that Mr. MacKoul does live there; he stays with his girlfriend periodically and when he does that his father does stay at the property, but currently both of them are living there. She also pointed out that the photographs had been taken in May and the violation was not sent out until September. She then briefed the Board on what has happened with the property over the last year and a half or so.

Mr. Gates asked Mr. Devine to go through the definition of subordinate. Mr. Devine said that according to Rochester's zoning the home occupation must be subordinate to the residential use and have little to no impact on the neighborhood. He stated that it was their determination when they went through the site in May that the residential space has been dwarfed by the commercial space. He said that when they were there, the space that Corey has on the application, as storage was set up for a salon, the front half of the building was set up for an insurance business, and the upstairs was set up for pieces of the salon. Mr. Devine stated that he does not think that there was a kitchen set up upstairs when they initially purchased the building, and he has not dug that far to see if they actually pulled permits. He said he also does not think there were two bathroom on the

first floor set up the way they are. Mr. Devine said that is expanding the business use according to the site plans.

Mr. Stevens asked the applicant and his representative if there were any permits pulled for work done on the property. Ms. Hoover said that she first wanted to point out a couple of things. She said that with the salon piece of things during that time they were in the middle of applying for a zoning change and they had anticipated that it would be approved so they were preparing for that. She then let Mr. MacKoul go ahead and answer about the permits. He stated that they had the electrical and mechanical permits pulled and a demo for a garage in the back. Ms. Hoover added that Peggy Lynch had been told that for some of the work they were doing they did not need permits such as replacing sinks.

Chair Spector asked how long Mr. MacKoul had been living there. Mr. MacKoul said since summertime.

The Board asked about plumbing permits for the two half baths upstairs that looked new. Mr. MacKoul said that they were told they didn't need permits to replace fixtures and that the bathrooms themselves already existed since the house used to be a duplex.

Chair Spector asked Mr. Devine if he had anything else, Mr. Devine pointed out the fact that Mr. MacKoul said that he's been living there since this summer, but the home occupation has been established since he purchased the property. He said that it's not a home occupation since he wasn't living there.

Ms. Hoover said that when they purchased the property and were approved for a home occupation, no one was living there. She said that it was inhabitable upstairs and that they had to redo all of the HVAC so when the insurance agency went in no one was living there.

Chair Spector stated that any abutters or persons affected directly by the appeal could speak to the appeal. Peggy Lynch approached the podium. She stated that she is affected by this because she is trying to maintain a business in the City after 27 years. She briefed the Board of her concerns.

Gary MacKoul approached the podium, introduced himself and briefed the Board of his concerns.

Chair Spector closed the public hearing portion of the meeting. The Board talked amongst themselves of the case.

Mr. Stevens made a motion to grant the appeal, Chair Spector seconded and the motion carried unanimously by roll call vote.

Chair Spector stated that they were handed 15 letters regarding the case that they have not been able to read. The Board let the applicants decide if they wanted to postpone the case or move forward with the application without them having read the additional information. Ms. Hoover met with her clients in the hall before answering.

They came back from the hallway and Ms. Hoover asked if the two letters from the abutters could be read, the Board agreed.

2018-10 Corey & Gary MacKoul applicants for a Variance to permit a mixed use dwelling, to include one professional office, and one personal service establishment according to Article 42.18, Table 18-A.

Location: 147 Wakefield Street, Rochester, NH 03867, 0113-0055-0000, in the Residential 2 Zone.

Ms. Hoover introduced herself again and began presenting their case. She briefed the Board on what was going on with the property and the various routes they have tried to take. Ms. Hoover began to go over what they are trying to accomplish and the five variance criteria they need to meet.

Chair Spector asked the Board if they had any questions. Mr. Goldstein asked the applicant what reason the Planning Board and City Council gave to deny the request for a zoning amendment. Mr. MacKoul stated that they did not want to rezone that area because of certain things that the Neighborhood Mixed Use zone would allow such as gas stations or tattoo shops.

Chair Spector opened the meeting to the public for input. Peggy Lynch approached podium to clear up some of the reasons the City Council denied their zoning amendment.

Chair Spector asked for the letters from the abutters to be read. Mr. Devine read them into the record. Chair Spector asked to hear from the City. Mr. Devine stated that the Department of Building, Zoning, and Licensing Services and the City Attorney review the application for a variance and they found the following facts: The variance is in direct conflict with the spirit of the ordinance and violates the ordinance's basic zoning objectives because having two businesses within a single family dwelling would alter the character of the neighborhood. Second, the applicant failed to prove any unnecessary hardship, the lot is similar to the surrounding residential properties in size and like matter. Therefore, you must deny the variance.

Chair asked if the applicant had anything else. Ms. Hoover just pointed out the section of the zone was unique. The Board discussed amongst themselves.

Mr. Stevens made a motion to deny the variance because the applicant does not meet the hardship criteria based on the City's findings; Mr. Gates seconded the motion, and the motion failed by a three to two roll call vote.

Mr. Gates made a motion to grant the variance because it is not contrary to the public interest based on the applicants written documentation; Mr. Lavallee seconded the motion, the motion failed by a three to two roll call vote.

Mr. Devine stated that anyone affected directly by the decision has the right to appeal within thirty calendar days.

2018-11 Dr. Dave Pak applicant for a Variance to permit a sign that exceeds 6 square feet in a residential zone. According to Article 42.29, Section (N)(1)(a).

Location: 248 North Main Street, Rochester, NH 03867, 0115-0019-0000, in the Residential 1 Zone.

Dr. Pak approached the podium, he briefed the Board of his application. He stated that he has a variance for the property to begin with and needs somewhat of a commercialized sign for the establishment.

Mr. Goldstein asked the applicant if the sign would be lit all night long. The applicant stated that if he can he would like it to be lit throughout the evening.

Chair Spector asked if there was anyone in the audience to speak for or against the application, and no one came forward. He asked for the city's opinion. Mr. Devine stated that the Department of Building, Zoning, and Licensing review Dr. Pak's application and they found the following facts: The burden is on the applicant to provide evidence that granting the variance would not diminish surrounding property values, just because there are buildings and signs surrounding the area are similar does not provide any proof that this would not diminish property values. Granting the variance is not contrary to the public interest. The sign would fit the character of the neighborhood and substantial justice would be done. The spirit of the ordinance would be observed but the applicant has failed to show an unnecessary hardship that relates to the property. There is no documentation to prove how this property is different than any of the other properties surrounding it. Therefore, the application must be denied.

Mr. Gates made a motion to grant the variance for a sign not to exceed 3ft by 6 ft or a total of 18 sq feet because it is not contrary to the public interest as described by the applicant; Mr. Goldstein seconded the motion, the motion carried by a four to one roll call vote.

Mr. Gates made a motion to grant the variance because it is not contrary to the spirit of the ordinance as described by the applicant; Mr. Lavallee seconded the motion, the motion carried by a four to one roll call vote.

Mr. Gates made a motion to grant the variance because it would not result in substantial justice as described by the applicant; Mr. Lavallee seconded the motion, the motion carried by a four to one roll call vote.

Mr. Gates made a motion to grant the variance because it would not diminish surrounding property values as described by the applicant; Mr. Lavallee seconded the motion, the motion carried by a four to one roll call vote.

Send to Vanessa

Mr. Gates made a motion to grant the variance because it would result in an unnecessary hardship based on the applicants findings; Mr. Lavallee seconded the motion, the motion carried by a four to one roll call vote.

Mr. Devine advised that any person directly affected by the decision has the right to appeal within thirty calendar days.

2018-12 717 Columbus Avenue, LLC applicant for a Variance to permit a gas station, convenience store and restaurant with a drive-through in the Neighborhood Mixed Use Zone. According to Article 42, Table 18-B and Table 18-C.

Location: 717 Columbus Avenue, Rochester, NH 03867, 0131-0007-0000, in the NMU Zone.

John Cronin approached the podium in representation of the applicant Mary Beth Hebert. He briefed the Board on their application as well as the five criteria.

Chair Spector asked the Board if they had any questions for the applicant, no one did. He asked if there was anyone in the audience to speak for or against the case. Gayden Lambert of 9 Old Gonic Rd approached the podium. He expressed his concerns regarding the case in opposition. Chair Spector responded that many of his concerns are things that would be addressed at the Planning Board level.

Discussion between the Board and the abutter took place about which lot he is located at and how it might affect him. The applicant addressed some of the concerns the abutter had and went over certain practices they would need to review and follow later.

Chair Spector asked the city for their opinion. Mr. Devine stated that the Department of Building, Zoning, and Licensing Services has reviewed their application and found the following facts. Number one, granting this variance is not contrary to the public interest because it does not alter the surrounding area because it is neighborhood mixed use and all the surrounding properties along 125 are commercial. Number two, the spirit of the ordinance is observed. Number three the City can find no harm in the public by granting the variance. Number four, we see no reason that property values would be diminished, currently it is an empty lot with nothing on it. By adding a building, property values will only increase. Five, given its size and shape compared to the surrounding properties, this property is remarkable different and unique and does cause a hardship. We feel that the applicant has met all five criteria and the variance should be granted, but the applicant must be sure to comply with all shore land protection acts.

Mr. Gates made a motion to grant the variance because it is not contrary to the public interest as described by the applicant; Mr. Lavallee seconded the motion, the motion carried by a four to one roll call vote.

Mr. Gates made a motion to grant the variance because it is not contrary to the spirit of the ordinance as described by the applicant; Mr. Golstein seconded the motion, the motion carried by a four to one roll call vote.

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Mr. Gates made a motion to grant the variance because it would result in an unnecessary hardship based on the applicant's findings; Mr. Lavallee seconded the motion, the motion carried by a four to one roll call vote.

Mr. Devine advised that any person directly affected by the decision has the right to appeal within thirty calendar days.

2018-13 Fieldings Oil Co. Inc. applicants, for a *Special Exception* to permit a fuel storage office in a Highway Commercial Zone. According to Article 42, Table 18-D.

Location: 72 Old Milton Road, Rochester, NH 03867, 0131-0007-0000, in the NMU Zone.

Bill Fielding the applicant approached the podium and briefed the Board on what they are looking to do at the property. Chair Spector asked the applicant to read his answers to the criteria for a Special Exception into the record.

Chair Spector asked the Board if they had any questions. Mr. Stevens asked how many trucks exactly would be parked at the property at a time. The applicant replied that the maximum would be five.

Chair Spector asked if there was anyone in audience to speak for or against the case, no one came forward. He asked for the City's opinion and Mr. Devine stated that the Department of Building, Zoning, and Licensing Services has review the application for a Special Exception and feel it should be granted for the reasons contained in the application.

Mr. Gates made a motion to grant the Special Exception for the reasons stated in the application; Mr. Lavallee seconded the motion. Mr. Stevens asked to amend the motion.

Mr. Devine read a letter from an abutter who spoke in favor of the application into the record before they changed the motion.

Mr. Stevens made a motion to amend the original motion with the conditions of the fence, barriers, and a limit of five trucks at a time, Mr. Gates seconded and the motion carried unanimously by a voice vote.

Mr. Gates made a motion to grant the special exception with the conditions, Mr. Goldstein seconded and the motion passed unanimously by a voice vote.

Mr. Devine advised that any person directly affected by the decision has the right to appeal within thirty calendar days.

Other Business:

Chair Spector asked if there was any other business and there was none.

Adjournment:

Mr. Stevens moved to adjourn the meeting, Mr. Gates seconded and the motion carried unanimously.

The meeting adjourned at 8:44 pm.

Respectfully Submitted,

Julia Libby

Julia Libby
Secretary for Building, Zoning, and Licensing Services

EXHIBIT 3

Send to Vanessa

Mr. Gates made a motion to grant the variance because it would result in an unnecessary hardship based on the applicants findings; Mr. Lavallee seconded the motion, the motion carried by a four to one roll call vote.

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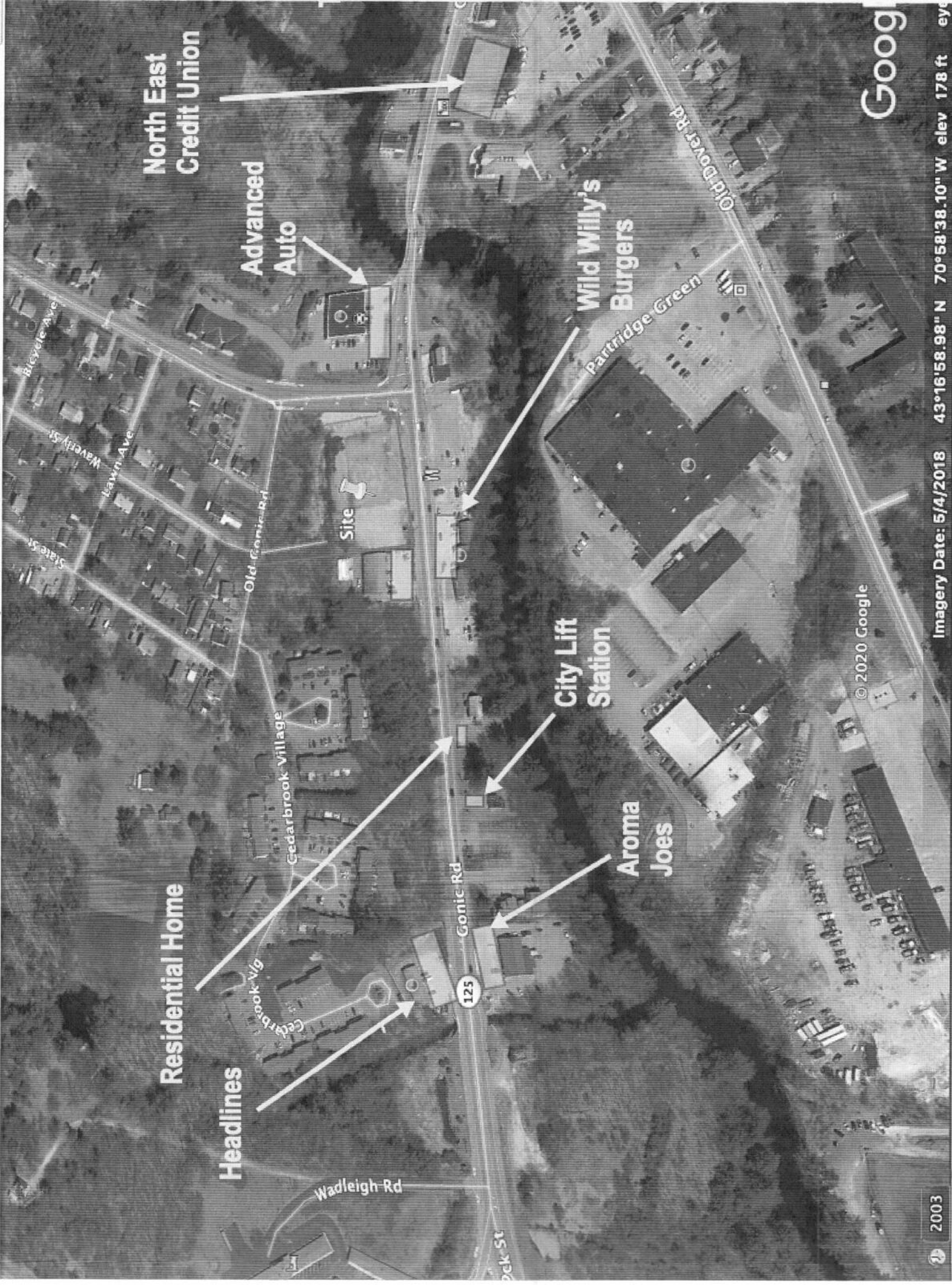
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Mr. Devine read a letter from an abutter who spoke in favor of the application into the record before they changed the motion.

Mr. Stevens made a motion to amend the original motion with the conditions of the fence, barriers, and a limit of five trucks at a time, Mr. Gates seconded and the motion carried unanimously by a voice vote.

EXHIBIT 4



Google

Imagery Date: 5/4/2018 43°16'58.98" N 70°58'38.10" W elev 178 ft

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EXHIBIT 5



City of Rochester, New Hampshire

Zoning Board of Adjustment

MINUTES OF THE ROCHESTER ZONING BOARD OF ADJUSTMENT MEETING HELD ON FEBRUARY 12, 2020

The Chair called the meeting to order at 7:01 p.m. in the Council Chambers.

Roll Call:

The Zoning Secretary conducted the roll call.

Members Present

Lawrence Spector
Shon Stevens
Paul Giuliano, Alternate
Terry Garland, Alternate
Taylor Poro, Alternate
Sue DeLemus, Alternate

Members Excused

Robert Gates
Leo Brodeur

Also present: Jim Grant, Director for Building, Zoning and Licensing
Rob Lynch, Code Compliance Officer for Building, Zoning and Licensing
Dee Mondou, Secretary for Building, Zoning, and Licensing

These minutes are the legal record of the meeting and are in the format of an overview of the Zoning Board of Adjustment meeting. It neither is intended nor is it represented that this is a full transcription. A recording of the meeting is on file online at www.rochesternh.net for a limited time for reference purposes.

Approval of Minutes:

The minutes of February 12, 2020 were reviewed; Mr. Stevens made a motion to accept the minutes, Mr. Giuliano seconded the motion. The motion carried unanimously by a voice vote.

Seating of Alternates:

Chair Spector said the four regular members and Ms. DeLemus would be the voting members for the night.

New Cases:

Z-20-01 717 Rochester Holdings, LLC applicant seeks *Variance* from section 5.5(b)(3) and 5.5(c)(3) of the Zoning Ordinance to permit off-street parking spaces in the front yard of property in the NMU Zone.

Location: 717 Columbus Ave, Rochester NH 03867, MLB 0131-0007-0000 in the NMU Zone.

John Cronin introduced himself as well as Patrick McLaughlin, Engineer and Jim Mitchell representing applicant, Rochester Holdings, LLC. He briefed the board about the case and why a Variance should be

granted for off street parking spaces in the front yard in the NMU zone. Second Variance request addressed the screening of parking.

Chair Spector asked if there was anyone in the audience to speak for or against the case, no one came forward. He asked if any of the members had any questions. Mr. Giuliano asked to explain the traffic pattern going in and out.

Mr. Cronin explained how that would work. Mr. Garland asked if it would be similar design to the one built in Barrington. Mr. Mitchell addressed this and the differences.

Chair Spector asked for the City's opinion. Mr. Lynch stated the City recommends approval of application for the reasons and facts stated in the application.

Chair Spector closed public hearing and asked for any additional comments before voting.

Ms. DeLemus motions to grant the variance. She reads each criteria followed with a vote from each voting member.

Chair Spector says the Variance is denied based on the hardship

Mr. Lynch advised that anyone affected directly by the decision has the right to appeal within 30 calendar days.

Z-20-02 Rochester Assembly of God DBA Revolution Church applicant seeks *Variance* from Table 18-B of the Zoning Ordinance to permit Office Professional offices in an R1 Zone.

Location: 87 Lowell St, Rochester NH 03867, MLB 0133-0044-0000 in the R1 Zone

Jim Stevens, Associate Pasture of Revolution Church introduced himself as applicant. He briefed the board about the case and why a Variance should be granted to allow office professional offices in the R1 zone.

Chair Spector asked if there was anyone in the audience to speak for or against the case. Abutters Mark Hoffman, Rian Bedard and Bob Barcelona each came forward expressing the concerns they have with allowing a business on the property.

Chair Spector closes the public hearing and asked for any additional comments. No one had any.

Chair Spector asked for the City's opinion. Mr. Lynch stated after reviewing the appropriateness of this variance we concluded the following fact. 1) Denied on criterial 1 & 2. 2) Facts: The R1 district is intended to allow ingle family neighborhoods and thus allows single family use with few other allowed uses. Most other allowed uses are directly associated with residential use. The current use of this property is non-conforming. Applicants suggested to make another non-conforming use which would violate principles of the zoning ordinances which is designed to bring all properties into conformity as rapidly as possible.

Chair Spector asks the board if they have anything to say. No one does. Asks if anyone wanted to make a motion.

Mr. Stevens motions to deny based on public interest. Vote is taken and carried unanimously.

Jim Grants recommends they continue and vote on all criteria so the applicant knows what they would need to appeal.

Mr. Stevens continues with each criteria. The board votes on each and also is denied in spirit of ordinance.

Chair Spector states the application is denied.

Mr. Lynch advised that anyone affected directly by the decision has the right to appeal within 30 calendar days.

Other Business:

Bylaws – Mr. Stevens makes a motion to accept the bylaws as presented. It was seconded by Ms. DeLemus and the motion carried unanimously

Election of Chair and Vice Chair – Mr. Stevens motions to postpone until all regular members are present. Mr. Giuliano seconds motion. Motion carried unanimously.

Notes from NHMA Land Use Conference brought in previously by member Leo Brodeur – Board agrees to wait until Mr. Brodeur is present to discuss.

Adjournment:

Mr. Stevens motioned to adjourn the meeting. It was seconded by Mr. Garland and the motion carried unanimously.

The meeting adjourned at 7:55 pm.

Respectfully Submitted,

Dee Mondou

Dee Mondou Secretary for
Building, Zoning, and Licensing Services

CRONIN, BISSEON & ZALINSKY, P.C.
6036244333
722 CHESTNUT STREET
MANCHESTER NH 03104

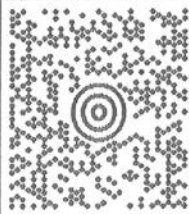
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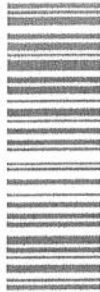
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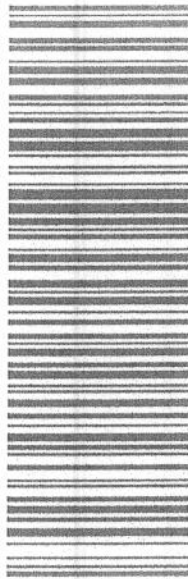
LARRY SPECTOR, CHAIRMAN
CITY OF ROCHESTER, ZONING BOARD
31 WAKEFIELD STREET
ROCHESTER NH 03867-1916



NH 038 0-02



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TRACKING #: 1Z F52 OV4 NW 9894 2843



BILLING: P/P
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Reference#1: Tropic Star

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