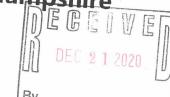


# City of Rochester, New Hampshire Zoning Board of Adiustment



#### Variance Application

TO: BOARD OF ADJUSTMENT CITY OF ROCHESTER

A !:	ZONING BOARD CLERK
Applicant: Zaremba Project Development, LLC	
E-mail: MCasey@zarembagroup.com	
Applicant Address: 14600 Detroit Avenue, Suite 1500, Lakewood, OH, 44107	one: 216-226-2159
Property Owner: Ervey Really Trust	
Property Owner Address: 1 Winter Street Plaza, Rochester, NH 03867	
Variance Address: 480 Gonic Road, Rochester, NH 03867	
Map Lot and Block No: 262-29	
Description of Property: 2.9 acre parcel of land	
Proposed use or existing use affected: Retail location including a 9,100± square foot re The undersigned hereby requests a variance to the	Pail building
a variance to the terms of the Rochostan	
and asks that said terms be waived to permit <u>construction of the proposed retail</u>	Zoning Ordinance, Ch. 275, Section 12.3 & 12.8
50-foot wetland hutton	development within wetlands and the associated

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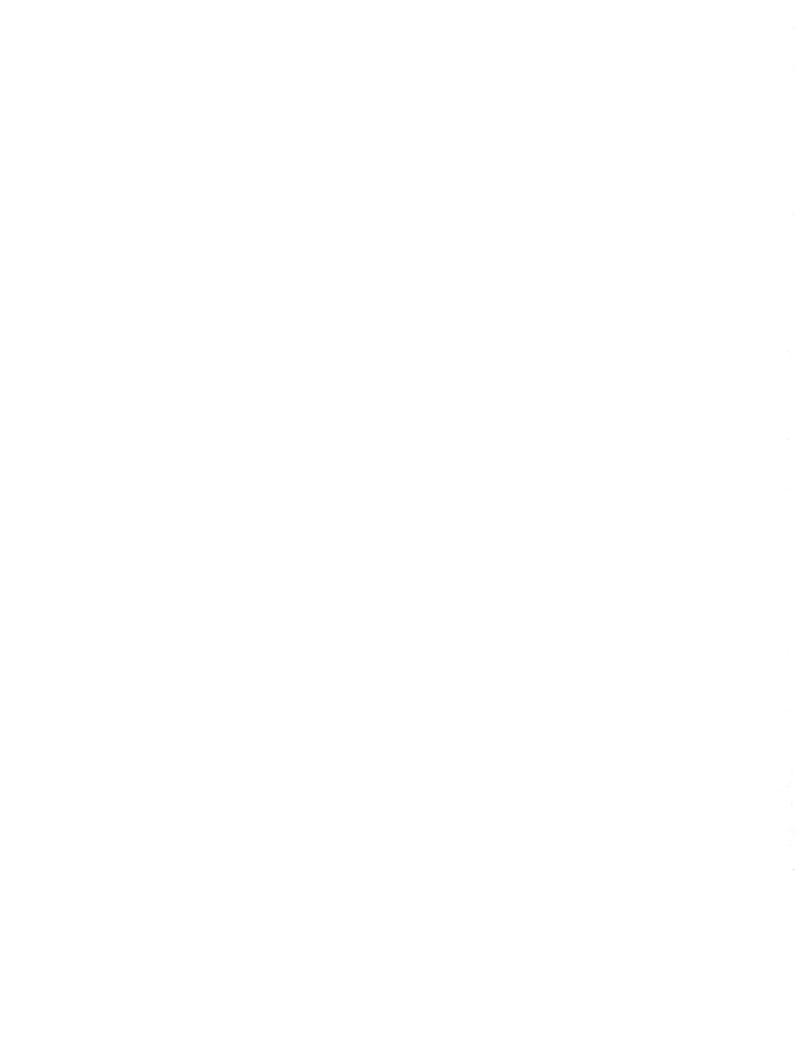


## City of Rochester, New Hampshire

## Zoning Board of Adjustment

#### Variance Criteria

1) Granting th See attached	e variance would not be contrary to the public interest because:
2) If the varian See attached	ce were granted, the spirit of the ordinance would be observed because:
3) Granting the See attached	e variance would do substantial justice because:
l.) If the variand See attached	ce were granted, the values of the surrounding properties would not be diminished because:
	Hardship:  ng to special <i>conditions of the property that distinguish it from other properties in the area</i> ,  f 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:
And: ii. The pro e attached	oposed use is a reasonable one because:
other proj	how, if the criteria in subparagraph (A) are not established, an unnecessary hardship will be o exist if, and only if, owning to the special conditions of the property that distinguish it from perties in the area, the property cannot be reasonably used in the strict conformance with the strict conformance wit





### **City of Rochester, New Hampshire**

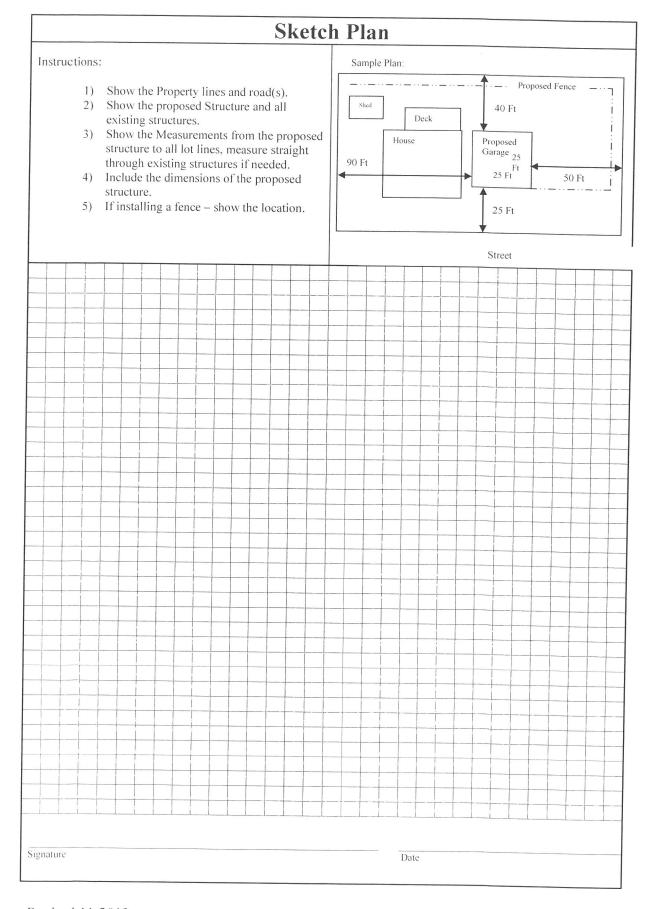
#### Zoning Board of Adjustment

#### Request of waiver of requirement to have a Certified Plot Plan for Case # \_\_\_\_\_

е	
	There are no objections from any abutter, <u>and:</u>
	Based on the information provided, the distance into the setback will not create any problems to the abutting property because:
	The property is described in its deed as being bounded, on the side for which relief is requested, by a natural feature like a: (stone wall/ row of large trees/roadway, etc.
	The request for relief from the setback required is modest enough that the probability of a surveying e
	The request for relief from the setback required is modest enough that the probability of a surveying e large enough to make a material difference is remote. Yes No Information provided is based upon other surveyed parcels in the immediate vicinity and is consistent with the tax map information, so the probability of a surveying error large enough to make a material difference is remote.
	Information provided is based upon other surveyed parcels in the immediate vicinity and is consistent with the tax map information, so the probability of a surveying error large enough to make a material difference is remote.  The request for relief from the setback required is in a direction where any impact on the abutter is small
	Information provided is based upon other surveyed parcels in the immediate vicinity and is consistent with the tax map information, so the probability of a surveying error large enough to make a material difference is remote.  The request for relief from the setback required is in a direction where any impact on the abutter is small or nonexistent and, should a large surveying error be found in the future, there is adequate land area to
	large enough to make a material difference is remote. Yes  No  Information provided is based upon other surveyed parcels in the immediate vicinity and is consistent with the tax map information, so the probability of a surveying error large enough to make a material difference is remote. Yes  No  The request for relief from the setback required is in a direction where any impact on the abutter is small or nonexistent and, should a large surveying error be found in the future, there is adequate land area to correct the problem through a lot-line adjustment. Yes No



<sup>\*</sup>Check with Building Zoning & Licensing Services to see if it is necessary to fill out this form\*



Revised 11-2013

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#### ROCHESTER ZONING BOARD OF ADJUSTMENT

#### VARIANCE & SPECIAL EXCEPTION CRITERIA

- Variances. The board may authorize, upon appeal in specific cases, a variance from the 2. terms of the zoning ordinance if it determines that all of the following conditions are met:
  - The variance will not be contrary to the public interest;
  - The spirit of the ordinance is observed;
  - Substantial justice is done; C.
  - The values of surrounding properties are not diminished; and D.
  - Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.
    - i. For purposes of this condition, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:
      - No fair and substantial relationship exists between the general (a) public purposes of the ordinance provision and the specific application of that provision to the property; and
      - The proposed use is a reasonable one.
    - ii. If the criteria in subparagraph i, above, are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Notwithstanding Section 2., above, the board may grant a variance from the terms of a zoning ordinance without finding a hardship arising from the condition of a premises subject to the ordinance, when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises, provided that:

- Any variance granted under this paragraph shall be in harmony with the general A. purpose and intent of the zoning ordinance.
- In granting any variance pursuant to this paragraph, the zoning board of adjustment may provide, in a finding included in the variance, that the variance shall survive only so long as the particular person has a continuing need to use the premises.
- Special Exceptions. The board grants special exceptions for particular uses and activities as listed in the Tables of Uses in Section 18-Use Regulations and as articulated in Section 22-Special Exceptions.

The board shall grant a special exception only if it reasonably determines that all of the following base criteria are met (in addition to those criteria and conditions included for specific uses in Section 22):

- A. <u>Location</u>. The specific site is an appropriate location for the proposed use or structure;
- B. Neighborhood. The proposed use would not be detrimental, injurious, obnoxious, or offensive to the neighborhood;
- C. <u>Traffic.</u> The proposed use would not create an undue hazard or nuisance to vehicular or pedestrian traffic;
- D. Public Facilities. Adequate and appropriate facilities and utilities would be provided to ensure the proper operation of the proposed use or structure; and,
- E. Master Plan. The proposed use or structure is consistent with the spirit of this chapter and the intent of the Master Plan.

Prepared January 25, 2017

## Requirements for Granting a Variance: A Suggested Approach

#### THE APPLICANT MUST ESTABLISH ALL OF THE FOLLOWING.

Requirement	Explanation
<ol> <li>The variance is not contrary to the public interest.</li> <li>The spirit of the ordinance is observed.</li> </ol>	The proposed use must not conflict with the explicit or implicit purpose of the ordinance, and must not alter the essential character of the neighborhood, threaten public health, safety, or welfare, or otherwise injure "public rights."
3. Substantial justice is done.	The benefit to the applicant should not be outweighed by harm to the general public or to other individuals.
4. The values of surrounding properties are not diminished.	Expert testimony on this question is not conclusive, but cannot be ignored. The board may also consider other evidence of the effect on property values, including personal knowledge of the members themselves.
5. Literal enforcement of the ordinance would result in unnecessary hardship. Unnecessary hardship means:	The applicant must establish that the property is burdened by the zoning restriction in a manner that is distinct from other similarly situated property.
Because of special conditions of the property that distinguish it from other properties in the area:  (a) There is no fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property; and  (b) The proposed use is a reasonable one.  Alternatively, unnecessary hardship means that, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance.	(a) Determine the purpose of the zoning restriction in question. The applicant must establish that, because of the special conditions of the property, the restriction as applied to the property does not serve that purpose in a "fair and substantial" way.  (b) The applicant must establish that the special conditions of the property cause the proposed use to be reasonable. The use must not alter the essential character of the neighborhood.  As an alternative to (a) and (b) above, the applicant can satisfy the unnecessary hardship requirement by establishing that, because of the special conditions of the property, there is no reasonable use that can be made of the property that would be permitted under the ordinance. If there is any reasonable use (including an existing use) that is permitted under the ordinance, this alternative is not available.

#### ZAREMBA PROJECT DEVELOPMENT, LLC 480 Gonic Road (Lot 262-29) APPLICATION FOR VARIANCE

#### **Background and Description**

Zaremba Project Development, LLC (the "Applicant"), with the consent of the owner, Ervey Realty Trust (the "Owner"), intends to construct a retail development (the "Project") on the 2.9 acre (126,324 square foot) parcel of land located at 480 Gonic Road in Rochester (identified as Tax Map and Lot 262-29; the "Property"). The Project includes a single-story, 9,100± square foot retail building, parking lot with 28 spaces (two of which will be handicapped accessible), and a stormwater detention facility and other related improvements.

The Property is located in the Highway Commercial (HC) District, which allows retail uses as of right. The surrounding area is primarily commercial, with neighboring properties housing car dealerships and repair businesses, a motel, machine shop, veterinary clinic, and other commercial uses.

The Property contains approximately 47,980 square feet of jurisdictional wetlands consisting of poorly or very poorly drained soils (the "Wetlands") and therefore partially falls within the Conservation Overlay (CO) District as described in Article 12 of the Rochester Zoning Ordinance (the "Zoning Ordinance").

The Wetlands encompass the eastern two-thirds of the Property, running the entire north-south length of the Property. The plans submitted with this Variance Application (the "Plans") show the Project, the Wetlands, and the associated buffer areas. As more particularly described in the Wetland Delineation and Wetland Function and Value Assessment Report (the "Wetland Report") submitted with this Variance Application, the Wetlands are not considered to be of very high value and the Project will be subject to a minimum expedited dredge and fill permit from the N.H. Department of Environmental Services. Construction of the parking area will impact 2,967± square feet of the Wetlands. Portions of the building, parking area and stormwater detention facility (consisting of a total of 19,451 square feet) will be located within the 50-foot wetland buffer. No portion of the building will be within the Wetlands itself.

Section 12.3 of the Zoning Ordinance requires a 50-foot buffer from the Wetlands and only those uses set forth in Section 12.8 of the Zoning Ordinance are permitted in the CO District. These



<sup>&</sup>lt;sup>1</sup> The proposed stormwater controls will be a closed system consisting of catch basins which will direct flow into the proposed 6,376 square foot infiltration pond to detain and improve water quality. Stormwater flow will be redirected from the proposed impervious areas (parking and building) to the southwest corner of the site where the stormwater detention pond is located. Once in the detention pond, stormwater runoff will be treated before released into the wetland. As a result of the increased impervious cover, runoff will be mitigated by storing water in the pond and releasing it slowly, allowing for some infiltration. Snow storage will be in upland areas so that snowmelt will not directly discharge into any wetland areas to minimize salt and grit from entering the wetland directly.

<sup>&</sup>lt;sup>2</sup> A variance granted in connection with this application will be conditioned on the issuance of all necessary permits from the N.H. Department of Environmental Services.

uses do not include the construction of buildings, parking areas, or other site improvements. <u>See</u> Zoning Ordinance, §12.8.B and §12.8.C.<sup>3</sup>

#### **Details of Request**

The Applicant requests a variance from Sections 12.3 and 12.8 of the Zoning Ordinance to permit the construction of the Project within the Wetlands and wetlands buffer as shown on the Plans.

#### Variance Standards

1. The variance will not be contrary to the public interest.

It is in the public interest to allow the highest and best use of real estate. The Project will allow for the beneficial use of the Property, which is currently prevented by the Zoning Ordinance. This will maximize the Property's value with no negative impact on any other property. There is no public benefit in preventing the Property from being put to any reasonable use.

Moreover, the Wetlands are particularly low value wetlands. As discussed in the Wetlands Report, due to the size of the Wetlands, the relatively low diversity within the Wetlands, the surrounding development, and the location of Route 125, these Wetlands were insufficient to have any principal function, *i.e.*, no "special value to society, from a local, regional, and/or national perspective". For example, it is too small to provide a habitat for large mammals, and only serves for birds and small mammals like squirrels or chipmunks. Similarly, there do not appear to be any ponded areas for possible vernal pool habitats. There is little to no value in maintaining these particular Wetlands.

At the same time, denying the application will harm the Applicant and the City by preventing the reasonable use of the Property.

2. The variance will observe the spirit of the Zoning Ordinance.

Section 12.1 of the Zoning Ordinance sets forth the purposes of the CO District, including, (1) maintaining and enhancing the quality and quantity of surface waters and groundwater by preserving the ability of wetlands to filter pollution, trap sediment, retain and absorb chemicals and nutrients, and produce oxygen; (2) minimizing expense to the City and the public in providing and maintaining essential services and utilities, such as wastewater collection and treatment, drainage facilities, and public water supply; (3) minimizing impacts to existing land uses and lots;

<sup>&</sup>lt;sup>3</sup> Roads and other accessways, drainage ways, and certain other similar features may be permitted within the CO District by conditional use permit from the Planning Board. See Zoning Ordinance, §12.9.A. For the purpose of this application, but reserving and without waiver of or prejudice to the Applicant's right to claim otherwise, it is assumed that none of the improvements shown on the Plans constitute a use set forth in Section 12.9.A of the Ordinance for which a conditional use permit may be sought. In addition, in certain circumstances, the required buffer from wetlands may be reduced by 50% by conditional use permit from the Planning Board. See Zoning Ordinance, §12.9.B. Even with such a reduction, the buildable area on the Property in this case would be so limited as to preclude any reasonable

(4) preventing the destruction of, or significant changes to, those wetland areas, related water bodies and adjoining land which provide flood protection; (4) encouraging those uses that can be appropriately and safely located within the CO District; and (5) protecting native wildlife habitat and natural vegetation. More generally, the purposes of the Zoning Ordinance itself include to "promote an orderly pattern of development and encourage the most appropriate use of land"; "preserve and enhance the value of land and buildings"; "revitalize the downtown and other village and neighborhood commercial areas"; and "foster economic development and provide opportunities for business growth". See Zoning Ordinance, §1.3.

The Project will be consistent with these purposes of the Zoning Ordinance. The Project specifically accounts for the purposes and needs of wetlands, such as protecting and promoting water quality and stormwater management, and makes every effort to minimize the impact on the Wetlands. Moreover, allowing the Property to be put to beneficial use encourages the appropriate use of the Property, promotes the development of the Property, and contributes to the revitalization and economic development of the area. Accordingly, the proposed use will be consistent with the overall spirit and intent of the Zoning Ordinance.

*3. Granting the variance will result in substantial justice.* 

The harm to the Applicant of strict enforcement of the Zoning Ordinance will far outweigh any benefit to the public in this case. As discussed above, the Wetlands are of particularly low value. There is little, if any, benefit to the public in preventing the Project which represents the least practical incursion into the Wetlands. On the other hand, denying the variance will result in a detriment to the public by preventing any use of the Property and the beneficial expansion of the area and the related tax base. Denying the variance will harm the Applicant specifically by denying the reasonable use of the Property. Granting the variance will therefore result in substantial justice.

*4. The variance will not diminish the value of surrounding properties.* 

The Project is of a reasonable size and location and consistent with the other commercial uses in the neighborhood. As mentioned above, the other properties in the area are commercial primarily car, truck, or other vehicle dealerships and repair business, as well as a machine shop, plumbing supply store, and veterinary clinic. The closest residential neighborhoods are separated by wooded areas and/or the Isinglass River. The Wetlands will provide a buffer to the other properties behind the Property. There is no reason to believe that having a retail store on the Property would diminish the value of any of the other properties in the area.

Moreover, increased commercial use of the area, and the associated increase in commercial business, will be beneficial to the other businesses in the area. For example, the retail location would be a convenience for the guests of the nearby motel. If anything, the Project will improve, not diminish, the value of surrounding properties.

5. Literal enforcement of the provisions of the Zoning Ordinance would result in an unnecessary hardship.

a. No fair and substantial relationship exists between the general public purposes of the Zoning Ordinance provision and the specific application of that provision to the Property because:

In this case, there is no fair and substantial relationship between the aforementioned purposes of the Zoning Ordinance generally, or the wetlands buffer specifically, and preventing the use of the Property. As mentioned above, the Project represents the minimal infringement on the wetlands buffer while still allowing for beneficial use of the Property. Moreover, the design of the Project specifically takes into account the importance of Wetlands. The stormwater detention facility is specifically designed to maintain and improve water quality. The Project locates snow storage in a location that will not discharge into the Wetlands, further protecting water quality. The purposes of the CO District are maintained, not contradicted, by the Project.

Additionally, the variance is necessary to allow the Project, or indeed any other beneficial use of the Property. Both the Zoning Ordinance generally and the CO District expressly recognize the important of allowing and encouraging appropriate use of land. See, e.g., Zoning Ordinance, §1.3.C, E, F; §12.1.E. Allowing the Project supports the purposes of the Zoning Ordinance.

When literally applied, the Zoning Ordinance would prevent the reasonable use of the Property in a manner consistent with the area and the purposes of the Zoning Ordinance, particularly by promoting the most appropriate use of land and fostering economic development. Denying the variance and prohibiting the Project would serve no rational purpose in these circumstances.

#### b. The proposed use is a reasonable one.

The Project constitutes a reasonable use. A retail use on the Property is permitted as of right by the Zoning Ordinance. As such, it is presumptively reasonable as a matter of law. See Malachy Glen Assocs., Inc. v. Town of Chichester, 155 N.H. 102, 107 (2007). The Project is also consistent with the neighborhood and will not alter its essential character.

The Zoning Ordinance, however, interferes with that reasonable use. As discussed above and as shown on the Plans, application of Section 12.3 and 12.8 of the Zoning Ordinance render the vast majority of the Property as unbuildable, preventing any beneficial use of the Property.

The Project locates the building as far from the Wetlands as possible and minimizes the amount of parking, impervious areas, and stormwater detention facilities located within the Wetlands or associated buffer, all while maintaining compliance with the City's setback, lot coverage and parking requirements. Specifically, the Project places the building as far from the wetlands as possible while maintaining the required front setback. In other words, the Project represents the least intrusion into the required setback that is practically achievable for the Project. Denial of this variance therefore will prevent the reasonable use of the Property.

c. Alternatively, owing to special conditions of the Property that distinguish it from other properties in the area, the Property cannot be reasonably used in strict

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conformance with the Zoning Ordinance, and a variance is therefore necessary to enable a reasonable use of it.

As discussed above, the Wetlands and the associated buffers encompass the vast majority of the Property. This is unique from the other Properties in the area which either do not suffer from such a prevalence of wetlands or were nonetheless able to be developed into large scale beneficial uses such as car dealerships. For example, most of the lots in the area appear to either not have significant wetlands or are large enough to be able to be developed without infringing on such wetlands. None of the other lots appear to be entirely dominated by wetlands, particularly wetlands without any significant value.

As shown on the Plans, without a variance, there is too little buildable space to make any practical use of the Property, retail location or otherwise. In other words, Sections 12.3 and 12.8 prevent any reasonable use of the Property, retail location or otherwise, particularly any use that is consistent with the surrounding area. A variance is therefore necessary to enable the Property to be put to a reasonable use.

The Applicant reserves the right to amend, modify, and/or supplement this Application at or before the hearing thereon.

4840-5505-7873, v. 1

