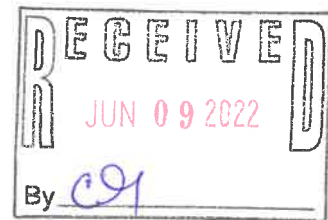


STATE OF NEW HAMPSHIRE



Strafford, SS.

City of Rochester  
Zoning Board of Adjustment

**In Re: ZBA Case #Z-22-15 GNM Solar 17, LLC, 60 Shaw Drive, Rochester, New Hampshire regarding an administrative appeal to permit solar farm (referred to by City as Power Generation Utility)**

---

**MOTION FOR REHEARING  
PURSUANT TO RSA 677:2**

---

NOW COMES GNM Solar 17, LLC, of P.O. Box 77, Farmington, New Hampshire (hereinafter the "Applicant"), by and through its attorneys, Bruton & Berube, PLLC, who respectfully move for a rehearing pursuant to NH RSA 677:2 with respect to the denial of the appeal of an administrative decision, and states as follows:

**The Proposed Project**

1. The Applicant seeks to operate a sustainable blueberry farm, solar farm and group host community solar project, at 60 Shaw Drive in Rochester, NH "hereinafter the "Property").
2. The Applicant proposes installation of fifty solar panels collecting 1-megawatt of alternative current to support farm-uses on the Property, with excess electricity delivered to group members, the primary member being the Rochester School District, under the State of New Hampshire's group host program pursuant to NH RSA 362-A, *et seq.* In addition to solar power production, the solar panels are proposed as a method to create a shaded micro climate for the Property's blueberry farm. This micro climate increases solar power production, and results in reduced water consumption and carbon emissions at the Property.
3. The Property is depicted on the Rochester tax maps as Map 240, Lot 49, and is located in the Agricultural Zone.
4. The Applicant has filed a concurrent application for a variance to permit the proposed solar farm, reserving the assertion that the project, as proposed, does not qualify as a Power Generation Utility, but represents an agricultural use, and solar use (i.e., many properties have solar in the agricultural zone and it is routine for permits to be issued.)

which is permitted and/or that the Rochester zoning restrictions are preempted by NH RSA 362-A, *et seq.*

5. On March 25, 2022, the Applicant submitted building and electrical permit applications to construct solar panels and related equipment on Property located in Rochester's Agricultural District.<sup>1</sup> The Applicant proposed installing fifty solar tracker with 48 panels per tracker, collecting 1-megawatt of alternative current to power multiple uses on the Property, with excess electricity to Group Host Members under the State of New Hampshire's net metering rules.<sup>2</sup> The primary group member being the Rochester School District.

6. In addition to solar power production, the solar panels were proposed as a sustainable method to create a shaded micro climate for the Property's proposed primary use as a blueberry farm resulting in reduced water consumption and increased power production.

7. On April 5, 2022, the building and electrical permits were denied by the City of Rochester.<sup>3</sup> In its Denial, the municipality explains that solar panels are considered "Power Generation Utilities" under the Ordinance (as hereafter defined),<sup>4</sup> and further indicates that a variance is necessary in order for the Applicant to proceed.<sup>5</sup> The Applicant respectfully disagrees with this interpretation, and the appeal of administrative decision ensued.

#### **May 11, 2022 ZBA Hearing**

8. At its May 11, 2022, public hearing, the Rochester Zoning Board of Adjustment, (hereinafter the "ZBA"), the Applicant presented an application for a administrative decision to permit the solar farm, classified by the City as a Power generation Utility, as referenced hereinabove. Specifically, this solar farm, as a Group Host community solar farm project, net-metering operation pursuant to NH RSA 362-A, *et seq.* is not a Power Generation Facility, as defined by the Rochester Zoning Ordinance.

9. At the May 11, 2022 public hearing, the ZBA denied the application for the requested variance.

10. On or about May 19, 2022, the Director of Planning & Development, Ms. Shanna B. Saunders, issued a Notice of Decision (hereinafter referred to as the "NOD"), indicating the reason for the denial as follows:

***"At its May 11, 2022 [sic], the Zoning Board of Adjustment voted to DENY the Administrative Appeal [sic](Emphasis in original). The decision of the Zoning Administrator stands."***

---

<sup>1</sup> See BP Application and EP Application.

<sup>2</sup> See *Id.*

<sup>3</sup> See Denial.

<sup>4</sup> *Zoning, City of Rochester, New Hampshire*, Chapt. 275 (2022) (the "Ordinance").

<sup>5</sup> See Denial.

### **Basis for Rehearing**

11. For the reasons set forth below, it is respectfully submitted that the Rochester Zoning Board of Adjustment's denial of the appeal of administrative decision, as set forth in the NOD is unreasonable and/or illegal.

12. The New Hampshire Supreme Court has ruled that the rehearing process is designed to afford a zoning board of adjustment an opportunity to correct its own mistakes or to consider new evidence. *Fisher v. Town of Boscawen*, 121 NH 431 (1981).

#### **I. THE APPLICANT'S PROPOSED PROJECT DOES NOT RAISE TO THE LEVEL OF A POWER GENERATION FACILITY AND SHOULD BE CONSIDERED AS SUCH GIVEN THE ADMINISTRATIVE GLOSS APPLIED BY THE CITY OF ROCHESTER**

##### **A) Solar Panels are not Power Generation Utilities.**

13. The Denial categorizes the Applicant's solar panels as Power Generation Utilities under the Ordinance.<sup>6</sup> However, the Ordinance fails to include facilities that produce energy harnessed by solar power in its definition of Power Generation Utility.

14. The Ordinance defines Power Generation Utility as "a facility producing energy from gas, oil, coal, wood, nuclear, waste, hydro, and other materials for commercial purposes."<sup>7</sup>

15. As drafted, this definition includes 7-specific, and 1-general, energy source, while explicitly omitting facilities producing energy from sunlight.<sup>8</sup> Under the statutory construction principal of ejusdem generis, where general words follow a number of specific words, the general words are precisely construed as limited, and apply only to things of the same kind or class.<sup>9</sup> Thus, sunlight cannot be categorized as "material" because sunlight is not physical material consisting of matter. Material is defined as "relating to, derived from, or consisting of matter,"<sup>10</sup> and matter is defined as the "substance of which a physical object is composed."<sup>11</sup> In addition, it is impossible to assert that sunlight is contemplated as "other material" because this general term is preceded by specific terms qualifying power sources of the same physical class.<sup>12</sup> Despite this basic canon of construction, the City of Rochester

<sup>6</sup> *See Id.*

<sup>7</sup> *Ordinance* § 275-2.2 at 275:34.

<sup>8</sup> *See Id.*

<sup>9</sup> Black's Law Dictionary (2<sup>nd</sup> ed. 2022).

<sup>10</sup> *Merriam-Webster* at <https://www.merriam-webster.com/dictionary/material>.

<sup>11</sup> *Merriam-Webster* at <https://www.merriam-webster.com/dictionary/matter>.

<sup>12</sup> The Ordinance clearly contemplates sunlight by defining Solar Panel as "a panel that converts the sun's radiation into energy for use." *Ordinance* § 275-2.2 at 275:32.

specifically considered in its Administrative Decision that solar “other material” under the Ordinance.<sup>13</sup>

16. Sunlight is energy that the Applicant is converting for consumption into AC power applications. Unlike all other items listed in the Power Generation Facility definition, sunlight is everywhere and is not trucked, shipped, purchased, traded, moved in and out of the site. Sunlight does not have the attributes of other “materials” brought to the site. Sunlight has no waste, and converting it into power requires no hours of operation, no machines, or employees to move or convert. The solar panel once installed is the only thing needed for sunlight to become converted to electricity, and, thus, is fundamentally different from all other materials.

17. Accordingly, it is impossible to define a facility generating power by sunlight as a Power Generation Utility under the Ordinance, and the Denial must be reversed.

**B) The use contemplated by the Applicant is not regulated as a utility or produced within a facility.**

18. The definition and the common-sense interpretation of the clause and provision as a whole can only be associated with a “facility” of consequence that is associated with a utility that is regulated by either the Federal Government or State of New Hampshire as a utility. Clearly, nuclear energy is not home-brewed. Nor is oil or gas refined, or hydro power, such as that generated by Hydro Quebec, generated by a customer. Within the definition of a Power Generation Facility, the use of the two words “facility” and “utility” is not meaningless. It is this very distinction that is made within the New Hampshire State regulations, which defines the activity proposed by the Applicant as a “Customer Generated” activity rather than utility. It is the Applicant’s position that the intended use is agricultural in nature, utilizing the sunshine. This understanding is shared within our general understanding between the difference between Power Generation Facilities and solar farms. This is why we all call the intended use a solar farm rather than a solar power generation facility.

19. In the past, the Applicant, as a “Customer Generator,” has erected similar solar trackers with 48 panels without being considered a Power Generation Facility<sup>14</sup>. Each Customer Generator is also considered, by the State as a Net Metering Facility which is eligible to be considered under NH RSA 362-A to be “behind the meter” as a customer, rather than “in front of the meter” as a utility, to share the solar electricity to benefit other utility customers financially, and to improve air quality, reduce global warming, and locally distribute generated electricity. This **administrative gloss**, as to how the City has treated such applications for years,

---

<sup>13</sup> See ADC.

<sup>14</sup> The draft minutes of the meeting incorrectly indicate that the Applicant represented that other municipalities have granted building permits for this use without considering the use a Non-Power Generation Facility. When in fact, the Applicant represented, as it had previously received such a building permit, that the city of Rochester itself issues said building permits. This is the basis for the “administrative gloss argument” that was made by the Applicant at the May 11, 2022 hearing but, for some reason, was not included in the draft minutes.

dictates how the same activity should be permitted to apply for approvals. The state specifically encourages NET METERING up to 1mw this solar and defines this as customer generation. Further the state makes a size determination that over 1 mw is a commercial solar project.

20. In those previous cases, as has been done in this instance, the Applicant was, and now should be, only required to submit a building permit and associated electrical permit associated with the farming use intended and the ancillary solar panel use. The Applicant agrees that over 100kw a solar farm can be subject to site review and other reasonable zoning ordinance. The Applicant further agree that up to 100kw ac is with an electrical and building permit only while between 100kw and 1 mw would require site review. The Applicant, however, disagrees that a 1mw project should only be allowed in certain zones and considered a power generation facility.

21. Both uses, the growing of blueberries and the use of the solar panels will only involve the passive absorption of the sun's radiation. The use of materials, brought to a site and waste remnants of a production which occurs at a utility, will not occur at this site.

22. The City cannot arbitrarily undermine rights given under state law for customer generation up to 1 mw behind any customer meter. The Applicant is not asking for an exemption from zoning as to those matters such as setbacks, etc. However, the Applicant rejects be characterized as a Power Generation Facility as the proposal does not meet that definition under the Rochester zoning ordinance, or the size criteria as defined in state law to be consider a Solar Power Utility, which would exceed the 1 mw size limitation.

23. Given the permitted use, as a farm and the permitted use of solar within the Agricultural Zone, with the construction of the solar panels as an ancillary use (i.e., a "solar farm"), the Applicant respectfully submits that the installation is permitted, as it has not been, nor should it now be, considered a Power Generation Facility, which requires a variance in order for the Applicant to proceed.

## **II. THE RESTRICTION SET FORTH IN THIS ADMINISTRATIVE APPEAL IS PREEMPTED BY NH RSA 362-A, ET SEQ.**

24. NH RSA 362-A:1 provides as follows:

**Declaration of Purpose. – It is found to be in the public interest to provide for small scale and diversified sources of supplemental electrical power to lessen the state's dependence upon other sources which may, from time to time, be uncertain. It is also found to be in the public interest to encourage and support diversified electrical production that uses indigenous and renewable fuels and has beneficial impacts on the environment and public health. It is also**

**found that these goals should be pursued in a competitive environment pursuant to the restructuring policy principles set forth in RSA 374-F:3. It is further found that net energy metering for eligible customer-generators may be one way to provide a reasonable opportunity for small customers to choose interconnected self generation, encourage private investment in renewable energy resources, stimulate in-state commercialization of innovative and beneficial new technology, enhance the future diversification of the state's energy resource mix, and reduce interconnection and administrative costs.**

25. It is the Applicant's position that the state New Hampshire has clearly adopted a policy of promoting the establishment of self-generating power facilities, as proposed by the Applicant. As such, the Applicant specifically raised the issue, at length, before the ZBA at the May 11, 2022 hearing. Oddly, absolutely no reference to the arguments is set forth within the draft minutes.

26. NH RSA 362-A permits all customers with any meter to have, by right, solar and to generate power pursuant to the net-metering guidelines for the community in which the customer's property exists. The statute itself makes no attempt to limit where those customers are located. The administrative action subject to this appeal attempts to do so by calling the net-metering customer a Power Generation Facility, and limiting the net-metering customer class to only those located in three (3) of the 12 zoning districts (See portion of district table attached hereto) within Rochester. Limiting and/or denying the net-metering customer frustrates, and thus undermines, the very state policy and purpose on NH RSA 362-A.

27. The asserts that the doctrine of preemption allows the legislature to override or ignore local land use controls in instances where the legislature has manifested an intent to control a particular activity or where a statute and local ordinance conflict.<sup>15</sup>

28. The doctrine of preemption allows private entities to avoid local land use controls. See 15 New Hampshire Practice: Loughlin, Land Use Planning and Zoning, Ch. 12, Generally, Section 12.01, Page 205.

29. The theory behind preemption is that municipal regulation should not be allowed to frustrate the implementation of what might be referred to as state policy. While New Hampshire has a long tradition of local home rule, plenary authority exists within the legislator to override local control when necessary for the greater good.<sup>16</sup> If a particular activity is found to be exclusively regulated by a state regulatory process, or if the activity is found to be essential to the carrying out of a state policy, such

---

<sup>15</sup> Derry Sand & Gravel, Inc. v. Town of Londonderry, 121 N.H. 501, 431 A.2d 139 (1981). See also 15 New Hampshire Practice: Loughlin, Land Use Planning and Zoning, Ch. 12, Generally, Section 12.01, Page 205.

<sup>16</sup> Region 10 Client Mgt., Inc. v. Hampstead, 120 N.H. 885, 424 A.2d 207 (1980). See 15 New Hampshire Practice: Loughlin, Land Use Planning and Zoning, Ch. 12, Generally, Section 12.01, Page 205.

activities will not be allowed to be frustrated by local zoning restrictions.<sup>17</sup> The terms of NH RSA 362-A, *et seq.*, clearly define and regulate the customer generator that the Applicant would be, as defined by state statute. To bootstrap the Applicant into the only definition of a "Power Generation Facility" that exists within the Rochester Zoning Ordinance is to flagrantly disregard the provisions of NH RSA 362-A, and defy common sense, given the nature in which the Rochester Zoning Ordinance defines a "Power Generating Facility," as outlined hereinabove.

30. The Applicant respectfully submits that it is instructive to acknowledge that the New Hampshire Supreme Court has found that municipalities are preempted from attempting to control locations of lines through local zoning regulations the location of electric transmission lines.<sup>18</sup>

31. To be clear, even where the state has preempted a particular field, a municipality may enforce its regulations against a particular land use so long as the regulations do not have an exclusionary effect. For example, regulations relating to traffic and roads, landscaping, building specifications, snow, garbage and sewage removal, signs, and other related matters which are enforced against all other industrial users may also be enforced against proposed hazardous waste sites.<sup>19</sup> In this instance, the Applicant will meet all of the dimensional requirements set forth withing the Rochester Zoning Ordinance. It is the "use" solely that is in question, and, as assured by the Applicant, that Rochester may not regulate as to where in the zones the use is permitted. See 15 New Hampshire Practice: Loughlin, Land Use Planning and Zoning, Ch. 12, Generally, Section 12.01, Page 207.

32. Similarly, and consistent with the use that is proposed by the Applicant, the construction and maintenance of dams in hydroelectric generating facilities are regulated by state statutory scheme, the New Hampshire Supreme Court has held that local land use regulations cannot prohibit their location with within the municipality. As a result, a hydroelectric facility could be placed in a residential district within a municipality.<sup>20</sup>

33. The Applicant respectfully submits that the intent of NH RSA 362-A, *et seq.* is to provide for the "net-metering" by "customer-generators," as defined by NH RSA 362-A:1-1, II-b, and that the attempt by the city of Rochester to regulate such use is preempted by the general provisions of NH RSA 362-A, *et seq.* The ZBA is respectfully requested to keep the distinction in mind verses community "customer generators" versus those Power Generation Facilities that exceed the capacity limits that restrict the definition of a "customer-generator". Specifically, customer generators are limited to a 1Mw size.

---

<sup>17</sup> Region 10 Client Mgt., Inc. v. Hampstead, 120 N.H. 885, 424 A.2d 207 (1980); City of Edmonds v. Oxford House, Inc., et al., 514 U.S. 725, 115 S. Ct. 1776, 131 L.Ed.2d 801.

<sup>18</sup> Public Service Company of New Hampshire v. Hampton, 120 N.H. 68, 411 A.2d 164 (1980). See also 15 New Hampshire Practice: Loughlin, Land Use Planning and Zoning, Ch. 12, Generally, Section 12.01, Page 206.

<sup>19</sup> *Stablex*, 122 N.H. at 1094, 456 A.2d at 95.

<sup>20</sup> *Wasserman & Sandell v. Lebanon*, 124 N.H. 538, 474 A.2d 994 (1984). See also 15 New Hampshire Practice: Loughlin, Land Use Planning and Zoning, Ch. 12, Generally, Section 12.01, Page 207.

34. The ZBA limited inquiry involved a line of questioning as to whether the Applicant would be sharing the generated electricity with others within the grid, and would the applicant be reimbursed for this power production. The Applicant indicted it would be considered a net-metering producer and, as a Group Host, would receive net meter credits in return for sharing the energy produced. Likewise, group members will also benefit financially from the community solar project. This energy produced would be utilized by those in the very close immediate vicinity. Ms. Saunders and the ZBA took this a profit, and for some reason concluded that such meant that the Applicant should now be considered a Power Generation Facility, notwithstanding the fact that the farm purpose, selling blueberries, or any farming activity itself, would also result in generating "profit." The state net-metering program is specifically designed, with the idea set forth in the statute regarding "group members" that the excess power community generated will be shared and reduce all costs of this green and renewable form of energy within the adjacent group members.

35. The solar farm proposed by the Applicant accomplishes every aspect of the purpose of NH RSA 362-A, providing community customer generation of sustained and green solar power. The actions of the City frustrate that objective without legal justification.

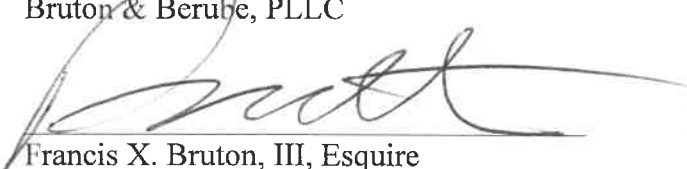
**WHEREFORE**, the Applicant respectfully requests the Rochester Zoning Board of Adjustment to:

- A. Grant a rehearing with regard to the above matter; and
- B. That upon a rehearing, grant the administrative appeal requested by the Applicant and specifically permit the Applicant's proposed use in the Agricultural District; and
- C. For such other and further relief as may be just and equitable.

Respectfully submitted,  
GNM Solar 17, LLC  
By and through its attorneys,  
Bruton & Berube, PLLC

Dated: June 9, 2022

By:



Francis X. Bruton, III, Esquire  
Bruton & Berube, PLLC  
601 Central Avenue  
Dover, New Hampshire 03820  
Phone: (603) 749-4529



# ZONING

## 275 Attachment 4

### City of Rochester

**Table 18-D Industrial-Storage-Transport-Utility Uses**  
[Amended 5-7-2019]

#### LEGEND

P = Permitted Use

C = Conditional Use

E = Use Allowed by Special Exception

Industrial-Storage- Transport-Utility-Uses	Residential Districts				Commercial Districts				Industrial Districts		Special		Criteria/Conditions Reference
	R1	R2	NMU	AG	DC	OC	GR	HC	GI	RI	HS	AS	
Airport	—	—	—	E	—	—	—	—	—	—	—	P	Article 21
Commercial parking facility	—	—	—	—	C	—	—	—	—	—	—	—	
Contractor's storage yard	—	—	—	E	—	—	—	E	P	P	—	—	Articles 20 and 22
Distribution center	—	—	—	—	—	—	P	C	P	—	—	—	Article 21
Emergency services facility	—	—	—	—	C	C	—	C	C	—	P	—	Article 21
Fuel storage	—	—	—	—	—	—	P	E	E	—	—	—	Article 21
Helipad (accessory use)	—	—	—	E	—	E	P	E	P	P	P	P	Article 21
Industry, heavy	—	—	—	—	C	—	P	E	P	E	—	—	Article 21
Industry, light	—	—	—	—	—	—	P	P	P	—	—	—	Article 21
Industry, recycling	—	—	—	—	—	—	—	—	—	P	—	—	Articles 20 and 22
Junkyard	—	—	—	—	—	—	—	E	E	P	—	—	Articles 20 and 22
Laundry establishment-3	—	—	—	—	—	—	—	P	P	—	—	—	
Mini-warehouse	—	—	—	—	—	—	P	C	P	—	—	—	Articles 20 and 21
Monument production	—	—	C	—	—	C	—	P	P	P	—	—	Article 21
Parking lot	—	C	C	C	C	C	—	P	C	P	C	P	Article 21
Printing facility	—	—	C	—	—	P	P	P	P	—	—	—	
Public parking facility	—	—	—	—	P	—	—	—	—	—	—	—	
Recycling facility	—	—	—	—	—	—	—	E	E	P	—	—	Articles 20 and 22
Research and development	—	—	—	—	E	P	P	P	P	—	—	—	Article 21
Sawmill	—	—	—	—	—	—	—	—	E	—	—	—	Article 21
Sawmill, temporary (accessory use)	—	—	—	P	—	P	—	P	P	P	—	P	Article 23

# ROCHESTER CODE

Industrial-Storage- Transport-Utility-Uses	Residential Districts				Commercial Districts				Industrial Districts		Special		Criteria/Conditions
	R1	R2	NMU	AG	DC	OC	GR	HC	GI	RI	HS	AS	Reference
Solid waste facility	—	—	—	—	—	—	—	—	—	P	—	—	Articles 20 and 22
Tank farm	—	—	—	—	—	—	P	C	P	—	—	—	
Trade shop	—	—	C	—	C	C	P	P	P	P	—	—	Article 21
Transportation service	—	—	C	—	C	—	P	P	C	C	—	—	Article 21
Truck terminal	—	—	—	—	—	—	P	—	C	C	—	—	Article 21
Utility - substation	E	E	E	E	E	C	E	P	P	P	E	E	Article 21
Utility - power generation	—	—	—	—	E	—	E	—	E	E	—	—	Article 21
Warehouse	—	—	C	—	C	C	P	P	P	C	—	C	Articles 20, 21 and 23
Wireless communications facility	—	—	—	E	E	E	P	E	P	P	E	E	Articles 20 and 22