

# City of Rochester, New Hampshire

## Zoning Board of Adjustment



### Variance Application

TO: BOARD OF ADJUSTMENT  
CITY OF ROCHESTER

DO NOT WRITE IN THIS SPACE

CASE NO. 2-22-16

DATE FILED 4/20/22

CJ  
ZONING BOARD CLERK

Applicant:

GNM Solar 17, LLC c/o Bruton & Berube, PLLC

E-mail: fx@brutonlaw.com

Phone: 603-749-4529

Applicant Address: 60 Shaw Drive, Rochester, NH 03868

Property Owner (if different): GNM Solar 17, LLC

Property Owner Address: 60 Shaw Drive, Rochester, NH 03868

Variance Address: 60 Shaw Drive, Rochester, NH 03868

Map Lot and Block No: 0240/ 0049/ 0000

Description of Property: Please see attached.

Proposed use or existing use affected: Please see attached.

The undersigned hereby requests a variance to the terms of the Rochester Zoning Ordinance, Ch. 275, Section Table 18-D

and asks that said terms be waived to permit Power Generation Utility in the Agricultural District

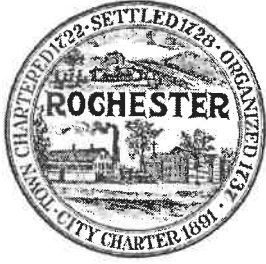
The undersigned alleges that the following circumstances exist which prevent the proper enjoyment of his land under the strict terms of the Zoning Ordinance and thus constitute grounds for a variance. **I understand that while presenting my case the testimony should be confined to the 5 criteria and how they pertain to my case.**

Signed: [Signature]

Attorney for Applicant

Date: April 18, 2022

20



# City of Rochester, New Hampshire

## Zoning Board of Adjustment

### Variance Criteria

1) Granting the variance would not be contrary to the public interest because:  
Please see attached.

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

Please see attached.

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3) Granting the variance would do substantial justice because:

Please see attached.

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

Please see attached.

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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.

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And:

ii. The proposed use is a reasonable one because:

Please see attached.

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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.

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FRANCIS X. BRUTON, III  
CATHERINE A. BERUBE  
JOSHUA P. LANZETTA

OF COUNSEL  
JAMES H. SCHULTE

# Bruton & Berube, PLLC

ATTORNEYS AT LAW

601 Central Avenue  
Dover, NH 03820

TEL (603) 749-4529  
(603) 743-6300  
FAX (603) 343-2986

[www.brutonlaw.com](http://www.brutonlaw.com)

April 20, 2022

**VIA HAND DELIVERED**

Robert Gates, Chair  
Zoning Board of Adjustment  
City of Rochester, New Hampshire  
31 Wakefield Road  
Rochester, NH 03867



**Re:** Appeal of Administrative Decision and Application for Variance  
**Applicant:** GNM Solar 17, LLC c/o Bruton & Berube, PLLC  
**Owner:** GNM Solar 17, LLC c/o Bruton & Berube, PLLC  
**Property:** 60 Shaw Drive, Rochester, NH 03868  
**MBLU:** 0240/ 0049/ 0000  
**Zone:** Agricultural District ("AG")

Dear Chairman Gates:

Enclosed please find ten (10) copies of an Application for Variance as well as ten (10) copies of an Application for an Appeal of an Administrative Decision, together with the associated filing fees for both.

We understand that this matter will be placed on the agenda of the Zoning Board of Adjustment for its meeting of May 11, 2022, and the Applicant respectfully requests that the Application for the Appeal of the Administrative decision be heard first. Should there be any questions regarding the enclosed application, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to be "FXB", written over a horizontal line.

Francis X. Bruton, III  
E-mail: [fx@brutonlaw.com](mailto:fx@brutonlaw.com)

FXB/mas  
Enclosure

cc: GNM Solar 17, LLC

FRANCIS X. BRUTON, III  
CATHERINE A. BERUBE  
JOSHUA P. LANZETTA

OF COUNSEL  
JAMES H. SCHULTE

# Bruton & Berube, PLLC

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ATTORNEYS AT LAW

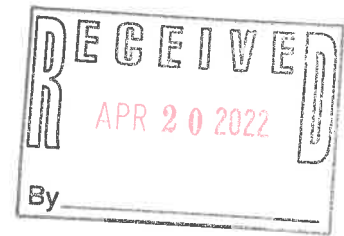
601 Central Avenue  
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(603) 743-6300  
FAX (603) 343-2986

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April 20, 2022

Robert Gates, Chair  
Zoning Board of Adjustment  
City of Rochester, New Hampshire  
31 Wakefield Road  
Rochester, NH 03867



**Re:** Variance to Install Solar Panels on Real Property located in the  
Agricultural District  
**Applicant:** GNM Solar 17, LLC c/o Bruton & Berube, PLLC  
**Owner:** GNM Solar 17, LLC c/o Bruton & Berube, PLLC  
**Property:** 60 Shaw Drive, Rochester, NH 03868  
**MBLU:** 0240/ 0049/ 0000  
**Zone:** Agricultural District ("AG")

Dear Chairman Gates:

The purpose of this letter is to submit a Variance Application (the "Application") on behalf of GNM Solar 17, LLC (the "Applicant") to install solar panels on real property located at MBLU 0240/ 0049/ 0000, otherwise identified as 60 Shaw Drive in Rochester, New Hampshire (the "Property").

Pursuant to N.H. R.S.A. 674:33(I)(b)(1) – (5)<sup>1</sup> and the Zoning Ordinance of the City of Rochester, New Hampshire<sup>2</sup>, the Applicant seeks a variance under Ordinance Table 18-D to install solar panels in the Agricultural District, and respectfully requests that the Zoning Board of Adjustment (the "ZBA") schedule a hearing in May to review and grant the Application.<sup>3</sup>

## I. ENCLOSED MATERIALS

Please find enclosed 1-copy of each of the following documents:

1. Variance Application dated April 20, 2022; and
2. Letter of Authorization dated April 20, 2022.

<sup>1</sup> RSA 674:33(I)(b)(1) – (5).

<sup>2</sup> Zoning, City of Rochester, New Hampshire, Chapt. 275 (2022) (the "Ordinance").

<sup>3</sup> Ordinance § 18-D.

## II. NARRATIVE

The Applicant seeks to operate a sustainable blueberry farm, powered by sunlight, on the Property. To this end, the Applicant proposes installation of fifty solar panels collecting 1-megawatt of alternative current to power multiple farm-uses on the Property, with excess electricity delivered to the nearby energy grid under the State of New Hampshire's net metering rules.<sup>4</sup> 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 by up to 3-percent, and results in reduced water consumption and carbon emissions at the Property.

The Property is uniquely suited to sustainable farming practices because it 1) is located on a Class VI Road, 2) is wooded and screened, 3) abuts residential and industrial, and commercial uses, 4) includes a high voltage electricity corridor, and 5) is encumbered by a utility easement for the same.

## III. LEGAL ANALYSIS

**The project substantially complies with the Ordinance, the Application, and the 5-variance criteria as set forth in NH RSA 674:33.**

The variance criteria are enumerated and *italicized* below with the Applicant's responses following in plain text.

### *A. The variance will not be contrary to the public interest.*

The Applicant respectfully asserts the proposed use, i.e., solar panels located in the Agricultural District, represent a reasonable use of the Property, and that the public interest is served by permitting the orderly development of property in a locus specifically zoned for agriculture.<sup>5</sup> Here, the solar panels produce energy while creating a shaded micro climate for the Property's primary use as a blueberry farm. This micro climate results in reduced water consumption and increased power production throughout the Property, and the proposed use does not 1) alter the essential character of the surrounding neighborhood, 2) impact abutters, and/or 3) affect the public.

### *B. The spirit of the ordinance is observed.*

The spirit of the ordinance is observed because the Project represents a reasonable use of property when balanced with the location, zone, and historic use of the Property. Allowing the solar panels that work to increase farm production—an agricultural use—encourages the most appropriate use of land in Rochester's Agricultural District when juxtaposed with the zone's intent "...to promote expansion of agricultural activity."<sup>6</sup>

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<sup>4</sup> See *Id.*

<sup>5</sup> Ordinance § 275-5.4(4), 275:52.

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

*C. Substantial justice is done.*

Substantial justice is done by granting this variance because it allows the Applicant's property to be reasonably utilized in light of abutting property uses (i.e., agricultural uses) and its locus in the Agricultural District (a district established "...to promote expansion of agricultural activity").<sup>7</sup> This proposal does not burden the public in any way, and substantially benefits the Applicant by allowing him to reasonably use his property with no detrimental effect to surrounding property.

*D. The values of surrounding properties are not diminished.*

The Applicant respectfully asserts that all surrounding properties have an associated value that is premised upon the existence of structures and features similar to those proposed on his Property, and that the proposed improvements likely increase comparable neighboring property values. Here, the Project will not affect any abutting neighbor and is consistent with other uses in the near vicinity and promoted in the existing district.

*E. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.*

- 1) *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.*

Rochester's Agricultural District was specifically created to allow agricultural uses.<sup>8</sup> The proposed solar panels work to create energy while substantially increasing farm productivity—an agricultural use. Additionally, the Property is adjacent to Rochester's General Industrial District where surplus energy is offloaded into the immediate power grid. This immediate proximity makes the Property uniquely suitable for installation of solar panels. Additionally, abutting property currently hosts 2-kVA transformers suitable for off-loading surplus energy produced by the solar panels.

Accordingly, there is no fair and substantial relationship between the general public purpose of the Ordinance's provision—prohibiting solar panels on the Property—and the specific application of this provision to the Property because the use specifically promotes agriculture, and the Property abuts the Industrial District where surplus power may be easily off-loaded.

- 2) *The proposed use is a reasonable one.*

The Agricultural Zone was created "...to promote expansion of agricultural activity." The solar panels serve the dual purpose of sustainably powering the Property's farm operation while providing a micro climate designed to increase

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<sup>7</sup> *Id.*

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

crop production and decrease water consumption. These symbiotic uses “preserve existing farms, promote expansion of agricultural activity,”<sup>9</sup> and are reasonable given the Property’s proximity to the Industrial District where surplus power is off-loaded.

#### IV. RELIEF REQUESTED

Pursuant to NH RSA 674:33, the Applicant respectfully requests the ZBA:

1. Approve the Application; and
2. Grant any and all relief necessary to affect the aforementioned request.

Sincerely,



Francis X. Bruton, III, Esquire  
fx@brutonlaw.com

FXB/mas  
Enclosures

cc: GNM Solar 17, LLC

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<sup>9</sup> *Id.*

# 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 Reference
	R1	R2	NMU	AG	DC	OC	GR	HC	GI	RI	HS	AS	
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



# 60 Shaw Drive

Rochester, NH

1 inch = 284 Feet



April 26, 2022

[www.cai-tech.com](http://www.cai-tech.com)



Data shown on this map is provided for planning and informational purposes only. The municipality and CAI Technologies are not responsible for any use for other purposes or misuse or misrepresentation of this map.



CURRENT OWNER		UTILITIES		TOPO		ZONING		CURRENT ASSESSMENT			
GNM SOLAR 17 LLC		0	NONE	0	LEVEL	A AGRICULTURAL			LUC Co	Prior Assessed	Current Assesse
				NEIGHBORHOOD		NHBD NAME					
				4005	INDUSTRIAL AIRPOR						
PO BOX 77		UTL/ ST / TRAF		EXEMPTIONS							
				Year	Code	Description					
		1	NONE								
FARMINGTON NH 03835		0	NONE								
						LEGAL DESCRIPTION					
								</			

VISION  
ROCHESTER, NH



SALES INFORMATION- GRANTEE		BOOK/PAGE	SALE DATE	SALE PRICE	SALE CODE	PREVIOUS ASSESSMENTS (HISTORY)			
GNM SOLAR 17 LLC BEAUDOIN DARCY R & HEATH BEAUDOIN DARCY R & HEATH TOBEY BEBRIS MARISA LORE BEBRIS IVARS TRUST % MARISA	4946	485	08-25-2021	100,000	90	Year	Descr	Prior Asses	Year
	3088	965	10-22-2004	46,267	24	2020	LAND	1,287	2021
	3088	962	10-13-2004	46,267	24		LAND	0	
	3063	692	08-31-2004	2,667	38			0	
	1203	592	12-24-1985	0	44				
		Total	1,287	Total	1,287	Total	1,287	Total	1,287

BUILDING NOTES		APPRAISED VALUE SUMMARY	
		Appraised Building Value (Card)	0
		Appraised Extra Feature Value (Bldg)	0
		Appraised Outbuilding Value (Bldg)	0
		Appraised Land Value (Bldg)	147,600
		Total Appraised Parcel Value	147,600
		Valuation Method	C

BUILDING PERMIT RECORD		VISIT / CHANGE HISTORY	
Issue Date	Permit Id	Description	Notes
02-01-2022	21-389-16	TIMBER INTNT	
		0	INTENT TO CUT 21-389-16
		Total Appraised Parcel Value	147,600

LAND LINE VALUATION SECTION																					
B	LUC	Description	LandU	Land Type	Loc Adj	UnitPric	Size Adj	Cond	Nbhd	Nb Adj	Inf1	Inf1 Adj	Inf2	Inf2 Adj	Inf3	Inf3 Adj	Adj UnitPrice	Appraised Value	Assessed Value	Notes	
1	6710	CU ALLOTH	1.000	PRIMARY	UN,AVF	60,000	1.00000	1.00	4005	1.000							60,000	60,000	50		
1	6710	CU ALLOTH	23.500	EXCESS A	E,AVFO	4,000	0.84259	1.00	4005	1.000							3,370.4	79,200	1,179		
1	6910	CU UNP	2.500	EXCESS A	E	1,000	0.84259	1.00	4005	1.000							3,370.4	8,400	58		
												Parcel Total Land Area		27.00 AC		27.00 AC		Total Land Value		147,600	



**GNM SOLAR 17, LLC  
123 WASHINGTON STREET  
ROCHESTER, NH 03867**

April 20, 2022

City of Rochester  
31 Wakefield Street  
Rochester, NH 03867

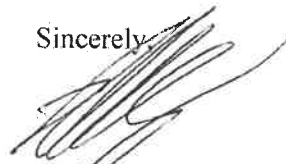
**Re:** Appeal of Administrative Decision & Application for Variance  
**Applicant:** GNM Solar 17, LLC c/o Bruton & Berube, PLLC  
**Owner:** GNM Solar 17, LLC c/o Bruton & Berube, PLLC  
**Property:** 60 Shaw Drive, Rochester, NH 03868  
**MBLU:** 0240/ 0049/ 0000  
**Zone:** Agricultural District ("AG")

To Whom it May Concern:

Please accept this correspondence as written authorization for Francis X. Bruton, or any other representative from the law firm of Bruton & Berube, PLLC of Dover, New Hampshire to act on our behalf with respect to the proposed project within the City of Rochester. This representation shall include, but not be limited to, discussions with Town officials, meetings before any regulatory boards, telephone conferences, signing of any applications, and any and all other actions reasonably necessary to move the above-referenced project forward.

Should there be any questions regarding this authorization, please feel free to contact me.

Sincerely,



W. Macky Campbell  
Its duly authorized Member

**ABUTTERS LIST  
FOR  
GNM SOLAR 17, LLC  
60 SHAW DRIVE  
ROCHESTER, NH  
(MAP 240, LOT 49)  
April 20, 2022**

**OWNER OF RECORD/APPLICANT:**

**TAX MAP 240, LOT 49     (60 SHAW DRIVE)**  
GNM Solar 17, LLC  
PO Box 77  
Farmington, NH 03835

**ABUTTERS:**

**TAX MAP 240, LOT 47     (23 DAIGLES WAY)**  
Charles E. & Alice D. Purpura  
23 Daigles Way  
Rochester, NH 03868-5726

**TAX MAP 240, LOT 47     (5 DAIGLES WAY)**  
Dennis L. & Carol A. Daigle  
5 Daigles Way  
Rochester, Nh 03867-5710

**TAX MAP 240, LOT 47-1   (21 DAIGLES WAY)**  
Katie M. Daigle  
& Evan T. Cook  
21 Daigles Way  
Rochester, NH 03868-5726

**TAX MAP 240, LOT 48     (933 SALMON FALLS ROAD)**  
Steven Wayne Noel Sr.  
& Joan Noel, Trustees  
Steven Wayne Noel, Sr. and Joan Noel Joint Living Trust  
106 Eagle Drive  
Rochester, NH 03867-7056

**TAX MAP 240, LOT 51     (59 SHAW DRIVE)**  
William R. Libby  
149 Dry Hill Road  
Rochester, NH 03867

**TAX MAP 240, LOT 52     (0 SHAW DRIVE)**  
Martin Ferwerda  
37 Tarah Way  
Fremont, NH 03044-3249

**ABUTTERS LIST  
FOR  
GNM SOLAR 17, LLC  
60 SHAW DRIVE  
ROCHESTER, NH  
(MAP 240, LOT 49)  
April 20, 2022**

CONTINUED

**TAX MAP 241, LOT 21      (1035 SALMON FALLS ROAD)**

Linda Sargent  
671 Salmon Falls Road  
Rochester, NH 03867

**TAX MAP 243, LOT 14      (156 ROCHESTER HILL ROAD)**

43 North, LLC  
156 Rochester Hill Road  
Rochester, NH 03867-3347

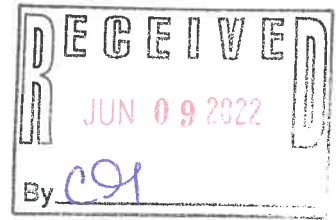
**TAX MAP 243, LOT 27      (216 AIRPORT DRIVE)**

Albany Eng'd Composites Inc.  
Attn: Accounts Payable  
PO Box 1907  
Albany, NY 12201

**PROFESSIONALS/INTERESTED PARTIES:**

Francis X. Bruton, III, Esquire  
Bruton & Berube, PLLC  
601 Central Avenue  
Dover, NH 03820

STATE OF NEW HAMPSHIRE



Strafford, SS.

City of Rochester  
Zoning Board of Adjustment

**In Re: ZBA Case #Z-22-16 GNM Solar 17, LLC, 60 Shaw Drive, Rochester, New Hampshire regarding a variance for to permit solar farm (referred to by City as Power Generation Utility)**

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

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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 a variance, and states as follows:

**The Proposed Project**

1. The Applicant seeks to operate a sustainable blueberry farm, a solar farm and a group host community solar project at 60 Shaw Drive in Rochester, NH "hereinafter the "Property").

2. The Applicant proposes installation of fifty solar tracker with 48 panels with 1-megawatt of alternative current inverters to power farm-uses on the Property, with excess electricity delivered to the Rochester School District the under the State of New Hampshire's Group Host rules 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 uniquely suited to sustainable farming practices, Solar Farm, and Group Host community solar project because it 1) is located on a Class VI Road, (project will have little traffic to site); 2) is a wet area, and secluded (this project only has temporary impact on the wetlands and maintained valuable wildlife corridors; 3) it is screened from residential uses on the far side by the maintained mature forest and utility lines; 4) large industrial, and commercial uses, direct site and impact property; 5) includes a high voltage electricity corridor, through entire north property line; 6) is encumbered by a utility easement for the same; 7) is abutted by active railroad tracks along the entire



southern property line; 8) is located in the active landing and fly zone of the local airport; and 9) has the appropriate electrical infrastructure located near the property that is a unique feature that is needed for the solar farm and community solar project.

4. The Property is depicted on the Rochester tax maps as Map 240, Lot 49, and is located in the Agricultural Zone.

5. The Applicant has filed a concurrent Appeal of Administrative Decision, pursuant to NH RSA 676:5, asserting that the project, as proposed, is not a Power Generation Utility, but represents an agricultural use, which is permitted and/or that the Rochester zoning restrictions are preempted by NH RSA 362-A, *et seq.*

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

6. At its May 11, 2022, public hearing, the Rochester Zoning Board of Adjustment, (hereinafter the “ZBA”), the Applicant presented an application for a variance to permit the solar farm, classified by the City as a Power generation Utility, as referenced hereinabove.

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

8. 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 Variance sighting the criteria for an unnecessary hardship was not met.”***

### **Basis for Rehearing**

10. For the reasons set forth below, it is respectfully submitted that the Rochester Zoning Board of Adjustment’s denial of the variance, as set forth in the NOD is unreasonable and/or illegal.

11. 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 ZBA FAILED TO DELIBERATE AND VIOLATED THE APPLICANT’S DUE PROCESS RIGHTS AND THE RIGHT TO KNOW LAW**

9. As reflected by the minutes of the meeting, attached hereto as Exhibit 1, Ms. Saunders was asked to comment on the applications and stated (as reflected in the draft minutes),

**“Ms. Saunders told the Board the opinion of the City Attorney was that the applicant did not meet the hardship criteria and there are other reasonable uses on a Class VI road in the agricultural zone this lot could be used for.”**

10. The Board engaged in no discussion on the application, whether as to the facts set forth within the application, the criteria for the variance or any reference to any reasonable and/or legal rational as to why the Applicant did not meet the “unnecessary hardship” test, as set forth within NH RSA 674:33(I)(b)(1) – (5).

11. As highlighted hereinabove, the City Attorney, in essence, decided the matter on an *a priori* basis, and directed the ZBA to deny the Applicant’s variance. The ZBA, without its own deliberations, followed suit. This course of conduct negates the very essence of the ZBA, which is established as a quasi-judicial board pursuant to NH RSA 673:1, IV to act in such capacity to protect the public. If this decision was upheld, simple issues such as disqualification of members for conflict of interest<sup>1</sup> or other “juror standards” issues pursuant to NH RSA 500-A:12 would be entirely superfluous.

12. The deliberative process of a ZBA must occur in a public hearing pursuant to NH RSA 676:7, II, and, as such, all deliberations must be made by the ZBA and are subject to the Right to Know Law pursuant to NH RSA 674:33 and NH RSA 91-A.

13. The authority of a ZBA in New Hampshire is exclusive and cannot be usurped by other boards.<sup>2</sup> As the ZBA in this case made no independent deliberation, but relied solely on the decision of the City Attorney, such a decision is unlawful and unreasonable.

14. Basic due process demands that any decision of a ZBA must be based upon evidence and facts set forth at the public meeting pursuant to NH RSA 674:33, *et seq.*, and NH RSA 91-A, *et seq.*

15. The decision of the ZBA fails to provide any reason as to a lack of support as to an unnecessary hardship, as the ZBA failed to independently deliberate at all (See copy of draft minutes). Rather, the ZBA took advice from the City Attorney that “...other reasonable uses are available for the Property.” At the May 11, 2022 hearing, undersigned counsel for the Applicant pointed out that the theory proffered from the City Attorney is incorrect and represents law that has been soundly rejected by the New Hampshire Supreme Court and New Hampshire Legislature with the decision in *Simplex v. Newington*, 145 N.H. 727 (2001) and the amendment to NH RSA 674:33 in 2009. Undersigned counsel’s comments at the May 11, 2022 hearing in response to the City Attorney’s interpretation were not included in the draft minutes (See attached).

16. The draft minutes and the NOD clearly violate the provisions of NH RSA 676:3, I, which requires, in part, the following:

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<sup>1</sup> See *Atherton v. Concord*, 109 N.H. 164 (1968).

<sup>2</sup> See *Buxton v. Exeter*, 117 N.H. 27 (1977).

The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. If the application is not approved, the board shall provide the applicant with written reasons for the disapproval.

17. The “decision,” as set forth in the NOD for this application, that is conclusory at best, without any ZBA deliberations as to facts of the case, and based purely on the opinion of the City Attorney, does not satisfy the Applicant’s due process rights and violates, as is thus illegal, all rules of procedure enacted by the New Hampshire Legislature, including, but not limited to NH RSA 676:3 and 91-A, *et seq.*

18. In failing to deliberate or make any specific findings of fact, the record provides for no further meaningful review, as is required. Findings of fact must be more specific than a mere recitation of conclusions. See *Cormier v. Danville*, 142 N.H. 775 (1998).

## **II. THE APPLICANT SATISFIES NH RSA 673:33 I (2) (A)-(E)(1).**

### **The Nature and Purpose of a Variance**

19. A variance has been defined by the New Hampshire Supreme Court as the authority granted to the owner of land to use its property in a manner otherwise violative of the zoning regulations. See *Stone v. Craig*, 89 NH 483 (1970).

20. A variance is in the nature of a waiver of the strict letters of the Zoning Ordinance without sacrificing its spirit and purpose. 15 *New Hampshire Practice Series: Land Use and Zoning*, Ch. 24, Sec. 2.

### **Unnecessary Hardship**

21. The adverse finding against the Applicant’s request for the variance was that the Applicant did not satisfy the “unnecessary hardship” criteria for the grant of a variance, or, as promulgated by NH RSA 674:33, that literal enforcement of the ordinance would result in unnecessary hardship to the Applicant.

22. It is important to note that the test is whether the hardship to the Applicant, or the prohibition of the use, is “unnecessary.” Further, it is a hardship to the Applicant, not a hardship to the property. The relevant inquiry as to the property is whether it contains “special conditions that distinguish it from other properties in the area.” See NH RSA 674:33 (I)(b)(1).

### **A. Special Conditions**

23. When considering the unnecessary aspect of the hardship, New Hampshire law focuses on whether, owing to **special conditions** of the property that distinguishes it from other properties in the area, no fair and substantial relationship exists between the general

public purpose of the ordinance provisions and the specific application of that provision to the property, and the proposed use is reasonable.

24. The general purposes of the Rochester Zoning Ordinance are to protect the health, welfare and safety of the residents of Rochester and to encourage economic development and the most appropriate land uses in various parts of Rochester.

25. The term “special conditions” of the property is a legal term of art, wherein, the term has a specific legal meaning, particularly when utilized when considering the grant of a variance.

26. The concept of finding “special conditions” to justify the grant of a variance “...has its origins in the Standard State Zoning Enabling Act of the 1902’s, since it is the existence of those “special conditions” which caused the application of the zoning ordinance to apply unfairly to a particular property, requiring that the variance relief be available to prevent a taking.” See 15 *New Hampshire Practice Series: Land Use and Zoning*, Sec. 24.2.

27. In its application, and at the May 11, 2022 hearing, the Applicant described the special conditions of the Property. Specifically, the Property is uniquely suited to sustainable farming practices and as a solar farm as it 1) is located on a Class VI Road; 2) is wooded and screened; 3) the Property contains significant wetlands which are adaptable to solar farms; 4) abuts the largest industrial use in Rochester (the Albany plant); 5) includes a high voltage electricity corridor; 6) is encumbered by a utility easement for the electricity corridor; 7) abuts an airport; 8) abuts an existing railroad; and 9) has the needed electrical infrastructure near the property for a solar farm and group host community solar project.

28. During the ZBA hearing of May 11, 2022, the ZBA made no deliberations and/or conclusions as to whether special conditions of the Property exist.

29. Rather, the ZBA relied on the City Attorney’s view that other uses were available for the Property. The City Attorney may be relying upon the alternative form of relief and text for a variance, under NH RSA 674:33 (I)(b)(2), which permits an Applicant to rely obtain a variance if there is no reasonable use of the property. This is an alternate criterion separate from that in NH RSA 674:33 (I)(b)(1), not an exclusive, and rarely if ever utilized criteria).

30. Sometimes, as is the case herein, a denial of a variance is perceived as justified as an applicant “...has an otherwise reasonable use of the property.” Again, this assumes this criterion is the exclusive criteria for the grant of a variance. It is not, and, as such, applications themselves distinguish the two alternate criteria.

31. City Attorney’s theory stems from a former legal theory that an applicant should be denied a variance if there is “any” form of alternative reasonable use. This logic formed the basis of *Governors’ Island Club, Inc. v. Town of Gilford*, 124 NH 126 (1983), a case that was specifically overruled by the NH Supreme Court in the case of *Simplex Technologies v. Town of Newington*, 145 NH 727 (2001). In that case, which

subsequently formed the basis for the codification of the statutory 5-pronged test for the grant of a variance pursuant to NH RSA 674:33 (1) (a) & (b), the New Hampshire Supreme Court indicated that such a standard had become “too restrictive in light of the constitutional protections by which it must be tempered.” *Id.* at 731. This is why there are two criterium to pursue for any applicant for a variance.

32. Rather, the proposal is to be considered in the context of the uniqueness of the property itself, not that there is another or existing reasonable alternative. That is why the test considers whether there is an “unnecessary hardship,” not an “ultimate hardship,” meaning it must be found that it is necessary to deny the variance in order to protect the general purposes of the zoning ordinance. Put another way, is the restriction on the property necessary in order to give full effect to the purpose of the ordinance, or can relief be granted to this property without frustrating the purpose of the ordinance? See page 11-14, *The Board of Adjustment in New Hampshire*, New Hampshire Office of Strategic Initiatives, December 2017.

33. As in the case of *Harborside v. Parade*, 162 NH 508 (2011), in order to prove unnecessary hardship, the applicant did not have to demonstrate that its proposed use was “necessary” to its operations, just that it is reasonable given the special conditions of the property.

34. Based upon the above, there clearly are special conditions of the property, and any reliance on the fact that “other uses can occur on the Property” is an unreasonable and illegal rational to deny the variance as the criterium set forth in NH RSA 674:33 (I)(b)(1). Rather, as there will be no adverse impact on the general purposes of the ordinance, which is to protect the health, welfare and general welfare of the residents of Rochester, there is no fair and substantial relationship between protecting these purposes of the zoning ordinance and restrictions upon the solar farm use proposed by the Applicant. As such, in light of the special conditions of the property, no purpose of the ordinance will be compromised by the proposed installation of the solar farm by the Applicant, making the denial of the variance an unnecessary hardship.

35. No abutters offered any correspondence or testimony at the May 11, 2022 hearing in opposition of the Applicant’s proposal, supporting the Applicant’s contention that denial of the variance represents an unnecessary hardship to the Applicant.

36. Based on the specific facts of this case and the demonstrated New Hampshire caselaw, it is respectfully submitted that the decision to deny the variance related to the “unnecessary hardship” prong is illegal and/or unreasonable.

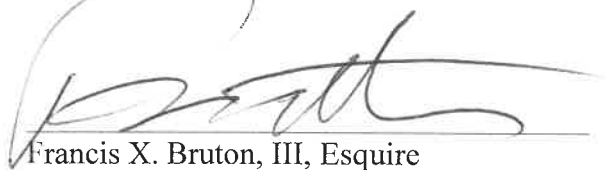
**WHEREFORE**, the Applicant respectfully requests the Rochester Zoning Board of Adjustment to:

- A. Grant a rehearing with regard to the above matter; and
- B. That upon a rehearing, grant the variance requested by Applicant; 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

## **City of Rochester Zoning Board of Adjustment**

Wednesday May 11, 2022

31 Wakefield Street, Rochester, NH 03867

*(These minutes were approved on, 2022)*

### Members Present

Larry Spector, *Vice Chair*

Leo Brodeur

James Hayden

Michael King

### Members Absent

### Alternate Members Present

James Connor

Lance Powers

Matthew Winders

Staff: Shanna B. Saunders, *Director of Planning & Development*

Crystal Galloway, *Planner I*

These minutes serve as 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 online at [www.rochesternh.net](http://www.rochesternh.net) for a limited time for reference purposes.

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Vice Chair Larry Spector called the meeting to order at 7:00 p.m.

The recording secretary, Crystal Galloway, conducted roll call.

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### **3. Seating of Alternates:**

Mr. Spector said the voting members for the meeting would be Leo Brodeur, James Hayden, Michael King, James Connor, and himself.

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### **4. Approval of Minutes:**

*A motion was made by Mr. Brodeur and seconded by Mr. Hayden to approve the minutes from the April 13, 2022 meeting. The motion carried unanimously.*

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## 5. New Cases:

**Z-22-15 GNM Solar 17, LLC** Seeks an *Appeal of Administrative Decision* preventing the issuance of a building permit to install fifty (50) solar pedestals on the property with a blueberry farm, as this use is considered a "Utility – Power Generation" which is not a permitted use in the Agricultural Zone

**Location:** 60 Shaw Drive, Map 240 Lot 49 in the Agricultural Zone.

FX Bruton of Bruton and Berube, PLLC presented the appeal of an administrative decision. He explained the parcel abuts industrial uses and the airport, but it is located in the agricultural zone. Mr. Bruton said the intended use for the property is a blueberry farm which would be an agricultural use, and the other is to install solar panels to add a solar farm. He explained the applicant has gone through the process before for the same use in a different town where he was only required to get a building permit.

Mr. Bruton explained this time the applicant was told his proposal would be considered a power generation utility which is not allowed in the zone. Mr. Bruton said RSA 362-A relates to a process called net metering which is the use of renewable energy for customers of existing utilities. When the customer has a solar panel the energy that is produced is metered in a net fashion off of what the customer is using from the utility.

Mr. Bruton went on to explain materials is a form of substance, not radiation from the sun or wind from the air and that is why they are not included on the list in the definition of power generation utility.

Mr. Bruton said the applicant is proposing a farming operation with a blueberry farm with solar power assisting with the production of the blueberries.

Mr. Spector opened the public hearing. No one from the public was present to speak; Mr. Spector brought the discussion back to the Board.

Mr. Brodeur asked how the blueberry farm will utilize solar. Mr. Bruton said energy is needed to do farming and it absorbs the energy and will reduce the use of water needed for the blueberries to grow. Mr. Brodeur said a blueberry farm requires sunshine. He asked if the solar panel would block the sun. Mr. Bruton explained the panels will move and they are designed to capture every strand of radiation. Mr. Brodeur asked for further clarification. Applicant Packy Campbell said solar panels use about 20 percent of the sun's spectrum. He said there will be enough sun left that is needed to grow the blueberries.

Mr. Hayden asked if fifty pedestals were chosen to get to the one-megawatt number or was it chosen for the size of the farm. Mr. Campbell explained there are 2,400 panels on fifty trackers which will produce one-megawatt of AC inverters.

Mr. Winders asked if the majority of the power will be used for the farm or will it go back to the grid. Mr. Campbell said the majority will be used in the group net metering program and will be used by members of the group.

Ms. Saunders said the City supports solar energy, saying permits are issued regularly for accessory solar panels on roofs and accessory trackers for residential and business. She explained there were two factors that lead to the decision in this case, one being sunlight would fall into the "other material" category of the definition, and two the fact that the majority of energy is being used for commercial purposes for profit, and it would not be an accessory use.

Mr. King asked if the City Attorney provided an opinion regarding the appeal. Ms. Saunders told the Board the City Attorney supports her administrative decision.



*A motion was made by Mr. Brodeur and seconded by Mr. King to deny case Z-22-15 based on the discussion with City Staff. The motion carried unanimously by a roll call vote.*

**Z-22-16 GNM Solar 17, LLC** Seeks a *Variance* from Table 18-D to permit the power generation utility in the agricultural zone.

**Location:** 60 Shaw Drive, Map 240 Lot 49 in the Agricultural Zone.

FX Bruton of Bruton and Berube, PLLC presented the variance application. He said the property is unique because it is located on a class VI road, it's wooded, it abuts residential properties as well as industrial and commercial uses. Mr. Bruton said the other unique characteristics of the property is there are high voltage wires going through the property creating an an easement, as well.

Mr. Bruton read through the five criteria. He said public interest is served by permitting the orderly development of property in a locus specifically zoned for agriculture. The spirit of the ordinance is observed because the project represents a reasonable use of the property when balanced with the location, zone, and historic use of the property. Substantial justice is done by granting the variance because it allows the applicant's property to be reasonably utilized in light of abutting property uses and its locus in the agricultural district. The surrounding properties have an associated value that is premised upon the existence of structures and features similar to those proposed on his property, and the proposed improvements likely increase comparable neighboring property values. The agricultural zone was created to promote expansion of agricultural activity. The solar panels serve the dual purpose of sustainably powering the property's farm operation while providing a microclimate designed to increase crop production and decrease water consumption.

Mr. Spector opened the public hearing. There was no one present from the public to speak; Mr. Spector brought the discussion back to the Board.

Ms. Saunders told the Board the opinion of the City Attorney was the applicant did not meet the hardship criteria and there are other reasonable uses on a class VI road in the agricultural zone this lot could be used for.

*A motion was made by Mr. Brodeur and seconded by Mr. King to deny case Z-22-16 because the applicant did not meet the hardship criteria. The motion carried unanimously by a roll call vote.*

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## **6. Other Business/Non-Scheduled Items:**

Mr. Spector let the Board know Mr. Gates will not be returning. He said his term expired in January of this year so he will not have to submit a formal resignation. Mr. Spector said the Board will need to vote for a new Chair and Vice Chair.

Mr. Spector nominated Mr. Brodeur for Vice Chair; Mr. Hayden seconded. The nomination carried unanimously by a roll call vote.

Mr. Brodeur nominated Mr. Spector for Chair; Mr. Hayden seconded. The nomination carried unanimously by a roll call vote.

There was a brief discussion regarding the by-laws for the Zoning Board. The Board asked to have a review and update of the by-laws at the meeting in June.

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**7. Adjournment:**

*A motion was made by Mr. Hayden and seconded by Mr. Brodeur to adjourn at 7:52 p.m. The motion carried unanimously.*

Respectfully Submitted,

Crystal Galloway,  
Planner I

and

Shanna B. Saunders,  
Director of Planning & Development