

City of Keene
New Hampshire

ZONING BOARD OF ADJUSTMENT
MEETING MINUTES

Monday, February 5, 2018

6:30 PM

**2nd Floor Committee Room,
City Hall**

Members Present:

Nathaniel Stout, Chair
Josh Gorman
Michael Welsh
Sean Wallin
John Rab, Alternate

Staff Present:

Gary Schneider, Plans Examiner
John Rogers, Zoning Administrator

Members Not Present:

Jeffrey Stevens, Alternate
Louise Zerba, Alternate

I. Introduction of Board Members

Chair Stout called the meeting to order at 6:30 PM and introduced the Board members.

II. Minutes of the Previous Meeting

Mr. Welsh made a motion to approve the minutes of December 20, 2017, which was seconded by Vice-Chair Gorman and carried unanimously

Mr. Welsh made a motion to approve the minutes of January 2, 2018, which was seconded by Vice-Chair Gorman and carried unanimously.

Mr. Welsh made a motion to approve the minutes of January 9, 2018, which was seconded by Vice-Chair Gorman and carried unanimously.

Chair Stout asked the Board if the motion in the affirmative followed by the motion to deny, in the January 9 minutes was clear; the Board stated in the affirmative. He noted henceforth in similar situations the Board will first decline a motion to approve, followed by a subsequent motion to deny the application. He also noted that Board members are not barred from voting to approve meeting minutes, even if they were not present at the meeting in question.

III. Hearings

ZBA 18-02:/ Petitioner, Jim Phippard of Brickstone Land Use Consultants of 185 Winchester Street, Keene, requests a Variance for property located at 338 East Surry Rd., Keene, Tax Map Parcel # 915-06-002, which is in the Rural District and owned by Bretwood Golf Course of 365 East Surry Road, Keene. The Petitioner requests a Variance to permit the installation of an above ground gasoline storage tank and concrete fuel dispensing pad approximately 20 feet from the street right of way line where a 50 foot setback is required in the Rural District per Section 102-791, Basic Zone Dimensional Requirements of the Zoning Ordinance.

Mr. Schneider presented the property owned by Bretwood Golf Course on a map which is in the Rural District. Chair Stout asked what defines the buffer in this application. Mr. Schneider replied the yellow buffer shown on the map was a buffer for notifying abutters of this meeting, not the buffer in question in this application, which was not shown on the map.

Chair Stout welcomed Jim Phippard to present this application on behalf of Bretwood Golf course. Mr. Phippard said this application is for a Variance to allow encroachment into a main setback of Bretwood Golf Course for installation of a concrete pad and an aboveground gas tank dispensing area within 20 feet of the right of way on East Surrey Road where 50 feet is required in the Zoning Code. The Board noted the site plan Mr. Phippard was presenting was not included in the meeting packet; they said they would hear the presentation and decide if more information is needed depending on how well it was presented.

Mr. Phippard continued showing the location on East Surrey Road; he showed the existing buildings, which are all non-conforming because they are within the 50 foot setback. These buildings predated the setback requirement because they were original farm buildings on the property since 1930. The existing public golf course has a paved driveway with a northern curb cut for parking entrance and an additional paved drive primarily for golf carts. The buildings he described are used for maintenance and equipment storage. Currently, there is a 1,000 gallon diesel storage tank in the northernmost building. To date that tank has been in full compliance with state regulations. This Variance is being requested now because the New Hampshire Department of Environmental Services (NHDES) has changed their rules on gas tank location and dispensing operations. The location in the northern building is now out of compliance and Bretwood Golf Course has been instructed to replace the single wall tank with a fireproof tank, remove it from the building, and ensure it is complaint with the new regulations. Bretwood has already purchased the new fireproof tank. The new tank must be located a minimum of 5 feet away from any enclosed structure, 10 feet away from any public right of way, 75 feet away from any surface water, and 250 feet away from any well that provides drinking water. Mr. Phippard showed the nearest well across East Surrey Road on property owned by the Golf Course owners. They applied for a waiver from NHDES because for a location within the 250 feet radius because they felt there were adequate protections in place to justify the waiver; the state disagreed and denied the waiver request and asked them to find a different location further south and outside the radius.

The proposed location, in compliance with NHDES, is adjacent to the southernmost building and will include a new concrete pad to accommodate the 4 foot wide and 16 foot long tank that will be elevated above the ground on pedestals. An adjacent concrete fuel dispensing pad with a minimum of a 6 foot tall chain link fence enclosure is also required. The fence will allow the Fire Department visibility to check for hazards and respond to incidents. Mr. Phippard said this location was chosen because it is far enough from surface waters, the

drinking water well, and potential hazards from golf course activity. Maintenance staff accesses the gas tank at least once per day and that could be hazardous within the direction of active play. The proposed location is as close as possible to the active play area. Mr. Phippard noted that Bretwood owns everything across the street from the golf course. There is no nearby private property within 1,500 feet that would be visually impacted by the proposed location. The proposed location can only be seen from the East Surrey Road right of way. The new tank will be oriented north-south to reduce width and the concrete pad will begin 20 feet from the right of way of East Surrey Road. He noted the City does not own the right of way in this location; Bretwood owns the land under East Surrey Road but they are applying for a Variance because of the City 50 feet setback requirement.

The Board agreed the presentation was sufficient and they did not need more time to review the plans. Mr. Phippard continued addressing the criteria for a Variance:

1. *Granting the Variance would not be contrary to the public interest* – Mr. Phippard said this is consistent with public interest because it is safer and respects environmental resources. There is no other way to fully comply with state regulations and maintain safe distance from golf course activity. Tanker trucks can safely deliver gas to this location. NHDES said they will approve this location if the City Variance is granted. Overflow parking will not be allowed near this location to ensure safety.
2. *If the Variance were granted, the spirit of the Ordinance would be observed* – Mr. Phippard said the Spirit of the Ordinance on setbacks is usually to separate buildings for safety, privacy, and aesthetics. Separation should not interfere with line of sight to ensure fire safety. They feel this location, an open grass area with an existing large oak tree that will be preserved, is accessible to the Fire Department, fuel delivery, and maintenance workers. He believes this meets the Spirit of the Ordinance because it protects environmental resources and is consistent with state and federal requirements.
3. *Granting the Variance would do substantial justice* – Mr. Phippard said the existing fuel tank was installed in 1970 and was non-conforming because of regulation changes. This Variance will bring the facility into compliance with state and federal regulations and protect public safety.
4. *If the Variance were granted, the values of the surrounding properties would not be diminished* – Mr. Phippard said the location is at least 1,500 feet away from any private property and does not interfere with adjacent landowner use of the property or visibility; the tank will only be visible when driving down East Surrey Road. This use is common and typical for a golf course.
5. *Unnecessary Hardship – owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:*
 - a. *No fair and substantial relationship exists between the general public purpose of the Ordinance provision and the specific application of that provision to the property* – Mr. Phippard said this is a unique condition because Bretwood owns more than 500 acres of surrounding property but cannot entirely comply because it has to be within the setback. He thinks this

situation fits the unique situation this criteria calls for. He believes the proposed use is reasonable because the tank is already noncompliant today; with these changes it will be more compliant.

- b. *The proposed use is a reasonable one* – Mr. Phippard said this property is unique because of the existing conditions and the gas tank cannot be near surface water, golf course activity, and must be accessible to maintenance.

Mr. Wallin asked about the buildings across East Surrey Road. Mr. Phippard noted there is a metal building for winter storage of maintenance equipment and the drinking water well on the private two-family residence next to the driveway in the front yard. Monitoring wells showed that groundwater moves west away from the well toward the Ashuelot River.

Chair Stout asked which side of the tank is 20 feet from the setback. Mr. Phippard replied the concrete pad is 20 feet from the setback and the tank is another five feet from the setback; however, the entire tank is within the 50 feet setback. These measurements do not include fencing, which will be 10 feet from the tank on all sides, because fencing is usually not prohibited within setbacks. Chair Stout asked if there were no concrete pad, would there be a need for setback. Mr. Schneider replied most likely not.

Chair Stout opened the public hearing. Mr. Rogers noted he received one phone call from an abutter that could not be present at the meeting that was in favor of this Variance. With no further public comment, Chair Stout closed the public hearing.

The Board discussed how this application meets the criteria for Variance.

Granting the Variance would not be contrary to the public interest:

Chair Stout said this is not contrary to public interest and this Board does not regulate aesthetics, which is the job of the Planning Board. Vice-Chair Gorman said public interest is served by these state regulations, even if the gas tank were moved back another 30 feet it would still likely be within line of sight and would not alter public interest. Mr. Welsh said the state inspection provides compelling reasons why this is necessary and serves the public interest.

If the Variance were granted, the spirit of the Ordinance would be observed:

No Board comment.

Granting the Variance would do substantial justice:

Chair Stout stated the necessity to move the tank is clear and there are no real other options.

If the Variance were granted, the values of the surrounding properties would not be diminished:

Chair Stout mentioned the significant distance between the applicant and the other property owners. Additionally, this is an interesting application because the applicant owns the right of way.

Unnecessary Hardship

E. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the Variance would result in unnecessary hardship because:

ix. No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property:

x. The proposed use is a reasonable one:

Vice-Chair Gorman said he believes this criterion exists to protect abutters and in this case the golf course is the primary abutter. Chair Stout said the necessity is obvious and the applicant made a plausible case that this is the only option.

Mr. Welsh made a motion to approve all criteria listed, which was seconded by Vice-Chair Gorman. The Board reviewed the findings of fact:

Granting the Variance would not be contrary to the public interest: Granted 5-0.

If the Variance were granted, the spirit of the Ordinance would be observed: Granted 5-0.

Granting the Variance would do substantial justice: Granted 5-0.

If the Variance were granted, the values of the surrounding properties would not be diminished: Granted 5-0.

Unnecessary Hardship

E. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the Variance would result in unnecessary hardship because:

ix. No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property: Granted 5-0.

x. The proposed use is a reasonable one: Granted 5-0.

Mr. Welsh made a motion to approve application ZBA 18-02, which was seconded by Mr. Rab and carried unanimously.

ZBA 18-03:/ Petitioner, Michael Petrovick of Catlin & Petrovick Architects, PC of 51 Railroad Street, Keene, requests a Special Exception for property located at 809 Court Street, Keene, Tax Map Parcel # 188-01-001, which is in the Commerce District and owned by Hillsborough Capital, LLC of 63 Emerald Street, Suite 167, Keene. The Petitioner requests a Special Exception per Section 102-856, Maximum Building Height from 35 feet to 50 feet.

Mr. Rogers showed the property on a map in the Commerce Zone on upper Court Street, where there has been a lot of recent development. There is an existing building at this location and its last use was offices though it has had many different uses over time. The applicants are requesting a Special Exception to increase the height of the building. Because this is a Special Exception request, there are five additional criteria from the Basic Zone Dimensional Requirements, Section 102-791, for increasing height of a building to review in

addition to the four regular Special Exception criteria. Mr. Rogers suggested reviewing both sets of criteria. If a Special Exception is granted, therefore in accordance with Section 102-37, the regular Special Exception criteria, the Board must additionally review the five criteria in Section 102-791.

Chair Stout welcomed Michael Petrovick, of 51 Railroad Street, Keene, representing the applicant, Hillsborough Capital, LLC, owned by Steven Holland. Mr. Holland noted he also owns a 6,000 square foot location in Marlborough, which is in its third year of operation, as an indoor athletic facility for the community which is used for many schools and traveling sports groups of all ages. The goal of the proposed facility on Court Street is to compensate for the increased demand the Marlborough location can no longer accommodate. The space is intended to be open to all ages and abilities as a community resource Keene does not currently have.

Mr. Petrovick stated this application is for a Special Exception to increase the height of the building. The nature of the business is for sports activities, which requires more than the 35 foot standard height requirement; for activities such as batting practice, 45 feet-50 feet are necessary. The entire building, per the site plans in the meeting packet, would not be 50 feet. The building would be the permitted 35 feet facing the road and slope up to 50 feet moving away from the road.

Chair Stout asked Mr. Petrovick to briefly explain the other two applications for Variances he has before the Board. Mr. Petrovick replied the second application, ZBA 18-04, is a Variance for the side yard setback; the existing building foundation will be used for this project so they need a Variance to expand that foundation. The third application, ZBA 18-05, is for a reduction in parking.

Mr. Petrovick said the request for an addition 15 feet in height is to provide interior space for safe sports activities, not to increase building occupancy; it will not increase the burden of the infrastructure on the surrounding area. Mr. Petrovick reviewed the criteria for a Special Exception:

1. *The proposed use is similar to one or more of the uses already authorized in that district and is in an appropriate location for such a use* – Mr. Petrovick said the proposed use is an athletic facility which is an permitted use in the Commerce District and appropriate use for this site.
2. *Such approval would not reduce the value of any property within the district, nor otherwise be injurious, obnoxious or offensive to the neighborhood* – Mr. Petrovick said approval would not detract from the value of the neighborhood or district and the building was designed to prevent negative aesthetic impacts.
3. *There will be no nuisance or serious hazard to vehicles or pedestrians* – Mr. Petrovick said there will be no increase in overall burden of the site, it meets the objectives of the applicant, and creates no hazards.
4. *Adequate and appropriate facilities will be provided for the proper operation of the proposed use* – Mr. Petrovick said the site is connected to City water and sewer and there is adequate proposed parking on site. There will be no additional burdens or

impacts of the building and the height addition is only to accommodate activities, not additional occupancy.

Vice-Chair Gorman noted one of the additional five criteria for height increases includes a parking requirement. He asked if it would be more appropriate to hear ZBA 18-05 first so the Board understands the parking request for consideration in the Special Exception. He said the Board cannot adequately vote on the Special Exception because they do not know the parking requirement will be met. Chair Stout replied that the Board can make that decision and discuss when the public hearing is closed. This application can be left open while the subsequent two applications are discussed. Mr. Rogers suggested finishing review of the Special Exception and then move onto the other applications and review the parking questions under the Special Exception. Chair Stout said procedurally they can review the applications in order, table them, and return to vote after all are reviewed.

Mr. Welsh said that this project's use is listed in the application as an athletic training facility but noted that the approved uses in the Commerce Zone only include health and fitness centers; he asked if that distinction is important. Mr. Rogers replied the Zoning Administration classifies this use as a recreational activity as a business, which is a permitted use in the Commerce Zone, Section 102-571, Division XIII. He further explained that this is what staff believe the use should be defined as and are comfortable with what is proposed in the application under that definition.

Chair Stout opened the public hearing. With no public comment, Chair Stout noted this public hearing will remain open while the next two applications are discussed. When all hearings are closed the Board will vote on criteria for each application individually and in the appropriate order. Mr. Rogers noted the Board still needed to review the second set of criteria for Special Exceptions relating to this application. Chair Stout read the additional Special Exception criteria for height requirements per Section 102-791, Basic Zone Dimensional Requirements, footnote b:

1. *There is adequate carrying capacity on public roads serving the proposed project site to accommodate traffic associated with and anticipated for the proposed project. It shall be the responsibility of the applicant to demonstrate such capacity, the demonstration or proof of which shall include affirmative letters from the state department of transportation, if state roads are within 1,000 linear feet of the proposed project site, and the city engineer and police chief. Traffic studies may be required by the board in its discretion at the applicant's expense in addition to the foregoing; and*
2. *All parking requirements can be satisfied on site. A waiver of on-site parking requirements in accordance with division 7 of article V of this chapter pertaining to off-street parking regulations may not be granted. In the central business zone only, parking capacity requirements may be satisfied on site or off site in accordance with division 7 of article V of this chapter, provided that the applicant demonstrates to the satisfaction of the zoning board of adjustment that there is adequate capacity in the proposed off-site parking location, whether a private or public parking area, for the parking required of the use under this chapter. The mere presence of a nearby public parking lot shall not in and of*

- itself be a sufficient demonstration of adequate parking capacity in the off-site parking location to accommodate the required parking for the use.*
3. *The design of the proposed building is attractive and compatible with adjacent buildings and those in the vicinity, does not unreasonably obstruct vistas of hills that can be seen from any public ways on the valley floor, or the light and air available to adjacent buildings; and*
 4. *Adequate capacity and availability of emergency services exists.*
 5. *Adequate existing sewer and water are available to serve the proposed building.*

Mr. Rab suggested reviewing Article V, Division VII that the aforementioned criteria say cannot be waived. Chair Stout agreed and asked if a waiver and Variance is the same thing. Mr. Schneider referred the Board Section 102-978. He noted the Board has heard testimony in the past in cases where an applicant cannot comply with on-site parking requirements and they are allowed to have off-site parking up to 300 feet away, provided they have an agreement with the off-site parking property owner for excess parking. There would also be an agreement with the City Manager to use the off-site parking spaces. Mr. Rogers added applicants can meet off-site parking requirements in other ways. He referred to part of Section 102-978 which says, *“except in the Central Business Zone no application for a permit for the erection of a new structure, development of a land use, change in use, or expansion of a structure shall be approved unless off-site parking requirements as set forth...”* This then refers to another Section in the Code that determines how many parking spaces are required depending on the type of use. With this type of use, the parking requirements are based on the square footage of the building. Mr. Rab clarified this is a waiver of on-site parking by providing off-site parking, which does not prohibit a parking Variance. Mr. Rogers replied that is a determination the Board needs to make.

Chair Stout asked about ZBA 18-05 that if the Variance request is to meet the number of parking spaces for this proposal. Mr. Rogers replied the applicant is requesting a lesser number of parking spaces. Vice-Chair Gorman said this does not prohibit the Variance. The Board can hear the request for the Variance in ZBA 18-05 and approve or deny and then return to the Special Exception request and determine if that Special Exception is in compliance.

Mr. Petrovick reviewed the Special Exception criteria for height requirements per Section 102-791, footnote b:

1. *There is adequate carrying capacity on public roads serving the proposed project site to accommodate traffic associated with and anticipated for the proposed project. It shall be the responsibility of the applicant to demonstrate such capacity, the demonstration or proof of which shall include affirmative letters from the state department of transportation, if state roads are within 1,000 linear feet of the proposed project site, and the city engineer and police chief. Traffic studies may be required by the board in its discretion at the applicant's expense in addition to the foregoing –* Mr. Petrovick said this area of Court Street is already handling traffic from this site; there have been other traffic studies in the area and the applicant does not think this exception will negatively or further impact the capacity of traffic on Court Street.

Mr. Welsh noted the Code states if the project is within 1,000 linear feet of a state road then a letter from the New Hampshire Department of Transportation shall be included. He asked the distance from the roundabout and Route 12 on this site. Mr. Schneider said approximately ¼ mile. Mr. Rab replied the Board needs further information in the application before moving forward, specifically, if a letter from the state is a requirement in the Ordinance and if, at a minimum the Board needs to know the exact distance from these state roadways. Chair Stout said he is not a proponent of traffic studies here. Mr. Rab replied the Board needs affirmative information from the state and can then discuss the need for a traffic study moving forward; he suggested tabling this application until the applicants can provide further information. Mr. Schneider suggested continuing the whole discussion and having the applicant return in March with the necessary information. Chair Stout noted if these applications are tabled until March discussions from this meeting can still be referenced. The applicants and Board agreed.

2. *All parking requirements can be satisfied on site. A waiver of on-site parking requirements in accordance with division 7 of article V of this chapter pertaining to off-street parking regulations may not be granted. In the central business zone only, parking capacity requirements may be satisfied on site or off site in accordance with division 7 of article V of this chapter, provided that the applicant demonstrates to the satisfaction of the zoning board of adjustment that there is adequate capacity in the proposed off-site parking location, whether a private or public parking area, for the parking required of the use under this chapter. The mere presence of a nearby public parking lot shall not in and of itself be a sufficient demonstration of adequate parking capacity in the off-site parking location to accommodate the required parking for the use –* Mr. Petrovick said there is a separate Variance request for parking but he interprets this criteria as requiring additional parking for additional occupancy with a height increase. This project is not adding additional capacity, only additional height to accommodate baseballs, etc. in the space. The site plan engineer is working with the Planning Department to determine if parking requirements will be met. They want to move forward with the Variance for parking in case the Planning Board does not approve the proposed parking. This project will go before the Planning Board in March. The applicant believes parking needs will be met on-site.
3. *The design of the proposed building is attractive and compatible with adjacent buildings and those in the vicinity, does not unreasonably obstruct vistas of hills that can be seen from any public ways on the valley floor, or the light and air available to adjacent buildings –* Mr. Petrovick said the building was designed specifically to negate visual obstructions; the highest 50 feet point of the roof will be furthest from the road, aesthetically attractive, and compatible with the area.

4. *Adequate capacity and availability of emergency services exists* – Mr. Petrovick said the site plan was engineered to be approved by the Planning Board so that emergency service access is possible.
5. *Adequate existing sewer and water are available to serve the proposed building* – Mr. Petrovick said the site is connected to City water and sewer.

Vice-Chair Gorman asked if the applicant can provide an estimate of how many athletes may be using the facility at a given time. Mr. Holland said in the three year history at the Marlborough site and with the availability of sports activity space, there can only be so many athletes using the facility at one time, even with turnover between activities. He does not see a need for more than 50 parking spaces. In cases of high demand at the Marlborough site, they have worked with schools to arrange shuttling students to the site.

Mr. Welsh asked the applicants to bring site plans reviewed by the Planning Board to the March meeting so the Board can ensure they have done their due diligence. Mr. Petrovick agreed to bring a larger version of the plan with more detail.

Mr. Welsh asked if the Board can grant a Variance for 50 versus 57 parking spaces without making provisions for those original seven spaces; or does the applicant have to find an adjacent seven spaces. Mr. Rogers replied the Board needs to decide if they want to grant that waiver in Division VII, in which case that waiver will be sent to the City Manager and the Zoning Administrator who can approve it. If the Variance for 50 spaces is not granted by the Board, the applicants cannot then go to the City Manager or Zoning Administrator and ask for seven off-site parking spots. It is up to the Board to determine if they want to grant a Variance for 50 parking spaces where 57 are required, in which case the applicant would only be required to have those 50 spaces total.

Chair Stout tabled this public hearing to hear the remaining applications.

ZBA 18-04:/ Petitioner, Michael Petrovick of Catlin & Petrovick Architects, PC of 51 Railroad Street, Keene, requests a Variance for property located at 809 Court Street, Keene, Tax Map Parcel # 188-01-001, which is in the Commerce District and owned by Hillsborough Capital, LLC of 63 Emerald Street, Suite 167, Keene. The Petitioner requests a Variance to permit a side setback from the required 20 feet to 5.5 feet per Section 102-791, Basic Zone Dimensional Requirements, of the Zoning Ordinance.

Mr. Rogers said the existing building at this site was before the Board in the past and the Board granted a Variance for a lot line adjustment between this building and the adjacent building; the building also received a Variance for a setback at that time because the existing building is within the setback. Chair Stout asked why that Variance does not carry through to the new building owners. Mr. Rogers replied the existing building is being demolished and the applicants intend to use the existing foundation. It is at the discretion of the Board if that Variance stays with the building or with the foundation if there are no changes to that foundation. He added it depends not just on the foundation but the overhang of the building; this information was not clear in the application, which is why it was appropriate to come to the Board.

Mr. Petrovick said the applicant is proposing to use the existing foundation but expand the building, specifically; the side of the building parallel to the property line will be extended toward Court Street. They will not further reduce the setback and they thought they needed to request a Variance to expand that foundation. They do not intend to extend any eaves or overhangs further into the setback than they were on the original building. Mr. Petrovick reviewed the criteria for a Variance:

1. *Granting the Variance would not be contrary to the public interest* – Mr. Petrovick said the existing foundation footprint will be used and expanded and this will not change the existing conditions of the previous Variance.
2. *If the Variance were granted, the Spirit of the Ordinance would be observed* – Mr. Petrovick said the building is located five feet from the current property line and the new building will be 11 feet ¼ inches at its furthest point, which will actually improve the condition toward Court Street.
3. *Granting the Variance would do substantial justice* – Mr. Petrovick said the structure will not decrease current side yard setbacks but improves the current situation, which allows the applicant to expand their business.
4. *If the Variance were granted, the values of the surrounding properties would not be diminished* – Mr. Petrovick said the proposed side yard setbacks are not reduced and do not create a worse situation than currently exists.
5. *Unnecessary Hardship – owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:*
 - a. *No fair and substantial relationship exists between the general public purpose of the Ordinance provision and the specific application of that provision to the property* – Mr. Petrovick said the existing building was constructed in its current location and the applicant would like to expand the building while not reducing the side yard setback any further. They propose to use the existing foundation.
 - b. *The proposed use is a reasonable one* – Mr. Petrovick said the proposed building is in the same location as the existing building so it is reasonable to continue using what is there.

Mr. Petrovick said that part of the issue with this property is an old Court Street easement, which put restrictions on the property making it more difficult to use the property. Still, the applicant is requesting to use the existing footprint of the building.

Mr. Schneider recalled the reason for this Variance is because there are certain sections of the Code that say if a commercial building is voluntarily removed, then everything on the new building should comply with the Ordinance. Another section says if the building is demolished due to fire, etc. then the owner can build on the same footprint. However, the applicant is voluntarily removing the structure, which means in theory they should comply with the Ordinance if the original building is gone. Mr. Petrovick noted the building is not

gone but the foundation will remain. Mr. Schneider said that is why the Board needs to make this decision.

Mr. Rab asked if the existing overhangs or eaves will be expanded. Mr. Petrovick replied no, they will be smaller than those on the original building. Mr. Schneider said the previous Variance should have been measured from the end of any overhangs.

Vice-Chair Gorman said he believes that when purchasing a property you should own the footprint of that property until the owners decide to move the footprint, including the Variance. Chair Stout noted the applicant is increasing the footprint perpendicularly. Vice-Chair Gorman agreed but stated he does not think it will create more encroachment in the expansion to make it more nonconforming. Mr. Schneider noted there is a Section in the Code, Section 102-209, that talks about expanding onto a building that is presently nonconforming; property owners are allowed to add up to 50% of the square footage that violates the setback Ordinance provided you do not come any closer to the property line.

Chair Stout asked if granting a new Variance negates the previous Variance. Mr. Schneider replied yes. Chair Stout said this is challenging because this Board could accept that and a different Board in later years could create conflicting Variances. Mr. Rab asked if there was an Administrative Decision that a Variance is needed in this case. Mr. Rogers said there is no written Administrative Decision because the application was unclear and needs full Board review. The Board needs to decide if a new Variance is needed or if the new building needs to meet the standards of an enlargement of nonconforming structures. Mr. Schneider referred back to Section 102-209, which says that the owner can add 50% square footage onto an existing building, but that does not include tearing down the building and then adding 50%. It is unclear if the foundation is left in place if the building is considered entirely demolished. Mr. Rogers said a new Variance would be very similar to the previous one because the five foot inch setback request is the same. He does not think Section 102-209 applies because most of the original structure will be removed. He recommends that a new Variance, if granted, should be applied and there will be no need to rescind the previous Variance. If the applicant were asking for a significant change to the setback, the previous Variance would need to be rescinded. Mr. Rab said the new Variance can supersede the old Variance.

Mr. Welsh said part of his confidence with the waiver is the existing footprint argument and the logic of sustaining the prior Variance. He said if the previous Variance was superseded there needs to be good justification for a setback violation. He referenced the application narrative in Part B, easement for utilities that restrict configuration of site development. He asked if that is an argument that the facility cannot be placed anywhere else because it would require a new foundation. He also asked to see evidence of the utility restrictions at the March meeting. Mr. Petrovick said there are deed restrictions for old Court Street that the property owners have to observe such as the building needs to abut the property line to meet any parking requirements or the building would have to be substantially smaller. He said realistically, the site is restricted. Mr. Welsh asked him to expand on those restrictions at the March meeting.

Mr. Schneider cited Section 102-4, which says if a building is torn down except as provided in this chapter, no structure or land should be used or occupied, and no building or other structure should be erected, reconstructed, or altered except in conformity with regulations in

this Chapter. Chair Stout said it is clear to him any new Variance would supersede the previous Variance.

With no public comment, Chair Stout tabled this public hearing.

ZBA 18-05:/ Petitioner, Michael Petrovick of Catlin & Petrovick Architects, PC of 51 Railroad Street, Keene, requests a Variance for property located at 809 Court Street, Keene, Tax Map Parcel # 188-01-001, which is in the Commerce District and owned by Hillsborough Capital, LLC of 63 Emerald Street, Suite 167, Keene. The Petitioner requests a Variance to permit the reduced number of parking spaces from the required 57 spaces to 50 parking spaces per Section 102-793 of the Zoning Ordinance.

Mr. Petrovick said this Variance request is because they are increasing the size of the building and parking is obviously restricted on-site. The pending site plan shows that parking demand can be met but consultants are unsure all parking will be approved by the Planning Board. For this reason, the applicant felt they should apply for a Variance in case they cannot meet the 57 space parking requirement. Despite increasing the size of the building 1,500 square feet, there will not be as many occupants as that square footage typically would accommodate.

Upon wanting to read through the criteria, Chair Stout asked Mr. Petrovick if he would be comfortable that this had been accomplished at the next meeting. Mr. Petrovick replied that yes, he would. Chair Stout further stated that the Board members would have had an opportunity to review the minutes prior to the March meeting. Mr. Petrovick reviewed the criteria for the Variance:

1. *Granting the Variance would not be contrary to the public interest* – Mr. Petrovick said this project intends to reduce the overall footprint while providing ample space for occupancy and the business will not produce more occupants therefore will not cause a parking burden.
2. *If the Variance were granted, the Spirit of the Ordinance would be observed* – Mr. Petrovick said the project will provide significant and adequate parking space for customers.
3. *Granting the Variance would do substantial justice* – Mr. Petrovick said the number of occupants that can access the building at one time will not exceed the proposed 50 parking spaces.
4. *If the Variance were granted, the values of the surrounding properties would not be diminished* – Mr. Petrovick said the reduced parking spaces will not be a nuisance for neighbors or a safety concern to customers.
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 unnecessary hardship because:*
 - i. *No fair and substantial relationship exists between the general public purpose of the Ordinance provision and the specific application of*

that provision to the property – Mr. Petrovick said the property includes the right of way for the old Court Street and access to neighboring properties which reduces available parking and traffic flow on-site.

- ii. *The proposed use is a reasonable one* – Mr. Petrovick said the reduction will not create a burden, parking loss, or safety concern to customers. The property contains an easement and therefore, to fit the building on the site, it must closely abut the property line to ensure space for parking.

- 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 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 thereby is necessary to enable a reasonable use of it.* – Mr. Petrovick stated the property contains an easement which restricts the configuration of site development. The requested location uses the existing building footprint.

Chair Stout asked if it was a City easement. Mr. Petrovick replied that he was unsure, it is related to old Court Street, but City water and sewer lines run through the property. Chair Stout asked if there could be more information provided on this. Mr. Petrovick replied that the engineered site plan will be submitted in the March meeting with more details.

With no public comment, Chair Stout tabled this public hearing to review all three applications. He said these applications are complicated and the Board wants to be as cooperative as possible so the applicant can return to the Board with answers to the various questions the Board has posed. Mr. Rab said if the Board approves the Variance on setbacks there should be a condition that eaves will not expand on the north side of the building. Mr. Rogers noted that when building permits are issued for a structure very close to a setback, like this one, Mr. Schneider will require that it is documented and a licensed surveyor will have to verify that the constructed building complies with those measurements.

Mr. Welsh summarized the list of questions the Board would like the applicant to address at the March meeting:

- i. The precise extent of the overhangs
- ii. A letter from the state about the property within 1,000 feet of a state roadway
- iii. A rendering presented to the Planning Board to show that the aesthetics will not be interrupted in the Special Exception
- iv. Site plan to explain the easement and site restrictions
- v. The footprint of the existing building compared to the new footprint

Vice-Chair Gorman said the Board knows a lot about the current use and traffic on Court Street and does not think this project will adversely affect traffic enough to demand a traffic study. Chair Stout suggested the applicants provide a relative estimate of expected traffic to and from the building throughout a typical day. Vice-Chair Gorman said if they decrease parking the traffic level should also decrease. Mr. Welsh said he thinks Mr. Holland provided a good description of use and suggested adding that briefly to the application narrative.

Mr. Rogers said this project is before the Planning Board and a pre-submission meeting with that Board will likely answer some questions about Public Works and Fire Department access that can be share at the next meeting. Chair Stout noted he is a member of the Planning Board and will recuse himself from Planning Board review of this project. He added there is a possibility the Planning Board will not have made their final decision before the Board meets again so the applicants and the Zoning Board of Adjustment will have to be prepared to move forward. Mr. Rab noted an important distinction is the applicant is not asking for a use Variance for a use not allowed in this zone.

Mr. Schneider said for the most part, the Planning Board will not address issues unless they comply with the Zoning Board. Chair Stout mention the reason for tabling these petitions is for addition information which the Board is requesting, specifically the letter from the state.

Chair Stout reopened the public hearing on the Special Exception when noticing the Petitioner is requesting to state more. Mr. Holland noted, regarding traffic, this location was chosen because of its proximity to Keene High School and Middle School, where most of their clients are based. Most activity will be right after school hours so they do not expect an increase in traffic because it will be the same traffic already coming to and from the schools.

Chair Stout closed the public hearings for ZBA 18-03, 04, & 05 until the next meeting.

Mr. Rab made a motion to continue applications ZBA 18-03, ZBA 18-04, and ZBA 18-05 until the Zoning Board of Adjustment meeting on March 5, 2018 at 6:30 PM. The motion was seconded by Vice-Chair Gorman and carried unanimously.

ZBA 18-06:/ Petitioner, Thomas J. Wood, Sr., of 54 Beech Street, Keene, requests a Variance for property located at 54 Beech Street, Keene, Tax Map Parcel # 018-04-007, which is in the Medium District and owned by the Petitioner. The Petitioner requests a Variance to permit a front porch 11 feet from the property line where 15 feet is required per Section 102-791, Basic Zone Dimensional Requirements of the Zoning Ordinance.

Mr. Schneider showed the property location on a map and noted there was a fire there on May 21, 2017. After the fire, the existing structure was torn down and a modular home has since been constructed through a building permit with the project nearing completion. The new building is on the same footprint of the previous building and there were setback issues with the previous structure. He said this is different than the previous application the Board heard because this building was destroyed by fire the owners can build on the same footprint despite the setback issues. The applicant is seeking a Variance to add a front porch to the structure. He noted in the Zoning Code, there are exclusions listed for structures that can violate setbacks. One such are stairs or ramps accessing the building are exempt to setback requirements as well as landing structures provided they do not exceed 25 square feet. The proposed porch landing structure will be larger than 25 feet, which is why the applicant is seeking a Variance.

Chair Stout asked if it is important to consider if there was a porch on the previous structure. Mr. Schneider said there was a two-story front porch on the previous structure with stairs that went up to a second floor apartment. Mr. Rogers said the stairs of the previous porch were behind the setback and closer to the home. The existing building was rebuilt on the same

footprint despite setback issues. Mr. Rab asked how much larger this proposal is than what is permitted. Mr. Rogers said the applicant will address that. Mr. Rab asked if the purpose of this entrance way was to meet American Disability Act (ADA) requirement, would that be permitted. Mr. Rogers stated the ramp or stairs would be allowed with no size restrictions but it would be the access landing size would have the 25 foot requirements. Mr. Rab asked the ADA requires a landing size. Mr. Schneider said no ADA requirement is necessary here. Mr. Rab asked if it was being built specifically to meet the ADA requirements for residents, would the ADA be applied. Mr. Rogers added that it would be the ANSI code, with is very similar to the ADA compliance would need to be met by the 25 foot landing requirement.

Chair Stout welcomed Thomas Wood, of 54 Beech Street, Keene. Mr. Wood said the rebuilt modular home is entirely parallel to the road; the previous structure was an old farmhouse that had a double porch further from the road because of its orientation. When he measured the new porch dimensions it would end at 11 feet 4 inches from the right of way and 16 feet from the road. He noted if you look at the street, almost all homes have porches that extend into the 15 foot setback. Vice-Chair Gorman agreed. Mr. Rogers noted there was a picture in the meeting packet illustrating the comparable porches in the area. Chair Stout asked if most of these neighborhood were built prior to the setback regulations were enacted. Mr. Schneider answered yes. Chair Stout then stated that this situation was a preexisting situation. Mr. Rogers said for most of the neighborhood this is the situation, not just for this specific house though it did have lot size dimension and front setback issues since it is a two family home. Chair Stout wanted to clarify that the Board is considering this Variance since the house was built prior to consideration to the setbacks. Mr. Rogers stated the original building permit did not show the front porch and there is a modification submitted for the porch.

Mr. Wood said the original house was the same way it was when he bought it in 2001 and the same way the previous owner had it for 16 years. He noted a granite post in the pictures off the new house that is approximately 1 foot to a foot and a half from where the new porch would end. Chair Stout thanked Mr. Wood for his attention to detail in the application. Mr. Wood reviewed the criteria for a Variance:

1. *Granting the Variance would not be contrary to the public interest* – Mr. Wood said he is asking for an 8 foot front porch and he does not think a 3 foot Variance should be a public interest concern. He said his porch will be further from the road than his neighbors by a foot. He added that porches bring neighbors and the community together.
2. *If the Variance were granted, the Spirit of the Ordinance would be observed* – Mr. Wood said he assumes the concern of a home too close to the road and property line is for public safety. This porch will be 11 feet from the property line and over 15 feet from the road. This is 1 foot farther from the road than his closest neighbor's porch.
3. *Granting the Variance would do substantial justice* – Mr. Wood said this porch would do substantial justice because he spent 16 years with the previous porch before a fire destroyed it. This will bring back a sense of normalcy and community, which is why he originally chose to buy there and subsequently decided to rebuild there.
4. *If the Variance were granted, the values of the surrounding properties would not be diminished* – Mr. Wood said a new house with a new porch will enhance property

values and increase neighborhood standards. He said an aesthetic modular home is not easy to find and he tried to match the new home as closely to the neighborhood as possible.

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 unnecessary hardship because:*

- i. *No fair and substantial relationship exists between the general public purpose of the Ordinance provision and the specific application of that provision to the property* – Mr. Wood said he, his family, and his neighbors were affected by the fire. Anyone driving by will not know this porch required a Variance because it is so consistent with the rest of the homes in the neighborhood. He added that he is a 100% disabled veteran and his son is also a disabled veteran; they both have mobility issues and would like sufficient accessible space if special accommodations are needed for their mobility in the future, as they plan for this to be their forever home.
- ii. *The proposed use is a reasonable one* – Mr. Wood echoed his disability and the need for future accessibility.

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 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 thereby is necessary to enable a reasonable use of it.* - Mr. Wood reiterated the mobility issues for both his son, who lives in the other duplex, and himself.

Mr. Rab questioned the exact distance the porch will extend into the setback. Mr. Wood clarified the porch will be 11 feet 4 inches from the right of way where 15 feet is required, approximately 3 feet. Mr. Rogers stated the original petition does say 11 feet, but the request is 11 feet 4 inches in giving a bit of leeway in construction.

Chair Stout opened the public hearing and recognized Joy Macleod, of 46 Beech Street, Keene. Ms. Macleod noted she is a direct neighbor and her home was also damaged in the fire. She stated her support for this Variance because it will be an aesthetic improvement and build the sense of community.

Chair Stout recognized Wayne Draper, of 57 Beech Street, Keene. Mr. Draper supported the idea of the porch but asked how parking will be structured with the new orientation of the building.

Mr. Wood said the building process allowed for a 24 foot x 24 foot garage behind the house and an enhanced driveway on the side of the house. There is room for five cars on the left of the building and five or six cars behind the building. There is no intention for excessive parking in front of the house. There will be a small parking spot in front of the house for visitors, but is not intended for consistent or public use. But for the most part it will be grass.

Mr. Rogers noted the Ordinance speaks to where parking has to be; for a new building the parking has to be in front of the building or not within setbacks; with this Variance the parking would have to be behind the porch. Mr. Wood agreed there will not be parking in the front yard. Mr. Schneider stated that a licensed surveyor will have to provide a stamped letter indicating the built porch complies with the Variance approval. He further stated that this is a process that was enacted to ensure that Variances granted do comply. Mr. Wood noted a stamped letter from a licensed surveyor is in the meeting packet which was based on the tubes already placed in the ground for the porch. Mr. Rogers agreed then all Mr. Wood needs to do is have that surveyor measure again after the porch is completed to show it complies. Mr. Wood added the proposed overhang does not extend further than the 11 foot 4 inches into the right of way.

Chair Stout closed the public hearing. Mr. Rab noted use Variances should be stricter than dimensional Variances. He added the Board should consider the size limitations of this property. Chair Stout noted he will share a handout from the City Attorney with the Board that shows data on the past use and dimensional Variances granted by this Board.

Granting the Variance would not be contrary to the public interest - Vice-Chair Gorman said the street is lined with porches so he does not think granting the Variance would be contrary to the public interest.

If the Variance were granted, the spirit of the Ordinance would be observed – Mr. Rab continued, stating this Variance is in the Spirit of the Ordinance because it matches the aesthetics of the neighborhood.

Granting this Variance would do substantial justice – Chair Stout stated because of the severe dimensional restrictions of this property. Mr. Rab added the neighborhood calls for a porch for consistency.

If the Variance were granted, the values of the surrounding properties would not be diminished - Mr. Rab added that leaving the home the way it is without a porch would diminish property values.

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 unnecessary hardship because:

ix. No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property –

x. The proposed use is a reasonable one - The Board agreed the proposed use is a reasonable one.

Mr. Welsh made a motion to approve all criteria listed, which was seconded by Vice-Chair Gorman. The Board reviewed the findings of fact:

Granting the Variance would not be contrary to the public interest: Granted 5-0.

If the Variance were granted, the spirit of the Ordinance would be observed: Granted 5-0.

Granting the Variance would do substantial justice: Granted 5-0.

If the Variance were granted, the values of the surrounding properties would not be diminished: Granted 5-0.

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 unnecessary hardship because:

ix. No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property: Granted 5-0.

x. The proposed use is a reasonable one: Granted 5-0.

Mr. Rab made a motion to approve application ZBA 18-06, which was seconded by Vice-Chair Gorman and carried unanimously.

IV. **New Business:**

Chair Stout asked when the Board will review its Rules of Procedure. Mr. Rogers said ideally at the March meeting, particularly to address withdrawing applications.

Chair Stout asked about new code changes in the Zoning Ordinance books. Mr. Rogers replied it is apparent the current books are outdated and do not reflect the new zoning on Marlboro Street. Staff is reviewing the book to make sure it is printed in the best way possible as it requires clarification and editing for the best possible print quality which includes newer zoning changes. He hopes the new books will be available by the March meeting, but there will still be changes after that with the current work on a unified development code which is a projected 18 month process. On February 20 there will be a presentation on the rewrite progress, though he is not sure if that presentation will be to full Council.

V. **Adjournment**

Mr. Welsh made a motion to adjourn the meeting, which was seconded by Mr. Rab and carried unanimously. Hearing no further business, Chair Stout adjourned the meeting at 9:11 PM.

Respectfully submitted by,
Katie Kibler, Minute Taker