

**City of Keene**  
**New Hampshire**

**ZONING BOARD OF ADJUSTMENT**  
**MEETING MINUTES**

**Monday, January 4, 2021**

**6:30 PM**

**Remote Meeting via Zoom**

**Members Present:**

Joshua Gorman, Chair  
Joseph Hoppock, Vice Chair  
Jane Taylor  
Michael Welsh  
Arthur Gaudio  
Louise Zerba, Alternate

**Staff Present:**

John Rogers, Zoning Administrator  
Corinne Marcou, Zoning Clerk

**Members Not Present:**

Chair Gorman read a prepared statement explaining how the Emergency Order #12, pursuant to Executive Order #2020-04 issued by the Governor of New Hampshire, waives certain provisions of RSA 91-A (which regulates the operation of public body meetings) during the declared COVID-19 State of Emergency.

**I. Introduction to Board Members**

Chair Gorman called the meeting to order at 6:35 PM. Roll call was conducted.

**II. Minutes of the Previous Meeting – December 7 and December 15, 2021**

Mr. Welsh made a motion to approve the meeting minutes of December 7, 2020. Mr. Hoppock seconded the motion, which passed by unanimous vote.

Mr. Welsh made a motion to approve the meeting minutes of December 15, 2020. Mr. Hoppock seconded the motion.

Ms. Taylor noted corrections needed:

Line 589 – “Chair Gorman asked staff to give provide relevant comments” should be “Chair Gorman asked staff to provide relevant comments.”

Line 677 – “There will be a decrease in tract” should be “There will be a decrease in traffic.”

Mr. Welsh stated that his motion is to approve the minutes with the corrections. Mr. Hoppock agreed. The motion passed by unanimous vote.

**III. Unfinished Business**

**A. Chair and Vice Chair voting for 2021**

Mr. Hoppock nominated Mr. Gorman for Chair. Mr. Welsh seconded the motion, which passed by unanimous vote.

Mr. Welsh nominated Mr. Hoppock for Vice Chair. Mr. Gaudio seconded the motion, which passed by unanimous vote.

Chair Gorman asked if staff had any other unfinished business. Mr. Rogers replied no.

**IV. Hearings:**

- A) ZBA 21-01:/ Petitioner, Frank Patel of 6 Woolsack Dr., Westford, MA, represented by Adam Kossayda, of Bragdon, Baron & Kossayda of 82 Court St., Keene, requests a Variance for property located at 443 Winchester St., Tax Map #115-028-000; that is in the Industrial District. The Petitioner requests a Variance to permit an employee lounge at the existing business at 443 Winchester St., for employees may stay in the lounge overnight, as needed, during inclement weather per Section 102-632 of the Zoning Ordinance.**

Chair Gorman asked staff to provide information about this application.

Zoning Administrator, John Rogers stated that this property is on Winchester St; as you head south out of town this property is on the right. He continued that for many years this was a rug wholesale retail establishment. In 2014, the owners received two Variances – one was for the convenience store and the other was for the number of parking spaces provided on site. This property is in the Industrial Zone. Across the street is the Commerce Limited Zone, where the car dealerships are. Just to the northwest of this property is the High Density Zone with quite a few single-family homes that are set back off the road, with a Commerce Zone that runs right along the road frontage of Winchester St.

Mr. Rogers continued that the Variance given for parking was not very clear regarding the actual numbers of spaces that were needed to be provided. He stated he researched the minutes and it appears that they were making the case that, based off of the information they had, only 12 spaces would be needed but they would be providing 14. He believes that is what is currently there.

Chair Gorman asked if Board members had questions.

Mr. Hoppock asked if the retail Variance in 2014 was to allow a retail use in an Industrial Zone. Mr. Rogers replied yes, it was to allow the convenience store retail in an Industrial Zone where that would not be an allowed use.

Mr. Hoppock asked if Mr. Rogers stated that there are currently 14 parking spaces. Mr. Rogers replied that based on what the applicant submitted for a site plan and from reading the meeting minutes for that Variance in 2014, yes, there should currently be 14 parking spaces.

Chair Gorman asked if the Board had further questions for Mr. Rogers. Hearing none, he opened the public hearing and explained how members of the public could participate. He asked to hear from Adam Kossayda, representing Frank Patel.

Shaun Filiault stated that he is will be filling in for Attorney Adam Kossayda and speaking on behalf of Frank Patel, a small business owner of the Discount Mart at 443 Winchester St. This application has to do with a minor change to the use of one area of this building. Mr. Patel seeks to use the back portion of this building, 43 x 20 square feet, as an employee lounge. In particular, the lounge will be used intermittently during inclement weather so employees can stay overnight so they do not have to drive home when it is unsafe to do so. Many of this business's employees are traveling from a half hour or more away and with New England snow it can become unsafe to drive home. This would allow them the opportunity to, on rare occasions, stay in this otherwise unused space which will be an employee lounge that would not change the overall commercial character of the business. It will remain a convenience store and the public will not be allowed into this lounge. This will not become a permanent residence and people will not be allowed to stay here on a permanent basis; only on the rare occasion when there is that New England storm that makes it unsafe to drive home will an employee be allowed to stay in this lounge.

Mr. Filiault continued that looking at the elements of the Variance, this is not contrary to the public interest because it actually furthers the public interest by taking unsafe drivers off the road in inclement weather. This is assisting the employees, by not forcing them to drive home for a half hour or more commute, and assisting Keene drivers by getting drivers off the road during inclement weather. Additionally, Mr. Patel has noted that on occasion some employees will be working 10-12 hour shifts and on those very rare occasions those employees as well will be invited to use this lounge and that will keep sleepy drivers off the road.

Mr. Filiault continued that this application is in the spirit of the ordinance because it does not change the overall industrial nature of the area. The purpose of the Industrial Zone is to ensure that there isn't a High Density, permanent residences in the industrial area, and indeed, this will not be a high density, permanent residence. This will be simply an occasionally occupied employee lounge limited to the employees of this business. Thus, it will retain the industrial character and the commercial character of this district. It will still be a business and no one will be living here.

Mr. Filiault continued that this application would be doing substantial justice to this business because it will allow the business to conduct its long hours (it is open 16 hours a day) and continue its trade during inclement weather by allowing the employees to stay there when it would otherwise be unsafe to drive home. It will also allow the best and fullest use of the entire building as currently this 43' x 20' back room is otherwise unused. This will allow the space to be used for the best benefit of the employees on the rare occasional use during inclement weather or after an extremely long shift.

Mr. Filiault continued that additionally, this will actually improve the values of the surrounding properties because it will mean that this back room will be furnished and improved. It will require the implementation of utilities and furnishing to make sure it is safe for that rare occasion when an employee needs to stay there, and it will not affect the surrounding businesses because the employee would have already been on site. There will be no additional traffic flowing to the building because the employee will have already been there. In fact it decreases traffic by ensuring that employees are not driving home tired or during inclement weather.

Finally, it avoids an unnecessary hardship to the business by allowing the business to maximally use this building, and particularly this small portion of the back area, to its fullest potential. This is a unique plot as it is nestled at the edge of the Industrial District, right beside the Commercial District and a Residential District. This use would otherwise be allowed across the street or a few yards in the either direction.

Mr. Filiault continued that additionally, this is a small lot that does not lend itself to industrial uses because of its size. Allowing this back room to be used for an employee lounge will maximize the potential and disallowing it will provide a substantial disadvantage to these employees who are traveling from a half hour away. This proposed use is reasonable, because it will be limited to those rare times when a New England storm makes it unsafe to drive home or the very rare occasion when an employee has worked an extra-long shift.

Mr. Filiault continue that finally, it will avoid an unnecessary hardship to the business owner who is himself engaged in those long commutes, coming from Massachusetts to work at his store in this local community, to make sure that he does not have to drive during inclement weather.

He continued that this is not going to become a residence. This is not changing the character of the building or the character of the district. Rather, it is allowing a small portion of the building to occasionally be used by employees to maximize to the fullest potential the commercial potential of the building by giving the employees the opportunity to be safe during inclement weather.

Mr. Hoppock stated that the application states the store is open 15 hours a day, but Mr. Filiault just said it was 16; he asked for clarification. Mr. Filiault replied that he misspoke, and it is 15. Mr. Hoppock asked what the hours are for each day, specifically, if they are different. Mr. Filiault replied that he is not sure, and will leave that question to Mr. Patel. Mr. Hoppock asked how many employees there are. Mr. Filiault said he will also leave that question to Mr. Patel.

Frank Patel of 6 Woolsack Dr., Westford, MA, stated that the store is usually open from 6 AM to 9 PM, depending on the weather. He continued that there are three to four employees.

Ms. Taylor stated that the application uses the words “lounge” and “apartment” interchangeably. Apartment has a very specific definition in the Zoning Ordinance, and is significantly different from a lounge, which is not defined. She continued that she is curious about which it is, because it needs to be one or the other but not both. An apartment is defined as *“A room or a group of rooms forming a habitable unit for one family, within a structure containing at least one other unit, with facilities used or intended to be used for living, sleeping, and including facilities for*

*cooking and eating.*” She assumes that could include a studio apartment. She asked for clarification from Mr. Filiault.

Mr. Filiault replied that this lounge will not meet the definition of apartment, nor is it intended to. As noted, this is only intended to provide intermittent, occasional accommodation for an employee after a shift and it is not intended to meet the definition in the code, nor is the intent to make a permanent residence or have any possibility of that. He continued that the word “apartment” was used colloquially and they apologize for that use; the correct word is “lounge.”

Ms. Taylor stated that this might be a question for Mr. Rogers, but if it is merely an employee lounge, is the Variance required. She continued that her understanding is that there are a number of businesses, both industrial and commercial in the City of Keene that have employee lounges. She is confused about what the issue is.

Mr. Rogers stated that what brought this issue before the Board, was that the application showed this lounge/apartment, having a kitchen and a full bathroom and that they were asking for people to spend the night in this area, which rose it above what would be a traditional employee lounge. He continued that Ms. Taylor is correct this that is an accessory use for many businesses. But the fact that they were creating more of a unit - which he does not necessarily want to call a “dwelling unit,” because the applicant stated that it is not intended to be permanently occupied and only used on a temporary basis - caused staff to feel that it was above the level of what would normally be considered an employee lounge, since it includes a kitchen, a full bath and a living area.

Mr. Filiault stated that he initially asked the same question as well and emailed Mr. Rogers to see if this would be a lounge that would be similar to the employee lounges that other businesses are allowed to have and therefore not need a Variance but just need a permit. They were advised that Mr. Patel was required to go forth with the Variance because of the plan that was submitted. But Ms. Taylor is correct, that this is similar to other employee lounges that other businesses are allowed to have without going through this Variance process.

Ms. Taylor stated that in one part of the application, Mr. Patel says “The apartment will only affect the second floor of one building,” but from what she can tell from the maps and drawings in the application, it looks like this lounge/apartment is anticipated to be on the ground floor of what she sees as an L to the building, or the rear portion. She asked Mr. Filiault to clarify.

Mr. Filiault replied that she is completely correct and that is a misstatement that should be struck. It is a one floor building and will remain a one floor building. This is in the back L portion, as seen on the plan, which will be in the rear of the lot. There is no intention for a second floor.

Mr. Gaudio stated that his first question deals with the issue of hardship. He continued that the hardship has to be due to special conditions of the property. In the presentation, he heard Mr. Filiault speak a number of times about the hardship to the employees and hardship to the owner, although in that sense it might be about the owner as an employee also. But he did not hear anything about a hardship endured by the property. He asked Mr. Filiault to address that.

Mr. Filiault stated that as noted during the presentation and application, this is a unique property because it is nestled so closely to a commercial and to residential lots. He continued that additionally, this is a very small industrial lot that really would not be suited to industrial purposes. This is best used as a commercial lot because of its very small size. As Ms. Taylor noted, many commercial uses include an employee lounge of this sort. To disallow an employee lounge would be to stymie its commercial uses and since this lot is otherwise stymied by its extremely tiny size it limits the commercial potential for this particular lot.

Mr. Gaudio asked if he is saying that it is the smallness and placement of the lot that is unique to the property. Mr. Filiault replied that is well summarized.

Mr. Gaudio stated that his second question is about other lounges. There are a number of other commercial and retail businesses on the street that he assumes all have employee lounges and if there is bad weather and an employee wants to stay over - he thinks the car dealership service customers until 9 PM – will the Board be in the position of having to issue Variances for each one of them.

Mr. Filiault replied that he cannot speak to the decisions of other businesses but Mr. Patel wanted to allow employees to stay overnight in his business. Again, they emailed Mr. Rogers about whether a Variance was needed for this or if it would be a permit that was needed; they were advised that the Variance was required which is what brought them to the Board. He continued that he agrees that a simple permit probably would have done, but due to the advice they were given they are requesting a Variance.

Mr. Hoppock stated that he has a question for Mr. Rogers. He continued that Mr. Filiault has been saying this lounge will be used “very rarely” and used the word “rare” at least half a dozen times, for occasional overnights. Would there be an issue if this morphed into something that is more permanent and they started having multiple employees staying there or someone staying there every night.

Mr. Rogers stated that if the Board were to put a condition on this property such as “only for an employee on an occasional use” it can be difficult to enforce that type of situation. He continued that he wants to step back and address what Mr. Filiault said about why he pointed them in this direction. This is, in his opinion, more than just a lounge. Certainly many businesses have an employee lounge with a little kitchenette and a table where people can relax and have a meal, but City staff was told that this lounge would have a kitchen, bed, and a bath with a shower. He is not sure how many lounges have a bed or a pull-out bed. That is why he, as the Zoning Administrator, pointed Mr. Patel towards a Variance. In his opinion this is a step above what a lounge would be considered.

Chair Gorman asked if there were any other questions. Hearing none, he stated that that Mr. Filiault is talking about the building not being fit for industrial use, but that is not the fact of its use, due to the Variance from 2014. It is aptly used as a commercial retail operation, which the Board did approve. Now there is this question at hand that it appears that Mr. Patel is seeking to create an apartment. He does not know that the Board has much scope of how the space is used, and certainly would not be able to police it nightly. He questions this, because there are a lot of

small businesses with employees who work long hours and have to drive home, and this is New England, with many of us have to make some slippery commutes on occasion. That is just part of living here. Sometimes he, too, is tired during his drive home from work, but that is just part of working. His question is what separates this business from so many others, where this business would have a lounge that is not a lounge and be able to have people sleep there as they saw fit. Chair Gorman stated that he guesses that the area probably has about 10 snowstorms a year, so it seems odd to him that Mr. Patel would build an apartment for that limited use. He asked if Mr. Filiault could speak to those questions.

Mr. Filiault stated that many of the businesses that would be anticipating this type of a lounge would not be located in an industrial zone and this particular lot is located extremely close to a commercial and residential zone. If this business was 50 yards down the road and applying from one of those zones, this would not be an issue. He continued that each individual lot that is anticipated to need this lounge could be evaluated on an individual basis. The Board has the ability to take each application on its own individual merits. The merits here are that this would not increase the traffic to the lot, and this would not be used on a substantial basis, and it would improve the overall value for this building as well as the neighborhood, and protect public safety. Based on those merits, the Board ought to allow this Variance to protect the public safety and to increase the value of the lot and then evaluate future applications as they come based on those merits. It seems unlikely that many future applications will come, since very few businesses will have the unique circumstances that this one does, of being nestled so closely to commercial and residential zones.

Ms. Zerba stated that her question is about semantics. When she thinks of the word “lounge” and how people might hear it in the future, she thinks that some people might say that a lounge is able to invite the public to it and serve alcohol, but if they use the term “Employee Lounge” it provides the definite definition that they are seeking.

Ms. Taylor asked if employees would be paid for or charged for staying in this lounge. Mr. Patel replied no.

Mr. Gaudio asked if this is added income to the employees. He continued that is an income tax question and it goes back to his question of who benefits from this. Mr. Filiault replied that he appreciates the insight to the income tax potential for this, which is certainly a topic of research. He continued that in terms of the benefit, it benefits both the employees, by staying off the road, and the public, by keeping sleepy or drivers off the road during a storm.

Chair Gorman asked if Board members had further questions. Hearing none, he asked for public comment and explained how members of the public could participate. Hearing no public comment, he closed the public hearing. He stated that he will reopen the public hearing as necessary to ask procedural or technical questions.

The Board deliberated on the criteria.

- 1. Granting the Variance would not be contrary to the public interest.*

Ms. Taylor stated that she has some real concerns about public interest, because this is, frankly, a little “squishy.” It appears to be introducing a residential type of use into a zone where generally is not permitted. She continued that she does not think it is particularly relevant that it may be close to other districts. It is up to the City Council to decide how it wants to zone the City. She does not see it as being in the public interest to add an overnight component to this property, especially since that does potentially introduce some public safety issues for police and fire, when they have to be concerned with somebody actually being on the property when it is closed to the public.

Mr. Hoppock stated that he thinks the applicant confuses the concept of zoning public interest versus safety public interest. He continued that he agrees with Ms. Taylor. What they are asking about here in terms of public interest is the question of whether or not the Variance would be contrary to the public interest as to whether it is related to the requirement that it be consistent with the spirit of the ordinance. He did not hear anything about the spirit of the ordinance in connection with public interest. He heard about tired drivers and bad weather, which as Chair Gorman said, they all have to get used to. He is not persuaded that this criterion is satisfied.

Mr. Welsh stated that something he finds compelling is that a Variance has already been granted for the property as a retail business in an industrial zone. He continued that what they are looking to do is modify the characteristics of that varied property. He finds it fairly compelling that another public interest is interest in safe roads and interest in businesses being able to operate with their staff. He would be inclined to vote positively on the first criterion.

*2. If the Variance were granted, the spirit of the Ordinance would be observed.*

Mr. Welsh stated that he would vote positively on this criterion too.

Ms. Taylor stated that she has similar concerns as to what she expressed earlier and as expressed by Mr. Hoppock in that granting this would take it even a step further away from the intent of the Industrial Zone. Even if a Variance has already been granted, this would almost make it like a “Variance plus,” by taking it even further away from the original intent of the Industrial Zone as stated in the ordinance.

Mr. Gaudio stated that he agrees with Ms. Taylor. He continued that this is a non-cumulative form of zoning, and the idea behind that is to protect industrial and commercial uses from residential use, and adding a residential-type use might bring in problems that were intended to be avoided.

*3. Granting the Variance would do substantial justice.*

Mr. Hoppock stated that the question at hand is the loss to the individual outweighed by the gain to the general public and if it is, it is an injustice. He continued that he is struck by Mr. Gaudio’s comments in terms of protecting the commercial and industrial uses from encroaching residential uses, and he is having a hard time determining what the loss to the individual is, if this request is denied. This strikes him as not very different from the curb cut application they had a few weeks back where the applicant was seeking a convenience. He looks at this as a convenience - a



lounge for some employees to sleep over in bad weather, to be used rarely and on occasion. If someone is in the back of the store sleeping, someone has to be in the front of the store working, so you are increasing the density in the building. He does not see a loss to the individual if this is not granted, so he is not persuaded by criteria three.

4. *If the Variance were granted, the values of the surrounding properties would not be diminished.*

Ms. Taylor stated that the applicant's representative has stated that the values would not be diminished but she did not see any evidence presented regarding that point, and she thinks it is his burden to show that to the Board. She continued that she thinks it is an open question. If you have businesses that are closed and darkened at night but there is one property where someone is sleeping, she has to question whether or not values would be impacted and she does not think the Board has heard anything one way or the other.

Mr. Welsh stated that for this criterion, quite often in the absence of data the Board goes with their impressions. He continued that the minority of the time they have data regarding property values and the impact a Variance or other action might take. He thinks this is *de minimis* either way. It will be a very occasional use in a property where few people would even notice it, and there will be some other kinds of uses taking place, people sleeping, a few hundred yards away or less. He does not see the values of the surrounding properties being diminished by this.

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 purposes of the Ordinance provision and the specific application of that provision to the property*

and

- ii. *The proposed use is a reasonable one.*

- 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 is therefore necessary to enable a reasonable use of it.*

Mr. Gaudio stated that he is having difficulty seeing where the special conditions of the property exist as a hardship. He continued that he understands there are hardships to the employees and to the owner/employer, but he does not see a hardship to the property. Regarding the idea that it is a small commercial property, it is a commercial property because of a Variance that was given, not because of the condition of the property. He does not think the smallness is unique. He does not see the unnecessary hardship.

Mr. Hoppock stated that he agrees with Mr. Gaudio and adds the following; even if there was a special condition - and he heard the applicant speak to certain conditions, but he is not persuaded

that they are special to the property - there is no tying together of the relationship between the general public purpose of the ordinance and the specific application to this property. To him that relationship was not established by the applicant so he is having a hard time with this one, too.

Ms. Taylor stated that her concern is that she does not see the hardship. She continued that it appears that this is primarily a convenience to the property owner in part based on economic considerations, and as the Board has discussed previously, while that could be a consideration, it is not a sole determining factor in deciding whether a hardship exists.

Mr. Welsh stated that again, he sees that this property did satisfy the array of questions necessary for it to be granted a Variance in the first place, one of which was expression of a hardship, for its ability to be used in other ways. He continued that the Board is on record for recognizing a hardship for other uses for this property. Now that they are looking at a retail operation that has presumably longer hours than some of the other industrial uses around it, they may be looking at situations where people want to stay overnight. He is not too troubled by asserting that there is a hardship.

Chair Gorman stated that his stance is that they have heard, in a nutshell, that approving this will keep people safe and off of the streets and not driving during bad weather or when they are tired, which he views as a personal responsibility, not a responsibility of the Board. If someone feels that they are unsafe to get behind the wheel, he suggests that they do not get behind the wheel. The looseness of this is a concern to him and he does not know how this is going to be used. The Board only knows what they are being told, which seems fairly harmless, but they also know that in reality they are granting a Variance for the property that will go on through multiple owners or even multiple uses. The Board is approving an apartment, plain and simple. They cannot police who stays there, when they stay there, whether they work there, how long they have been there, whether they are tired, or whether the weather is bad. Those are things that are not in the Board's purview. Thus, as soon as those things start to get mentioned as facts he tends to disregard them. At the end of the day, if they wanted a lounge they could have one with a permit, but now they want an apartment, and that requires a Variance. When looking at putting an apartment in there, he does not put much weight on how the person intends to use it because it will create muddy waters later. They have heard that the hardship of the property is that it is small and it is a bad industrial location, but they know it is not even used for industrial purposes. The fact that it is small would lead him to believe that maybe they should not be expanding its non-conforming use, given that it is small and has already been granted a Variance by the Board. Collectively when he weighs these five criteria he has trouble approving an apartment at this site.

Mr. Hoppock made a motion for the Zoning Board of Adjustment to approve ZBA 21-01. Chair Gorman seconded the motion.

1. *Granting the Variance would not be contrary to the public interest.*

Not met with a vote of 1-4. Mr. Welsh was in favor.

2. *If the Variance were granted, the spirit of the Ordinance would be observed.*

Not met with a vote of 1-4. Mr. Welsh was in favor.

3. *Granting the Variance would do substantial justice.*

Not met with a vote of 1-4. Mr. Welsh was in favor.

4. *If the Variance were granted, the values of the surrounding properties would not be diminished.*

Met with a vote of 3-2. Ms. Taylor and Mr. Hoppock were opposed.

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 purposes of the Ordinance provision and the specific application of that provision to the property.*

and

- ii. *The proposed use is a reasonable one.*

- 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 is therefore necessary to enable a reasonable use of it.*

Not met with a vote of 1-4. Mr. Welsh was in favor.

The motion to approve ZBA 21-01 failed with a vote of 1-4. Mr. Welsh was in favor.

Mr. Hoppock made a motion for the Zoning Board of Adjustment to deny ZBA 21-01. Ms. Taylor seconded the motion, which passed with a vote of 4-1. Mr. Welsh was opposed.

Tim Sampson requested that the Board hear ZBA 21-03 before ZBA 21-02. Chair Gorman and the Board agreed.

- B) ZBA 21-03:/ Petitioner, Angela and Adam Robinson of 17 Birch St., Keene, NH, represented by Tim Sampson, of Sampson Architects of 103 Roxbury St., Keene, requests a Variance for property located at 17 Birch St., Tax Map #545-030-000; that is in the Low Density District. The Petitioner requests a Variance to allow the expansion of an existing one car garage by an additional two feet to allow the garage to be utilized to store two cars. The existing garage sits with four feet of the property line. The proposed garage proposes to site within two feet of the property line per Section 102-791 of the Zoning Ordinance.**

Ms. Taylor stated that she is an abutter and needs to recuse herself.

Chair Gorman asked Mr. Rogers to give relevant information about this application.

Mr. Rogers stated that Ms. Zerba will be stepping in for Ms. Taylor as a voting member. With a map of 17 Birch St. on the screen, he stated that it is in the Low Density District. He continued that the existing garage is a one-car garage and rather oversized. The dimensions of it are 18 feet wide, which is a little bigger than the typical one-car garage. The existing garage already violates the setbacks. As the application mentions, it is already four feet to the property line. The applicant proposes tearing this one down and building a new one within two feet of the property line. When the Board is deciding whether to approve this application, they should get a better idea of what that distance is going to be, since they would require a surveyor to document how close to the property line this structure would end up being.

Chair Gorman stated that what Mr. Rogers stated is correct that Ms. Taylor is recused for this application and Ms. Zerba will be filling in as a voting member.

Mr. Gaudio stated that first of all, this is currently a non-conforming use, for the garage to be within four feet. He asked if the fact that the garage is going to be torn down and another garage is going to be built is the reason why it is not an application for an expansion of a non-conforming use, or if there is another reason that he is not understanding correctly. Mr. Rogers replied that it is not that it is a non-conforming use, it is that they are building within the setback. He continued that even though this current garage is within the setback, they are actually going to be going even further into the setback with the proposed new garage, and that is why it is before the Board. Mr. Gaudio stated that he understands but continued that it currently is a non-conforming structure. Mr. Rogers replied that is correct. He continued that if a structure that is non-conforming due to dimensional requirements, the Zoning Ordinance does allow for expansion upon that structure as long as the structure does not come any closer/violates the setback any further, which is what this application is asking.

Ms. Zerba stated that she would like to confirm what Mr. Rogers just said. She continued that she did not read that the garage was going to be torn down. She asked if just the end of the garage that is going to be expanded or will it be completely torn down so a new one can be constructed. Mr. Rogers showed a slide of the existing footprint of the garage, and the proposed, newer footprint. He stated that that the proposed, newer footprint is significant different than the existing garage. Mr. Sampson, the project architect can correct him if he is wrong, but his understanding is that the current garage would be torn down and a new garage would be built.

Mr. Welsh asked to look again at the slide showing the various houses in the neighborhood, from above, and their proximity to the property line. He continued that it seems like there are a number of non-conforming properties. He asked if these lots were subdivided and sold as non-conforming, or if the zoning came in and had a setback in place that made them non-conforming. Mr. Rogers replied that his understanding is that this was a development from the 1950's. He continued that the file for this property does not have the building permit from when this house was initially built. It does have several permits from when subsequent owners did work on the house. He assumes that this was when the house was built and the setback came since then.

Chair Gorman opened the public hearing and explained the procedures for participation. He asked to hear from the Petitioners and their representative.

Angela Robinson of 17 Birch St. stated that she is going to be presenting on her own behalf. She continued that she and her husband Adam are the owners of 17 Birch St. and reside there as their primary residence. They have been there for over 13 years and have 2 young children who go to local schools. She is before the Board as she and her husband desire to renovate and expand their home to accommodate their growing family. They are seeking a Variance from the side set back in the Zoning Ordinance to permit an expansion of the existing garage within two feet of the property line. Granting this Variance will allow her and her husband to rebuild the garage in accommodate two modern vehicles, based on the size and dimensions of vehicles and trucks in today's day and age. It will also provide them with much needed space above the garage to accommodate their growing family. The existing garage is already in the setback and they are seeking permission to rebuild the garage an additional 80 square feet into the setback. This additional square footage is nominal in nature but will greatly benefit their aspiration for expansion of their home. There are other properties on the street with structures that are also in the setback. Their property is not unique in its non-conformance. Granting approval for the Variance would have negligible impact on adjacent properties. Their intention for this renovation improvement to their property will increase the value of their home and of nearby residences.

Ms. Robinson continued that speaking to the application, the existing garage is already within the setback, and granting the Variance would allow them, as the property owners, to rebuild a garage structure that would allow room for modern vehicles with minor impact to neighbors, allowing for a small increase to an existing non-conforming condition. The spirit of the ordinance is to prevent encroachment of adjacent properties, and the existing garage already sits within the required setbacks and would be only a minor change to an existing non-conforming condition. Granting the Variance would allow them as the property owners to build a garage large enough to store vehicles and provide much needed space above the garage structure for their growing family. There are a number of properties in the neighborhood with similar conditions and the non-conformity currently exists. Expansion of the non-conformity would have negligible impact an adjacent properties. The existing garage currently sits within the setback, and granting the Variance to expand the non-conformity would allow reasonable use of a new garage and would be sized to provide storage of two vehicles and also provide additional space for a growing family. This expansion does not create a new condition and has minimal impact on the neighbors.

Ms. Robinson continued that she wants to add that this is a one-door garage and is larger than your typical one unit, one-car garage, but with today's vehicles sizes - her husband has a truck and she has an SUV – they certainly cannot park both of those vehicles in their existing garage. The proposed expansion has been sized to provide the minimum width required to store two vehicles. There is an existing garage and it is non-conforming. There is not a proposed new use for the structure or a new entrance for non-conformity. The expansion proposed is the absolute minimum needed for proper use. They are trying to be very mindful not to expand more than completely necessary to accommodate parking of two vehicles. Due to the layout of the house, the proposed expansion is the only reasonable way to provide an expanded garage that is large

enough to store two vehicles as well as provide additional living space above the garage. The proposed expansion has been minimized to the extent possible while allowing the space to be properly utilized. The proposed expansion is reasonable, based on an existing, non-conforming condition and it is already being used outside of the strict enforcement of the ordinance.

Ms. Zerba asked if the garage was already there when they purchased the property. Ms. Robinson replied yes.

Ms. Zerba stated that her concern is with the neighbor to the north. She continued that if this Variance passes, there would only be that two feet and then she notices that there is a fence that goes directly to the edge of both properties. She asked if the fence is parallel to the garage, not the one facing the street, belongs to the Robinsons or their neighbors. Ms. Robinson replied that she and her husband had their property surveyed a couple months ago, and this survey indicated that their neighbors' fence is right on their property line, and she and her husband also have a fence that is within six inches of the neighbors' fence. Ms. Zerba asked if she means that there are two fences there, one right next to the other, on the side. Ms. Robinson replied that it is difficult to see in the picture, but essentially, the fence for her property starts at the very rear of the garage structure as it exists today, while the fence for their neighbors to the north extends a bit more than that.

Mr. Hoppock stated that Mr. Rogers made a remark about needing a survey or a site plan prepared, of where the new garage would be, if this were approved. He questioned regarding the existence of the fence of the neighbor to the north and whatever objects are on the Robinsons' neighbors' properties and questioned the reason for the survey is to ensure there is enough space between the end of Ms. Robinson's garage and that property line? Ms. Robinson replied that the intent of the survey that she and her family paid for was to ensure that with any type of structural change, addition to their home, or anything to do with their property, they would be honoring the boundaries of their property to the most accurate reflection.

Mr. Rogers stated that to clarify, many times there are structures being built that are either very close to the setback or in the setback, like this one, and traditionally it is the City's requirement that a surveyor verify that. Thus, if the Board were to grant this Variance within two feet of the property line, the City would be seeking the surveyor so they could verify that that is actually where the structure has been built.

Mr. Gaudio stated that the garage is a slight angle to the property line. He asked where these two feet are exactly and questioned if it is at the front of the garage or two feet in the back. Ms. Robinson replied that the expansion will extend two feet out to the side. She continued that it will essentially result in an additional two feet into the setback with the angle of the property line as well as the angle of the existing garage, it will ultimately result in the front side of the garage being closer to the property line and further into the setback than the back of the garage. There is no plan necessarily to change the angle of the garage. The plan is to add on an additional two feet to the existing structure, but she clarified the statement of "add on," that their intent is to demolish the existing garage structure, pour a new foundation, and rebuild. That rebuild will ultimately result in an expansion of two feet off the side.

Mr. Gaudio stated that he was looking at it from the other side and questioned how many feet from the property line will the front of the garage be. Ms. Robinson replied that the front of the garage, with the two feet expansion, will result in them being about one and a half feet from what she thought was the setback, but now she is thinking it might be the property line.

Tim Sampson stated that the closest point to the property line is going to be in the front, at about 1'6" or 1'10" to the overhang. He continued that it will be about 4'6" to the overhang in the back and the property line tapers away from the proposed building. That closest encroachment at 1'10", roughly, to the overhang, is in the front corner closest to the street.

Ms. Zerba stated that is less than the two feet they are requesting, with the property line less than two feet than what is stated in the application. Mr. Sampson replied that was a last minute adjustment. He continued that closest dimension is to the overhang so it will actually be about 2'3" to the actual base of the building. The overhang will be roughly nine feet off the ground and only at that one outside point.

Mr. Rogers stated that Mr. Sampson is correct that the point to measure is the furthest point of the building, so measuring to the overhang is appropriate. He continued that is why when he was speaking earlier he mentioned that the Board should get clarity on the distance, because the application does state "within two feet" but it seems that they are asking for less than two feet. He thinks it is important for an accurate number to be provided by the applicant and/or Mr. Sampson, so that if there is an approval, the building permit has a number to work with.

Mr. Sampson stated that if this does get approved, they can submit the final number and have a surveyor come out. He continued that he did the site plan, so he might be off by an inch or two, which is why the application was worded as is. They could have the final number verified by a surveyor, if this gets approved.

Chair Gorman stated that Mr. Rogers can speak to this, but he thinks the Board needs a number if they approve it. Mr. Rogers replied that it is up to the Board. He continued that he would also caution leaving it wide open without a number, because of another concerns, which the Board might bring up as they have in the past with other setback encroachments, is regarding runoff. He questioned how will the proposed roof be sloped, and how the applicant will keep water off their property. If the Board were to leave this as just "within two feet" and they end up building right to the property line, he is not sure about that. It is up to the Board to make that determination.

Ms. Zerba stated that she did not think about the water coming off of the roof on to the other property. She asked Mr. Rogers if this will be clarified. Mr. Rogers replied that it is just something to bring up, because the Zoning Code does speak to no development allowing water to leave somebody's property. He continued that if this were to be built right to the property line and then they had to put a gutter on it to control the water flow and keep it on their property, the gutter could be across the property line. That is just something for the Board to take into consideration.

Ms. Robinson stated that she currently does have gutters on her garage and they are angled in parallel with the driveway. She continued that what she envisions, if permitted with this Variance, is that they would continue to have gutters on the front of the garage with the down spout angled parallel to the driveway. There would never be an intention to have it pointed toward their neighbors, and in fact it would run more toward their own property than their neighbors' property.

Chair Gorman asked if Board members had further questions. Hearing none, he welcomed public comment and explained the procedures for participation.

Richard Roth of 12 Hillside Ave. stated that he owns 21 Birch St. where his daughter lives. He continued that he does not know if he should address the application point by point, but he wants to clarify a few things. The cover letter he received surprised him initially because it said that the petitioner requests a Variance to allow the expansion of the existing one car garage. The Robinsons currently park two cars in their garage as it is a two car garage. They would like it to be a bigger two car garage, from what he understands, but it is currently a small two car garage. The idea that it is a one car garage and that that is a hardship is repeated a few times. He is troubled by the presentation of the arguments for the Variance, which amount to, as far as he can tell, *"We are already really close to the property line and well within the setbacks, so what is another couple of feet?"* His understanding is that these houses were built prior to the existence of zoning ordinances, including setbacks. A lot of the properties in that neighborhood, and probably many neighborhoods in Keene, were built prior to 10' side setbacks and 25' frontage setbacks and are not up to current code. The second criterion says, *"If the Variance were granted, the spirit of the Ordinance would be observed"* and the applicants say that the spirit would be preserved because the spirit of the ordinance is to prevent encroachment to the adjacent property. In fact, they are already four feet from the property line and are proposing to encroach another two feet. He hopes that it is the Board's interest that if someone is going to tear down a structure that is within the setbacks, it would be to improve conformity to newer standard, and not to reduce conformity, so that if they were going to build a garage from scratch it is the opportunity to build something that has 10' of clearance on the sides or 25' of clearance in the front, and so on and so forth. He is a little taken by the fact that the spirit of the Ordinance would absolutely not be observed if this were granted; it would be further failed to be observed.

Mr. Roth continued that the third criterion talks about substantial justice and the applicants say this would allow the owner to build a garage large enough to store vehicles, but again, it is already a two car garage and has been functioning that way as far as he knows. He talked with some friends in real estate about how to present an argument about property values and whether or not surrounding property values would be diminished, because it is very hard to come up with factual claims about future scenarios. They do not know if his property or any of the properties in that neighborhood would be enhanced or diminished. The applicants stated in their presentation that they believe their renovation would enhance property values both for themselves and for adjacent properties, but that is just an assertion, and he is not prepared to say that he knows it will harm his property value, because he does not know when he is going to sell and what will happen. What he wants to speak to instead is the property value of his home at 21 Birch St., because ultimately his plan was to move into that house when he retires in about four years. The property value would be diminished to him because the neighbor is his southern



exposure. When he bought the house he saw that the Robinsons' garage was very close to the property line, but it is a one story garage and the sunlight was coming in through the dining room windows and in the upstairs bedroom that is on that side of the house and everything seemed acceptable. The Robinsons say that they are going to move the garage two feet closer, and the diagram shows it is also probably two to four feet forward in the driveway, which means it will be more directly across from the body of his house. Adding a second story to the garage means there will be a view of that two story wall outside his window with the southern exposure. He cannot say what that will do to the amount of sunlight or how much it will change the sunlight, but it may create a hardship for him and may diminish his property value, and that is not being accounted for. He knows the Robinsons have the current capability of building a second story on the existing garage; that does not require a Variance. He continued that his daughter told him she first heard from the Robinsons about a plan to build an addition on the garage and he was concerned and looked at it but thought there was nothing he could do because they are allowed to have up to two stories in that neighborhood. He did not know that the Robinsons would then want to move the whole thing closer to his house, which complicates things.

Mr. Roth continued that the application states, regarding the fifth criterion about hardship, "*This expansion does not create a new condition and has minimal impact on neighbors,*" but that is just a statement that has no provable evidence to support it. In his opinion, there is no unnecessary hardship that the Robinsons would face if this Variance were not approved. They have an existing two car garage which they can build additional family space on top of it. They could honor the minimal four foot setback right now of their current garage by building two feet wider in the other direction where they have a breezeway between the current garage and their house. It is not like they are going to go without a garage or without the availability of living space. He is very concerned that by moving two feet closer, they are setting a new lower bar for the neighborhood and for the public value of properties in that neighborhood, they are going in the wrong direction, contrary to the intent of the zoning ordinances.

Chair Gorman thanked Mr. Roth and asked Staff if there were any other members of the public calling in and wishing to speak. Ms. Marcou replied no.

Ms. Robinson stated that she values Mr. Roth's perspective as the owner of the property next door and as a potential future neighbor. She continued that she wants to share with the Board that upon planning for this addition and expansion, she and her husband had an appraisal completed on the home several months ago, and during that process the appraiser did indicate in his report that the Robinsons' garage was considered a one car garage. And then she had to argue that from an appraisal standpoint she wanted to see the highest value possible on their home, and she could not sell the fact that even though it is an oversized one car garage, the appraiser, in his professional opinion and knowing the real estate market, did indicate that this is considered a one car garage. With that, she and her husband do each have a vehicle and their existing garage does not allow both of them to park their vehicles inside the garage. They are seeking to enhance their property and get the most use possible when they seek and put this additional monetary investment into their property. They have significantly invested in their property over the course of the 13 years that they have resided here. They intend to make their property better. The two car garage structure will only be accomplished with a slight expansion of that side of the garage.

Mr. Roth stated that presumably the Robinsons want to make their new garage two feet wider to get to 20 feet, if the existing one is 18 feet. He continued that can be achieved by going in the other direction, into the breezeway space, without further violating the setback ordinance. Thus, this plan is not the absolutely only way to accomplish what they want to accomplish. It fits two cars now, and there are two cars in there. It can be a little wider by facing the house going to the right instead of the left. That is an option that makes it an unnecessary move.

Ms. Robinson stated that while physically they could expand the garage to the right, which will then diminish the value of their property because now they are removing existing, livable space, which has a higher square foot value, and adding a lower value per square foot for that garage space. It would be detrimental to the value of their property to build in the other direction as Mr. Roth has suggested, unfortunately, but they did consider that.

Chair Gorman asked if the breezeway is finished living space at this point. Ms. Robinson replied yes, and it has a heat source as well.

Mr. Hoppock stated that Mr. Roth was concerned about his ability to get light from the southern exposure if the Robinsons encroached any further than they are encroaching now into the setback. Mr. Hoppock asked if Ms. Robinson heard that remark. Ms. Robinson replied yes. Mr. Hoppock asked Ms. Robinson to explain why, if she thinks Mr. Roth is wrong.

Ms. Robinson stated that it is the southern exposure of the house, but given the way that the sun comes up over her property and his property, she believes that if she and her husband moved their garage structure an additional two feet to the north it will make such a minimal difference, if any difference at all, to be impact of the sunlight, based on the fact that they will end up building a two story structure. Whether it is in additional story where it stands today or an additional story with the structure moved two feet to the north, she does not think it will make an impact to the sunlight on his property.

Mr. Hoppock asked if they are planning to increase the height of the garage once it is built into the setback, if it is. Ms. Robinson replied yes, the intent is to have a second story above the garage.

Mr. Gaudio stated that he has a question about what was described as a breezeway. He continued that the first floor plan on the drawing shows it as being part of the kitchen after the renovation. He asked if there will be a breezeway there anymore. Ms. Robinson replied that the intent is that area will have a small, covered porch structure where essentially from the exterior of the home, will be a couple stairs and then enter on the same level as the existing structure of the home which will be a mud room area, so the utility of that space will remain the same. The backside of the existing breezeway area will be fully open to the existing house. The plan is to expand adjoined, livable space with the existing house and the new mud room structure that will be attached to the garage. Mr. Gaudio asked if the mud room will only be about the first five feet of what would be the breezeway, and everything back behind that will become part of the house. Ms. Robinson replied that is correct. She continued that the mud room right now is 10' by 10' and they will use 8' of that depth for that new mud room and the remainder of the space will be open to the house, whereas right now it is a covered patio area on the backside. She wants to add

that while they are intending to build a second story over the garage, it does sit lower than the concrete foundation for what they intend to build for the new mud room area.

Ms. Zerba asked if staff could show the slides of both the Robinsons' and Mr. Roth's properties so the Board can see how close the house to the north is with regard to the second floor addition.

Chair Gorman asked if anyone had further questions. Hearing none, he closed the public hearing. He stated that he will reopen it to ask procedural or technical questions if necessary. He stated that the Board will now deliberate.

Mr. Hoppock stated that he has a technical or procedural question. He continued that the application before the Board is not for a two story garage extending into a setback. It is for a one story garage that goes to about two feet/no more than two feet to the boundary line. It is about eight feet in on the setback, give or take. Mr. Hoppock questioned, hypothetically, if this is approved, what happens when the Robinsons submits for a building permit with a proposed second floor on the garage that is already within the setback, what problems are being created.

Mr. Rogers stated that Mr. Roth expressed some of his frustration with the language of the application itself, as "*expansion of the existing structure*" does not seem to be the case, since they intend to tear down to build a new garage. The fact that the applicant has put forth to the Board that this is a two story, new structure being proposed is something the Board needs to take into consideration. If it were to be granted to build a one story garage, the section of the Zoning Code that might prohibit them from putting a second story on either this existing garage or a new one if it were built is the Alteration or Expansion of a Non-conforming Use section's 50% rule. Based off the square footage, if they added a second story they would still have to meet that 50% rule of square footage. That would be a problem. But again, if the Board is looking at how the applicant has stated that it is a two story addition, not just an expansion, he will leave that up to the Board to determine.

Mr. Gaudio stated that he, too, has a technical or procedural question. The affidavit does not have a signature at the bottom. He asked if the office has a signed copy. Mr. Rogers replied no, in looking at the application now there is not a signature on it.

Chair Gorman asked where these issues leave them, procedurally.

Mr. Welsh stated that he has a clarifying question, if they were to grant the Variance, and he is hearing the 50% rule described the way it was meant to be heard, it seems like they would once again be reviewing the same applicants at some point in the future about the second story.

Chair Gorman replied that he would be inclined to agree, that is, provided they are increasing their constructed square footage by more than 50% of what they are removing. He asked Mr. Rogers if that is an accurate assessment. Mr. Rogers replied that is correct.

Mr. Hoppock stated that he is dissatisfied with the completeness of the application. He continued that even when he looks at Mr. Sampson's plans, with the side elevation, the rear elevation, and the front elevation, perhaps the front elevation shows that it is a two story, but it is

not entirely clear with the rest of it, and there is nothing in the application that speaks to that. His understanding, from listening carefully to the applicant, was that they wanted the setback now and in some point in the future they were going to expand and make it a two story and that was a separate application down the road, which is why he asked the questions that he did. If he is wrong about that and this is intended to be a “full package” of a two story garage within a setback, he is not prepared to support it under the present explanations.

Chair Gorman stated that other Board members are welcome to offer their opinions, but he would like to reopen the public hearing and get clarification this from Ms. Robinson. Other Board members agreed.

Chair Gorman re-opened the public hearing and asked Ms. Robinson to clarify these questions. Ms. Robinson stated that she is unclear about what additional information the Board is seeking. She continued that to restate, they are looking for approval to rebuild, which would mean demolishing the existing garage structure and rebuilding a garage structure with a second floor. That new structure would move to the north an additional two feet, whereas the garage currently is built within the setback. The purpose and utility of that space is for accommodation of two vehicles.

Mr. Welsh asked that with this rebuilding, if the applicant is seeking to add a second story to the garage. Ms. Robinson replied yes, it would be a Cape-style addition, similar to the original home. The proposed architectural drawings were shared on the screen a moment ago.

Hearing no further questions, Chair Gorman closed the public hearing. He asked Mr. Hoppock how he suggests the Board move forward. Mr. Hoppock stated that now that they have had the public hearing and people have had their say, and Ms. Robinson has made her position clear as to what the application is intended to request, the Board is in a position where they should consider the merits of it.

Chair Gorman stated that the Board will review and deliberate on the five criteria.

1. *Granting the Variance would not be contrary to the public interest.*

Ms. Zerba stated that based on the comments of the neighbor, and she is including him as part of the “public interest,” she would not support this. She does not think it is in the neighbor’s public interest to approve this request.

2. *If the Variance were granted, the spirit of the Ordinance would be observed.*

Mr. Hoppock stated that for this criterion, the Board should ask two questions, “*Will granting the Variance alter the essential character of the neighborhood?*” and “*Will it do anything to harm or threaten the public health, safety, or welfare?*” On those two questions, he would have to say it would not. He noticed when Ms. Zerba asked that they go back to that overall picture, there are two lots in the neighborhood that he can see, #13 and #11, which he thinks is in the Low Density District, that appear to have very close structural setback implications. Other than that, all of the other properties appear to have significant space between the boundary lines and

the structures on the property. He does not find that this Variance would alter the essential character of the neighborhood or threaten the public health, safety, or welfare.

3. *Granting the Variance would do substantial justice.*

Mr. Hoppock stated that he is unsure and that in his view, this ties a bit together with the unnecessary hardship. Mr. Roth properly raised the issue of light and air and space between the properties. With the second story, he does think there is an impact on Mr. Roth's light and air expectations. Part of the purpose of an ordinance is to space structures apart so that individual structures do have sufficient light and air and are not densely congested to threaten firefighting capabilities and whatnot. He is not saying this structure would do that, but he is saying that a two story structure is likely to impact Mr. Roth's expectation of light and air. That is a gain to the public that would be hurt, and it is not outweighed by an individual loss, so he is not prepared to say yes to this question.

4. *If the Variance were granted, the values of the surrounding properties would not be diminished.*

Ms. Zerba stated that she cannot say with certainty that the properties would not be diminished, at least the property to the north of 17 Birch St. She continued that Mr. Roth made some good points and the Board does not have any definite statements from any realtors that the property would be diminished as a result of some of the potential losses that Mr. Roth would face.

Chair Gorman stated that he feels that the Robinsons' attempt to build something that is tasteful and like the neighborhood would certainly point in favor of not demonetizing surrounding properties. He continued that also, an addition of extra living space with the intention of making their house nicer typically would increase values in a neighborhood. He does not see a strong argument for demonetization of value regarding the sunlight for the house to the north. He notes that Mr. Roth's house appears pushed almost all the way to the other side of his lot, so there is a pretty good gap between the two houses. He also notes that it is a Cape-style roof. He does not know how much taller it is actually going to be, as a dormer. He knows it will not shed water next door because the roof will be pitched the other way now and might even shed less water. He does not see some of the demonetizing assertions that the abutter made as fact. He thinks the Robinsons can build the second story if they like, they just cannot stretch the setback, as long as it is less than 50%. He does not think this addition will lower property values.

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 purposes of the Ordinance provision and the specific application of that provision to the property because:*

and

ii. *The proposed use is a reasonable one.*

Mr. Hoppock stated that he thinks there is a case for a special condition of the property, which has to do with the map that was shown from which you can compare this lot with lots #13 and #11. He continued that he will agree that lot #11 is in the Low Density District, but he is not sure that matters too much. The only one that appears like lot #17 is its southerly abutter, which is very close. It seems like at that curve in the road all the properties were pushed to the north. He is prepared to say that is a special condition of the property. He also questions, given the general purpose of the ordinance, what is the general purpose of a setback requirement. It is to reduce density and reduce congestion, and it is to reduce structures being built too close to one another, so that light and air are not restricted. Thus, he thinks there is a fair and substantial relationship between the general purpose of the ordinance and its specific application to this property. For that reason he would not find an unnecessary hardship.

Mr. Gaudio stated that this is the most difficult question of the criteria. He continued that he thinks there probably is an unnecessary hardship in the sense of sub-criteria A., but not necessarily sub-criteria B., more or less like Mr. Hoppock just mentioned. The houses here were placed there 50 or 60 years ago prior to the Zoning Ordinance adoption which left property owners stuck with the circumstances as presented which is a hardship. It is hard to do anything with the house now to deal with changing circumstances. He thinks that, on balance, there are special conditions of the property that bring in an unnecessary hardship in this circumstance, and that it would be a reasonable use.

Chair Gorman stated that he is inclined to agree with Mr. Hoppock and Mr. Gaudio on criteria 5.A. This house was built clearly prior to the adoption of the Zoning Ordinance. He continued that what would normally be reasonable to have on a single-family home with a two car garage and living space above, is not an easy accomplishment for the Robinsons with this situation relative to the setback. From his perspective that is a hardship.

Chair Gorman asked if anyone had more to say. Hearing none, he asked for a motion.

Mr. Hoppock made a motion for the Zoning Board of Adjustment to approve ZBA 20-03. Mr. Welsh seconded the motion.

Mr. Gaudio asked for clarification if this was an approval of a Variance only for the garage portion and if the Robinsons were to have a residential use above it, will there be a need to have another request.

Chair Gorman stated that they are voting to approve the two story construction. Mr. Hoppock replied yes, within the setback. Chair Gorman replied that is correct, they are approving a two story addition to replace what exists currently, that will encroach two feet further into the setback. They are approving this based on the dialogue from tonight, not necessarily the letter or specifics of the application.

Mr. Rogers asked if the Board wants to be clear as to how far into the setback they are talking about, because the application just says "within two feet." Chair Gorman replied that is a great suggestion. He asked if Mr. Hoppock would be willing to include in his motion a limitation of one and a half feet. He continued that Mr. Sampson mentioned 1'6" to 1'10" with overhang. He

does not know what the Board is comfortable with but he thinks they should make some assertion about the maximum distance.

Mr. Hoppock stated that he amends his motion to include “no more than one foot ten inches from the northerly boundary line.” Mr. Welsh stated that he will amend his second.

Chair Gorman clarified that motion is for the Zoning Board of Adjustment to approve ZBA 21-03 for a two story replacement of the existing garage, coming no more than one foot ten inches from the northern boundary line.

1. *Granting the Variance would not be contrary to the public interest.*

Not met 1-4. Ms. Zerba was in favor.

2. *If the Variance were granted, the spirit of the Ordinance would be observed.*

Met 4-1. Ms. Zerba was opposed.

3. *Granting the Variance would do substantial justice.*

Met 3-2. Mr. Hoppock and Ms. Zerba were opposed.

4. *If the Variance were granted, the values of the surrounding properties would not be diminished.*

Met 3-2. Mr. Hoppock and Ms. Zerba were opposed.

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 purposes of the Ordinance provision and the specific application of that provision to the property because:*

*and*

- ii. *The proposed use is a reasonable one.*

Met 3-2. Mr. Hoppock and Ms. Zerba were opposed.

- 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 is therefore necessary to enable a reasonable use of it.*

Not met 0-5.

The motion to approve ZBA 21-03 was denied with a vote of 0-5.

Mr. Hoppock made a motion to for the Zoning Board of Adjustment to deny ZBA 21-03. Chair Gorman seconded the motion, which passed by with a vote of 5-0.

**C) ZBA 21-02:/ Petitioner, DLC Spofford, LLC of Spofford, NH, represented by Tim Sampson, of Sampson Architects of 103 Roxbury St., Keene, requests a Variance for property located at 800 Park Ave., Tax Map #227-002-000; that is in the Commerce District. The Petitioner requests a Variance to allow construction of a covered outdoor seating area within 15 feet of the property line where a 25 foot setback is required per Section 102-791 of the Zoning Ordinance.**

Chair Gorman asked Mr. Rogers to give relevant information for this application.

Mr. Rogers stated that this is on Park Ave. and there are two buildings on the property. He continued that the building they are referencing tonight is the smaller one, currently being operated as Cowlicks Ice Cream which does have some outdoor seating on the back deck. The Applicant is seeking to create a covered space in the front of the building which, since this is a corner lot, into the side setback. In the Commerce District the rear, side, and front setbacks are all 20 feet. The application is asking to be within 15 feet as opposed to the 20 feet.

Mr. Welsh asked Mr. Rogers if the applicant were seeking to expand the patio and put a deck out there and not have a covered structure, would the Board be reviewing this application. Mr. Rogers replied that if it was simply a patio, most likely not. If it was a structure being built, yes that would be required to meet the setback, if it was a deck of any sort. He thinks they are proposing to put construct a stone patio with a cover over that. Mr. Welsh asked for clarification that if it were a stone patio with tables with umbrellas, the Board probably would not be hearing this. Mr. Rogers replied yes, that is correct.

Ms. Taylor stated that for the record she wanted to mention that she is back as a voting member. She questioned Mr. Rogers that there is a steep drop off behind this particular building, but if there were to be a patio built in either direction to the side, as opposed to the front elevation of the building, if that would run into any setback issues. Mr. Rogers replied that there would not be any setback issues, continuing, that he would let the applicant speak to this. He knows that one side has a handicapped accessible ramp that was built a few years ago, and some parking. He continued that he does not know what the property looks like, according to this plan. Ms. Taylor replied that her question was specifically for Mr. Rogers, and her question was whether or not there were any other setback issues if there were to be any expansion on either side of the structure. Mr. Rogers replied no, not that he is currently aware of. He continued that he believes this building meets the other setbacks.

Mr. Gaudio asked if the steps and all of the front of the building now come out within the setback, or if this will extend out beyond where those steps are. Mr. Rogers replied that his understanding is that this will extend out beyond the steps. It is a very basic set of stairs on the front of the building.



Chair Gorman asked if there were any more questions for Mr. Rogers. Hearing none, he stated that he will open the public hearing, and explained the procedures for participation. He asked to hear from Tim Sampson, representing the Petitioner.

Mr. Sampson stated that he recently received clarification from his client that this space is deep enough to allow some seating. He continued that what is also driving this request with the 10 foot depth, is to allow expanded use because there is very little seating inside, and also minimal seating in the back. It is also a way to connect the two parking areas together and connect to the stairs and the ramp. Right now there is parking on both sides of the building. Mr. Sampson stated that what really is driving this proposed change is to allow customers from the parking lot on the side furthest from the entrance in out of the rain to potentially do some take-out from that front window, as well as closer to the entry which is towards the back corner of the building. It is a fairly simple project. As someone mentioned, if it was just a patio, he is 99% sure he and his client would not have submitted an application, but the intent is to have some covered area out front and allowing what is the majority of the parking for this use, which is on the right hand side of the drawing, in to get people out of the weather and over to the entry for the building. The front door is not the main entry to the building at this point. When Kristen's owned it years ago, they did some renovations. Regarding those two front rooms that you would normally see in a Cape style building like this, one has very limited seating and the other is the kitchen area. There is also some kitchen area downstairs. There is about 200 square feet inside for the public. The main entry they are trying to get people to, is in the far back corner.

Mr. Sampson continued that someone had asked if there was a chance to expand either left or right. Again, if the intent was purely seating expansion, there could probably expand between the stairs and where that ramp comes out between the American Disabilities Act (ADA) parking area, but the intent is more than just seating. It is a way to connect the majority of the parking to the main entry for the building.

Ms. Taylor stated that she has several questions, and might be even more confused by Mr. Sampson's explanation. She continued that she understands that there is no indoor seating at the moment because of the COVID restrictions, but still questions what is the indoor capacity. She is also confused by the entrance, because she did not think that that front entrance had been used.

Mr. Sampson replied that this is potentially going to be a new client, new tenants of the space, so he cannot totally speak to what the intention is for indoor seating. He continued that he knows that the last plan that he himself did for this building was back when Kristen's moved in and did the majority of the renovations. He himself has not been inside since it has been the ice cream shop. He showed the ability to seat eight people inside with two tables of four people, and seating space outside for about 12 people on the back porch.

Ms. Taylor asked if that was when it was Kristen's Bakery. Mr. Sampson replied yes, when it was Kristen's, continuing that he has not had access to the building since then. He thinks he has been there once since it was Cowlick's.

Ms. Taylor asked when Mr. Sampson says that it is a vacant building, the indistinctness of the application is what she is trying to get more specificity on. Mr. Sampson replied that this

application is for a new tenant; it is not for Cowlick's. Ms. Taylor asked if he is saying that it does not have a tenant in it currently. Mr. Sampson replied that he does not know if Cowlick's still has a current lease for the space, but this application will be for a new use, similar to the ice cream store. He believes it will be a sandwich or pizza shop, although he does not have total clarity on that.

Ms. Taylor stated that she was the one who asked if it could be built on either side, and until she saw this particular application, she did not realize that it was necessarily part of a larger parcel. She asked if it is correct, that it is a part of a larger parcel. Mr. Sampson replied that to his knowledge it is all one parcel. Ms. Taylor replied that what is shown on the screen right now is 800 and 830 and asked if that is all one parcel. Mr. Sampson replied yes, and he had some confusion about that originally as well, because he thought the address for this building was 830, and he was told by the City that it is all part of the 800 address.

Ms. Taylor stated that what her questions are essentially getting at is, in trying to establish hardship, they need to try and understand what the special conditions are of the property and why this particular use or expansion cannot be accommodated within the confines of the Zoning Ordinance. She continued that she understands that behind the building there is quite a steep drop-off. She understands that might not be a reasonable place to put a walkway or a patio. That was the basis for her question of why whatever they wanted with some reconfiguring of parking could not be accommodated on one side or the other of the building.

Mr. Sampson stated that he does not believe that the property owner is looking to reconfigure parking. He continued that he thinks this is a simple solution as they are not looking to add impervious surface and add to any drainage issues or runoff anywhere. There is sufficient parking for what will be the proposed new use, essentially the same as what is there now. They're looking for a simple solution to connect to one parking area that is a fair distance from the main entry to the building while providing potential customers with an easy, sheltered way to get from that parking and perhaps have double use with a little bit of exterior seating. He does not feel as though they can accomplish that by going out back on that deck or porch area which will begin to interfere with some of the seating. He thinks this is a fairly simple, straightforward solution that is also in keeping with some of the commercial spaces out there. There are other covered entries on some of the adjacent buildings on that same piece of property, and he thinks this ties into that.

Mr. Gaudio asked if there is a fairly extensive parking area off to the right as he notes that at least in the summer months, there is usually a food truck there and the map shows this all on the same property, couldn't a covered seating area be put on the right with a covered front while still within the 20 foot setback. He also asked that if the steps are not in violation, couldn't that be brought across the front and have the covered area with the seating area off to the right of the building. Mr. Sampson replied that again, it is more than just the seating area. It is a way to get people from that parking area to the existing parking for this building. He continued that he does not know how any of the parking is allotted, to which specific buildings. He does not know if it is deeded or part of leased space. He assumes that the parking area for this building, around this building, is specifically for this. What they seek is a simple solution that is consistent with other buildings that have covered walkways.

Mr. Gaudio asked if there is an unofficial subdivision of the land. Mr. Sampson replied that he cannot speak to how the leases are written. He continued that he assumes that there is parking allotted to specific buildings and specific businesses that are there. He believes that when he worked on this years ago, this is how the parking got laid out for this, because they could not steal any of the other parking behind the building for this one. He does not know if there is any unofficial subdivision or not. He was under the impression that they had different addresses, as they seem to be noted on that plan as separate addresses. But when he submitted the application, the City corrected his paperwork to say 800 versus 830 Park Ave.

Ms. Taylor stated that she believes there is a sidewalk on that section of the public street on Park Ave. She asked if that is Mr. Sampson's understanding. Mr. Sampson replied that he does not know if that sidewalk continues down in front of this building or not. Ms. Taylor asked if that is in fact a sidewalk, how close the intended addition is expected to come to that sidewalk. And asked if Mr. Rogers has a better understanding of this information.

Mr. Rogers stated that it does appear there is a public sidewalk on that side of the street and there also is a sidewalk that crosses over in front of the building from one parking lot to the other which crosses right in front of the two steps leading to the door. The front door leads into the kitchen area and a stairway to the second floor. He assumes that the property line that Mr. Sampson has on his site plan is from the end of that sidewalk.

Chair Gorman asked if anyone had more questions for Mr. Sampson. Hearing none, he asked for public input. He stated that he does not see anyone wishing to speak. He asked staff if there were any callers. Ms. Marcou replied no.

Ms. Taylor asked Mr. Sampson to tell the Board in a phrase or two specifically what he views as the hardship that is involved in this application for this proposed use. Mr. Sampson replied that the hardship is that in the area where the ADA ramp is and there is some parking, they are unable to expand in that direction. There is a curb cut there that lets into the larger parking areas for the other buildings. He knows it looks like there is a lot of space around this building on the plan, but it is significantly tighter than it looks based on where all the existing paving is, even based on that steep slope in the back of the property. The applicant is not looking for a dedicated seating area, they are really seeking is that connection from the parking lot to the main entry to the building. There are two ways around the building; one, they would have to build a very steep slope and the other, they would have level grade that is already paved, thus, there is a much simpler solution without having to jump through hoops building on steep slopes and grades. There are those two options – one is very difficult and the other is very straight forward and limits the amount of extra impervious surface.

Chair Gorman closed the public hearing. He stated that the Board will deliberate and stated that he will reopen the public hearing if necessary to ask procedural or technical questions.

The Board deliberated on the criteria.

1. *Granting the Variance would not be contrary to the public interest.*

Mr. Gaudio stated that he does not see that it would be contrary to the public interest in this case. He continued that it is not going to negatively affect other properties or other people. He does not think that being a little closer to the street is going to have a negative effect.

Chair Gorman stated that he would be inclined to agree. Mr. Hoppock stated that he would be inclined to agree, too, but he missed how close the setback will come to the sidewalk.

Chair Gorman reopened the public hearing to let Mr. Rogers answer this question. Mr. Rogers stated that looking at the map here and Mr. Sampson's site plan with the sidewalk right there, he would make an assumption that the edge of the sidewalk is the property line. He would get clarity from the Board, if the Board were to approve this, on how close they can come to the property line, because this application also states "within 15 feet." If they are looking to be 15 feet from the property line they would be 15 feet from the sidewalk.

Chair Gorman thanked Mr. Rogers and closed the public hearing again.

*2. If the Variance were granted, the spirit of the Ordinance would be observed.*

Mr. Hoppock stated that he does not think there is going to be any alteration to the essential character of the neighborhood if this Variance were granted. He continued that given what he heard Mr. Rogers say about the distance between the end of the porch and the beginning of the sidewalk, roughly 15 feet, he will take that as what it is going to be, and if he makes a motion he will state 15 feet. He does not see any threat to public health, safety, or welfare in connection with that distance.

Ms. Taylor stated that she generally agrees with Mr. Hoppock. She continued that her only concern here is that even though this is definitely a commercial area, it is possible that the laundromat that is down the street is that close to the setback, but generally most of the properties in this area have buildings that meet the setback requirements, although the parking may not.

*3. Granting the Variance would do substantial justice.*

Mr. Hoppock stated that he guesses from the layout, the plan, and what he has heard, he does not see any loss to the general public from denying this, but he does see a loss to the individual if they deny this. He continued that he is unsure of his stand on this criteria, but he is leaning toward being in favor of there being substantial justice by granting this.

Chair Gorman stated that he is inclined to agree. He continued that he does not see much negative or adverse impact to surrounding properties, and he does see some gain to the owners who are trying to do business at the property.

Mr. Gaudio stated that he thinks in this particular case it is actually the same as the first criterion, it is not contrary to the public interest, but is in the public interest.

4. *If the Variance were granted, the values of the surrounding properties would not be diminished.*

Chair Gorman stated that he does not believe that granting the Variance would diminish surrounding properties. He continued that he thinks this will fit in with the appearance and generally what is going on around the property.

Mr. Hoppock stated that he understands the argument that would suggest that if a business were able to accommodate people, there would be potentially more business attracted to other surrounding businesses. He does not see anything that would diminish property values, and there is an argument that it could increase them. Chair Gorman replied that that is a great point he had not thought of.

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 purposes of the Ordinance provision and the specific application of that provision to the property because:*

*and*

- ii. *The proposed use is a reasonable one.*

- 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 is therefore necessary to enable a reasonable use of it.*

Ms. Taylor stated that this criteria is the one she is struggling with. She continued that she really has not found where there is a hardship. There might be a hardship in the rear of the building because of the drop off, but especially on a corner that already has traffic issues, she does not see why this is the only location on that property where the owner wants to do the addition that they have proposed.

Mr. Welsh stated that he thought the applicant did a pretty good job fielding Ms. Taylor's question about this. He continued that it conjured the peculiarities of the property and the utility of being able to bring people from the parking lot to the west, more directly into the facility. He finds that this was demonstrated.

Mr. Hoppock stated that he is inclined to agree with Mr. Welsh on that point. He continued that he would add, based on what he said in regards to the prior application in terms of the general purpose of the setbacks is to give space between neighbors to allow light and air and to allow safety in terms of fire and containing contagion and whatnot. Here, they do not have the problem they had in the last case, so there is no fair and substantial relationship to that overall general purpose and its application to this property. He thinks the special conditions of the property, mainly the issues that Mr. Welsh raised, enhance that lack of relationship.

Mr. Hoppock made a motion for Zoning Board of Adjustment to approve ZBA 21-02, with the structure to be built no more than 15 feet from the sidewalk.

Chair Gorman asked if they are referring to the sidewalk as the property line. Mr. Hoppock replied yes, that was his understanding, the Park Ave. sidewalk.

Mr. Welsh seconded the motion.

Chair Gorman stated that they have a motion to approve ZBA 21-02 with the condition of the structure for the outdoor seating area not encroaching within 15 feet of the property line and/or the sidewalk.

1. *Granting the Variance would not be contrary to the public interest.*

Met 5-0.

2. *If the Variance were granted, the spirit of the Ordinance would be observed.*

Met 5-0.

3. *Granting the Variance would do substantial justice.*

Met 5-0.

4. *If the Variance were granted, the values of the surrounding properties would not be diminished.*

Met 5-0.

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 purposes of the Ordinance provision and the specific application of that provision to the property because:*

*and*

- ii. *The proposed use is a reasonable one.*

Met 4-1. Ms. Taylor was opposed.

- 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 is therefore necessary to enable a reasonable use of it.*

Not met 0-5.

The motion to approve ZBA 21-02 passed with a vote of 4-1. Ms. Taylor was opposed.

**V. New Business**

Mr. Rogers stated that staff does not have any new business.

Mr. Hoppock asked if Mr. Rogers has any update on any appeals that may be pending in court. Mr. Rogers replied that there was an appeal filed for the Water St. property. He continued that he is not sure the status though he knows the City Attorney is preparing information for the appeal.

Mr. Hoppock asked if there was any Motion to Rehear in connection with the Kings Court petition. Mr. Rogers replied that staff has not seen anything on that one.

**VI. Communications and Miscellaneous**

**VII. Non-Public Session (if required)**

**VIII. Adjournment**

There being no further business, Chair Gorman adjourned the meeting at 9:40 PM.

Respectfully submitted by,  
Britta Reida, Minute Taker

Edits submitted by,  
Corinne Marcou, Zoning Clerk