City of Keene
New Hampshire

ZONING BOARD OF ADJUSTMENT
MEETING MINUTES

Monday, May 2, 2022 **6:30 PM** **Council Chambers, City Hall**

Members Present:
Joshua Gorman, Chair
Joseph Hoppock, Vice Chair
Jane Taylor
Michael Welsh
Richard Clough

Staff Present:
John Rogers, Zoning Administrator
Corinne Marcou, Zoning Clerk
Michael Hagan, Plans Examiner

Members Not Present:
All Present

I) Introduction of Board Members

Chair Gorman called the meeting to order at 6:30 PM and explained the procedures of the meeting. Roll call was conducted.

II) Minutes of the Previous Meeting: April 4, 2022

Ms. Taylor stated that she has a correction to line 95: the minutes state "especially if it can be done in accordance with the latest Zoning requirements is possible," and she thinks it should read either "as is possible" or "which is possible." She continued that there seems to be a dropped word.

Mr. Welsh made a motion to approve the meeting minutes as amended. Mr. Hoppock seconded the motion, which passed by unanimous vote.

III) Unfinished Business

Chair Gorman asked staff if there was any unfinished business. John Rogers, Zoning Administrator, replied no.

IV) Hearings

A) ZBA 22-06: Petitioners, John B. & Judith A. Hulslander Living Trust, represented by James Phippard, of Brickstone Land Use Consultants, LLC,

requests a Variance for property located at 0 Belmont Ave, Tax Map #598-030-000-000-000 that is in the Low Density District. The Petitioners requests a Variance to permit a building lot containing 5,625 square feet with 50 feet of frontage, and 50 feet width at the building line in the Low Density District where 10,000 square feet lot size, 60 feet of frontage, and 70 feet width at the building line is required, per Chapter 100, Article 3.3.2 of the Zoning Regulations.

Chair Gorman asked to hear from staff.

Mr. Rogers began by reminding the Board the need to determine whether there is a material change for this application to proceed. He continued that the Applicant is applying for the same Variance this property applied for in 1988, which was denied. There is an allowance for the Board to hear this petition if a material change has occurred. Staff has asked the Applicant to present their case as to what the material change in this situation would be.

Ms. Taylor stated that the Board does not have a copy of the prior applications. She asked if Mr. Rogers could fill them in, asking if the Variance was solely limited to the lot size.

Mr. Rogers replied that the Variance request in 1988 was to build a single-family dwelling on the lot that had the same square footage that it does today, 5,625 square feet. At that time, the square footage requirement was 15,000 square feet and today it is 10,000 square feet. They also were only going to have 50 feet at the building line where 80 feet was required at the time; today it is 70 feet. Reviewing the current application, it states 50 feet of frontage, which is the same as in 1988. The two petitions are identical with the only difference is that in 1988 the requirement was 15,000 square feet and today it is 10,000 square feet in the Low Density District.

Chair Gorman asked if anyone had further questions for staff. Hearing none, he asked to hear from the Applicant.

Jim Phippard of Brickstone Land Use Consultants stated that he is here on behalf of the John and Judith Hulslander Living Trust. He continued that Mr. Rogers described what the material change was, the change in the zoning dimensional requirements that occurred, he thinks, in 1986. They applied for a Variance in 1988, which was denied, where 15,000 square feet was required and this lot is only 5,625 square feet. The material change, which he believes is significant enough to justify hearing another Variance application, is the change in the dimensional requirement to 10,000 square feet.

Mr. Phippard continued that the Board should be aware of this lot's history. This lot was created in 1924, as part of an approved subdivision, which he has a copy of from the Cheshire Count Registry of Deeds. Back in the day, when they subdivided properties, they would do slivers of land, 25 feet wide and varying in length. In the area where Belmont Ave. was constructed, they did 112 of these lots, 25 feet wide. People would buy between two to five lots, combine them, and build a house. That is how the neighborhood was developed. Belmont Ave. was developed

as a City street. The subdivision, at that time, called for other streets – Neil St., Amherst St., and Princeton St., which were never constructed. They became lots in private ownership, City-owned properties for possible future right-of-ways or utility corridors. In 1959, the Hulslanders purchased two of the lots on Belmont Ave., which he pointed out were are outlined in red/pink on the presented plans. They are lots 32 and 33 in the original subdivision. At that time, this property was zoned "Single Family District" and the minimum lot size was 4,000 square feet. By buying two parcels, the Hulslanders exceeded the minimum lot size and had a legal building lot. In the 1970's there was another major zone change, changing the minimum lot size to 10,000 square feet and changed the name of the Single Family District to the Low Density District. Thus, Low Density required a minimum of 10,000 square feet and the Hulslanders have 5,625 square feet. They applied for and received a Variance in 1980 to build a house on the property. When 10,000 square feet was the minimum lot size, the Board made determinations that the Hulslanders met all the criteria and were entitled to a Variance, but it was noted that the property owners did not take advantage of the Variance. Then in the 1980's, the change went to 15,000 square feet, which became such an extreme difference that the Board was not comfortable, and denied a new Variance application. Going back to the 10,000 square feet is a significant, material change that justifies rehearing the Variance application.

Mr. Hoppock asked Mr. Phippard to repeat the dates of the two Variances, the one that was granted and the one that was denied. He also asked for an explanation to the Variance that was granted. Mr. Phippard replied that the one that was granted, in 1980 expired prior to the owners acting on the property, further explaining that at the time, approvals were valid for 6 months. At the end of 6 months, the Hulslanders applied for and were granted an extension. That Variance was thus valid for one year. At that time, the Hulslanders could not afford to build a house, so the Variance lapsed. It was not until 1988 that they decided to try again, and at that time, the regulations were "going in the wrong direction," depending on your perspective. People thought Keene was growing too fast, and proposed changes to the regulations to slow it down. One of the ways to do that was to create larger lots.

Mr. Hoppock asked if that was when the 15,000 square foot minimum came into effect. Mr. Phippard replied yes, and he believes it was 1986. He continued that the Hulslanders applied to the Board in 1988 and were denied. He reviewed the records, and minutes of the meeting, stating the denial was mostly because the Board at the time thought that lot size was so extreme. He stated that the Board was requiring larger lots, where now they are not with the pendulum has swung the other way. Now, they are running out of building lots and buildable land, and recognizing that we need to make lots available at a reasonable price so people can afford to stay in the community. We can have workers in the community. Young people, our children, can afford to buy or build a home and stay in the community. The City Council and the City of Keene are increasingly pressured to find ways to make that happen. In his office, he is seeing more and more applications for in-fill development, lots that were left over in subdivisions for whatever reason. Now he is seeing those people come forward, wanting to know if now is the right time to build on these properties. He is seeing more marginal land areas, like steep slopes and areas with wetlands, get proposals for development. The community is trying to respond.

The Hulslander family felt that this is the time for them to come back to their lot, which they have held onto since 1959, paying taxes all those years on the property that was too small to put in current use.

Mr. Phippard asked if he could now proceed with the Variance criteria. Chair Gorman replied that the Board needs to deliberate first, and vote on whether it is actually a material change.

Ms. Taylor asked if it makes a difference to Mr. Phippard whether the particular lot they are looking at today or whether the Zoning provision required 6,000, 7,000, or more square feet. Mr. Phippard replied that it could make a dramatic difference, depending on the property. Ms. Taylor replied that she is only talking about this property. She asked if he would still need to come in to request a Variance. Mr. Phippard replied yes, unless it dropped below 5,625 square feet, they would need a Variance.

Mr. Welsh asked for clarification/confirmation that both Variances, the one that was denied and the one that was approved, were heard before a Zoning Board like this one. Mr. Phippard replied the Keene Zoning Board of Adjustment heard them.

Mr. Hoppock asked what makes this change, from 10,000 square feet to 15,000 square feet, material. He is having a hard time understanding that. He asked if there are any cases on this, because he did not have time to research. Mr. Phippard replied that in reading the minutes of the 1988 meeting, and the testimony that was heard, he sees that when 15,000 square feet was the minimum lot size, that was the direction of the City, with larger building lots. The Zoning Board in 1988 felt that at 5,625 square feet, it was roughly a third of the minimum lot size, and that was too extreme. Now with a required minimum of 10,000 square feet, the Hulslanders are at a little over half of the required minimum lot size. Looking closer at this, you can see that depending on the lot and the lot constraints, it can make a huge difference based on the size of the property. Mr. Phippard questioned if it is adequate to build a single-family house and meet the other dimensional requirements in the zone with a lot size of 0,000 square feet, with setbacks of 10 feet on the sides, 20 feet in the rear, and 15 feet in the front. He continued that it is possible to build a conventional, single-family home, by today's standards, on that property, and still meet the dimensional requirements of setbacks and lot coverage. In his mind, that is of major significance and would make this lot eligible to be built on, because it meets all of the criteria other than lot size. A homeowner living on this lot would just have a smaller lawn to mow.

Chair Gorman stated that he thought they were saying it needed 60 feet of frontage and has 50 feet. Mr. Phippard replied yes, that is the second part of the zone dimensional requirements this lot does not conform too. There is 70 feet width at the building line, 60 feet of lot frontage, and then the 10,000 square foot lot size. Chair Gorman asked if it meets the setback requirements. Mr. Phippard replied that it could still meet all the setback requirements. Chair Gorman asked if that has changed. He asked if it still would have met the setback requirements under the old zoning requirements of 15,000 square feet. Mr. Phippard replied that he did not look at that, but he has that information in his office, because he kept all the old regulations over the years. He

asked if Mr. Rogers knows. Mr. Rogers replied no, he does not have that information readily available.

Chair Gorman asked if there were any other points Mr. Phippard wanted to make before the Board deliberates. Mr. Phippard replied no. Chair Gorman asked if anyone had further questions for Mr. Phippard. Hearing none, Chair Gorman stated that the Board needs to determine whether they deem this a substantial change that actually does impact the initial decision.

Ms. Taylor stated that she does not see a material change. She continued that the standard set in Fisher v. Dover was that in order to be considered, the successive Variance proposal has to *"demonstrate (1) a material change in the proposed use of the land, or (2) material changes in the circumstances affecting the merits of the application."* There does not appear to be a material change in the use of the land. The question before the Board is whether the change in the Zoning Ordinance for the amount of land that will support a single-family dwelling affects the merits of the application. Her opinion is that it does not, because whether it is 15,000 square feet, 10,000 square feet, or 6,000 square feet, you still have the same circumstances affecting the underlying merits of the application.

Mr. Welsh stated that not having been presented with any of the other factors that may be weighing in, such as setbacks, and frontages, he looks at the behavior of the two prior Board's that have considered this. He continued that the denial by the second Board, under circumstances when 15,000 square feet was the minimum lot size, is different from the approval of the Board prior to that when it was 10,000 square feet. He assumes that this is enough of a material change to warrant denial by one, as opposed to approval by a prior. The requirement moving back to 10,000 square feet, therefore, to him seems like material change of the same sort, although in the opposite direction. He is inclined to see this as a material change, of the second kind that Ms. Taylor mentioned.

Chair Gorman stated that with the history of this property, and now the return to a 10,000 square foot minimum, so he thinks there is a good case for considering this application. He continued that they still have to treat it as a Variance and walk through all the criteria.

Mr. Hoppock stated that he tends to agree with Ms. Taylor on the point of materiality, for the reasons she stated. He continued that he sees Chair Gorman's point, too, but just does not think that one change is sufficient and material. Chair Gorman replied that he could see that point as well. Mr. Clough stated that he could see both points, too.

Mr. Hoppock made a motion for the Zoning Board of Adjustment to find that there is a material change in circumstances. Chair Gorman seconded the motion, which passed with a vote of 3 to 2. Mr. Hoppock and Ms. Taylor were opposed.

Chair Gorman stated that the Board will consider the application, and asked to hear from Mr. Phippard.

Mr. Phippard stated that because of the zone changes that occurred over the years, most of this existing neighborhood on Belmont Ave. and Colby St. have become non-conforming. The subdivision was created in 1924. Most of the lots were purchased and homes were built throughout the 1930's through 1960's. The neighborhood was well built. Today, this is the last remaining vacant lot on Belmont Ave. Looking at the dimensions and square footage for each of these properties today, it will be obvious that 68 of the properties along Belmont Ave. and Colby St. vary in lot size from 0.129 acres to 0.63 acres. Forty-eight of those 68 lots are non-conforming due to lot size and are smaller than the size required, even when the requirement is at 10,000 square feet. He thinks there was only one conforming lot when it was at 15,000 square feet. This is the character of the neighborhood and it is well established. That is important to understand.

Mr. Phippard went through the criteria.

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

Mr. Phippard stated that the public interest today, in the City of Keene in general, not just of the neighbors who do not want to see this lot developed, is to make building lots available to members of the community. He continued that Keene needs housing and affordable lots, and obviously, a small lot is more affordable than a 5-acre lot would be in Keene. That will enable people to build more housing and allow people and their children to stay in Keene, and allow workforce housing to be created. This neighborhood is close to Markem Co. and the Industrial Park area off Optical Ave. This neighborhood was created as workforce housing. It is in the public interest to allow a vacant lot in this neighborhood to be developed, provided that it can meet all the other criteria. The Applicant proposes building a single-family home on this lot, which is just under 0.13 acres. Belmont Ave. has three other developed lots of the same size, which were built, he believes in the 1950s and 1960s, as legal lots at that time and became non-conforming as the Zoning Ordinance changed. Many lots of this size exist in the neighborhood and to his knowledge, have created no problems being developed at that lot size.

Mr. Phippard continued that that he was alluding to earlier, in answering Ms. Taylor's question about whether the size of the lot makes a difference, that it can make a difference. If there is a steep slope, wetland area on the property, ledge outcrops, etc., that can make a big difference on the viability of building on the lot. This lot does not have any of those constraints. It is flat, level, and has sandy soil. City water and sewer exist on Belmont Ave. and would be adequate to support another house constructed here.

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

Mr. Phippard stated that the Land Development Code says the intent of the Low Density District is *"to allow single-family homes, low intensity development, on lots with City water and City sewer."* He continued that is exactly what this property is; a lot that could support a single-

family house on City water and City sewer, and can meet the setback and lot coverage requirements. He thinks this lot clearly meets the spirit of the Ordinance as a low-density lot.

3. Granting the Variance would do substantial justice.

Mr. Phippard stated that when the lots were created, and when the Hulslander family purchased them in 1959, they were legal building lots. He continued that it became a non-conforming lot due to changes in the Zoning regulations, so through no fault of their own, the Hulslanders' legal building lot became non-conforming. That is why in 1980 they had to apply for a Variance to build a house. Unfortunately, they were not able to act on that Variance and it expired. They reapplied, but the regulations had changed, and their Variance request was denied. Now that the City is back to a 10,000 square foot minimum, it is the same situation where the Variance was granted in 1980. It would do substantial justice to allow the Hulslanders to construct a single-family home on this lot.

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

Mr. Phippard stated that the existing neighborhood is all built out with three other lots exactly the same size, with single-family homes, and this lot can be developed with no significant effect on property values in the area. He continued that an abutter expressed concern that if this became a rental unit with an inattentive landlord, it could create a situation where property values could be negatively affected, if people living there are not taking care of the property. That is not the intent. Mr. Hulslander wants to give this lot to his daughter, Wendy, and she wants to build a single-family home, which will be for sale. She will not construct a rental unit in this location.

Mr. Phippard continued that in 1990, Powers Appraisal was asked to look at the impact of putting a single-family house on this property, which they did, providing a letter at that time. He did not turn it in as part of this application, because he did not think he would need it. He knows the Board does not like to get information last minute, but he wants the Board to have it for the record.

Ms. Taylor stated that under the Board's revised rules, they need to vote on whether to accept that letter. She continued that the letter is 30 years old.

Mr. Phippard stated that he would ask the Board to consider that there have been no changes in the neighborhood, other than the dimensional requirements, because it is a full, built out neighborhood. There have been no other homes built, and he thinks that the conditions that Mr. Powers reviewed are still in place today.

Chair Gorman stated that his inclination would be not to accept the letter. He continued that they are hearing this Variance request because there has been a change in circumstances, and now they are being asked to accept documentation of old circumstances, which they are also being

asked to overlook as irrelevant. His inclination is to not put it on the record. He does not think they can process it properly, either.

Mr. Hoppock asked if Mr. Phippard could tell them what the letter says. He continued that he would like to see the letter, if Mr. Phippard thinks it is important enough to show them. He may not give it any weight, but would like a summary of the letter.

Mr. Phippard stated that Richard Powers wrote the letter, as the owner of Powers Appraisal, who has since retired. The conclusion of his letter, in large, bold print, says, *"The placement of a modest home on the Hulslander property does not change the density or character of the neighborhood, and does not cause a diminution of value to the neighborhood as a whole."*

Ms. Taylor stated that she agrees with Chair Gorman and is inclined not to accept it, primarily because it is 30 years out of date. She continued that she has dealt with a number of assessors, and not many would be willing to approve of what they said 30 years ago without further investigation.

Chair Gorman stated that also, given that Mr. Phippard has himself voiced how much things have changed since 1990, there are too many variables to accept something 32 years old.

Mr. Welsh stated that it looks like a long letter, and he is inclined to go with the Board. He continued that he thinks they can deliberate and make a decision in the absence of the letter.

Chair Gorman asked for a vote on whether to admit the letter. The Board members unanimously opposed.

Mr. Phippard thanked the Board for considering the letter, and stated that regarding property values, he wants to show an example. He presented a prepared sketch, and stated that it shows a lot 50 x 112.5 feet, labeled on the plan, and drawn to scale. He continued that it is a single-family home, 24.5 feet wide and 50 feet long. He showed the setback lines as 10 feet on the side, 15 feet in the front, and 20 feet in the rear, clarifying that it fits easily within the setback lines. A driveway leads to what would be a single-car garage, directly in from Belmont Ave. He continued that the total lot coverage calculations is a little over 33% and the Low Density District allows 55%. Mr. Phippard stated that this single-family house on a property lot meets the front and rear setbacks, with room for landscaping around the building, room for a driveway and safe access in and out. This is a flat, level lot, with good, sandy soils, with the ability to connect to City water and sewer. He thinks a new home would not negatively affect property values in the area.

Mr. Phippard continued that an abutter interestingly wrote in their letter that if this were a new home offered for sale, given the current sale prices, it may raise property values in the area, affecting neighborhood property taxes. Thus, it is the opposite of a diminution in value. He hopes abutters' property taxes do not go up because of this, but he thinks it would be an improvement

to the property value on this lot, and thinks it will have no negative effect on property values in the neighborhood. Again, eight lots away on Belmont Ave. are three other lots exactly the same size. He does not believe they have had a negative effect on the 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:

Mr. Phippard stated that clearly, a special condition was created on this property when the zone requirements changed. He continued that the City does not single out properties to do this to; this happens all the time as changes occur in zoning. In this particular neighborhood, this is the last undeveloped lot, that makes it unique in the neighborhood. Then the City changed the zoning regulations, which makes it impossible to do any building on this lot without a Variance.

and
ii. The proposed use is a reasonable one because:

Mr. Phippard stated that the Board saw that a single-family home does fit, does meet the setbacks, does meet the lot coverage requirements, and can be an asset on Belmont Ave. rather than just a vacant lot. He continued that he is happy to answer questions.

Chair Gorman stated that regarding the site proposal with the structure and setbacks, it is his understanding, and maybe it changed in the new Zoning Code, that parking needs to be behind the front line of a house. He asked Mr. Rogers if that is no longer in effect. Mr. Rogers replied that there are two options, and one is that it would have to be behind the front setback. He continued that many older homes sit within that front setback; that is where that front building line parking requirement comes into play.

Mr. Welsh stated that the Board received, via email this afternoon, letters from neighbors on this case. He asked if the same situation applies to admitting those letters as part of the record, as the letter Mr. Phippard requested go in the record. Chair Gorman replied that the Applicant has a deadline for submittal, but people contesting or supporting the application do not. Mr. Rogers replied that is correct. He continued that many times letters come from people who are not able to attend the meeting, and historically they have accepted the letters of support or opposition.

Mr. Phippard stated that he has a clarification to add in relation to the parking for this lot. Mr. Rogers mentioned that parking requirement is behind the front setback; Mr. Phippard referenced the single-family home drawing, stating that there is adequate room on the property and in the garage to park well, which is behind the front setback line.

Ms. Taylor asked how many bedrooms the 24.5' by 50' proposed dwelling unit has. Mr. Phippard replied that the actual house is in design, but continued that if it were a single story ranch, it would probably be a two-bedroom. If it were a two-story or a Cape-style, which it could be, there would be space for three bedrooms. Ms. Taylor stated that you would need two parking spaces, one of which could be in the garage. She asked how long the driveway is. Mr. Phippard replied that the drawing is to scale. Mr. Rogers replied that Ms. Taylor is correct that a dwelling unit would require two parking spaces, depending, and he would stress that at this point, this is just a proposed drawing. He continued that if this Variance were approved, and a building permit were submitted, it could be something completely different. He wants it to be clear that behind the front setback you would need 18 feet in order for it to be considered a parking space. Alternatively, there could be a two-car garage built underneath the structure. Mr. Phippard stated that the front of the building, or the entrance to the garage, is about 27 feet behind the front setback line, thus, there is more than adequate parking. There is also room to widen the driveway providing space for two cars side by side.

Chair Gorman asked to hear from the public, beginning with anyone in support of this.

William Hope of 43 Belmont Ave. stated that he lives across from said lot, and he does not see any problem with John Hulslander building a house here.

Chair Gorman asked if anyone wanted to speak in opposition to this proposal. Hearing none, he stated that he would read the letters into the minutes. He continued that three have very similar content. Mr. Rogers replied yes, all three have the same bullet points.

Chair Gorman read:

"To: Members of the Zoning Board
Re: ABA 22-06

We went through this years ago; the lot size has not changed since then and is still too small for zoning requirements. Why are we doing this again??

Sincerely,

Dennis W. Lackenal
29 Belmont Ave.
Keene, NH 03431

4/29/22"

"Chair of the Zoning Department
City of Keene
3 Washington St.

Keene, NH 03431

4/29/22

Re: ABA 22-06

To: Members of the Zoning Board

I am writing in agreement with other abutters to O Belmont Ave. to share my concerns regarding the request for a variance by John B. and Judith A. Hulslander Living Trust to build a home on this lot. My objections to the request to build a house on this property are as follows:

• The size of the lot does not conform to the current zoning requirements.
• Construction of a house will cause long term disruption to the existing neighborhood.
• Plans for the building do not indicate number of floors.
• This house might be built for immediate resale of the property, thus raising the value and having an impact on neighboring tax levels, or it could be used for rental purposes lowering the value of neighboring homes.
• Those who live opposite and adjacent to this property want to keep this space open to avoid overcrowding and retain the aesthetic sense of open space in the neighborhood.

Sincerely,

Sally Luksevish/Houghton
37 Belmont Ave., Keene, NH

04-30-22"

"Chair of the Zoning Department
City of Keene
3 Washington St.
Keene, NH 03431

4/29/22

Re: ABA 22-06

To: Members of the Zoning Board
I am writing in agreement with other abutters to O Belmont Ave. to share my concerns regarding the request for a variance by John B. and Judith A. Hulslander Living Trust to build a home on this lot. My objections to the request to build a house on this property are as follows:

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• Construction of a house will cause long term disruption to the existing neighborhood.
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• Those who live opposite and adjacent to this property want to keep this space open to avoid overcrowding and retain the aesthetic sense of open space in the neighborhood.

Sincerely,

Dennis W. Lachenal and Sandra Lachenal
29 Belmont Ave., Keene NH

4/29/22"

"Chair of the Zoning Department
City of Keene
3 Washington St.
Keene, NH 03431

4/29/22

Re: ABA 22-06

To: Members of the Zoning Board

I regret that I am unable to attend the meeting in person because I will be taking care of my handicapped daughter that evening so I am writing, along with other abutters to 0 Belmont Ave., to share my concerns regarding the request for a variance by John B. and Judith A. Hulslander Living Trust to build a home on this lot. My objections to the request to build a house on this property are as follows:

• The size of the lot does not conform to the current zoning requirements.
• Construction of a house will cause long term disruption to the existing neighborhood.
• Plans for the building do not indicate number of floors.
• This house might be built for immediate resale of the property, thus raising the value and having an impact on neighboring tax levels, or it could be used for rental purposes lowering the value of neighboring homes.
• Those who live opposite and adjacent to this property want to keep this space open to avoid overcrowding and retain the aesthetic sense of open space in the neighborhood.

Recognizing the burden of paying taxes on a non-conforming piece of property, if the petition fails, I would be willing to consider purchasing the land at its appraisal value of $3,600 to keep

it as open space adjoining my property at 21 Colby St., depending on the amount of annual tax paid for it.

Sincerely,

Lucy G. Truslow
21 Colby St.
Keene, NH 03431

Date: April 30, 2022"

Chair Gorman asked if Mr. Phippard wanted to speak in response to the letters.

Mr. Phippard stated that he is glad to see people take the time to express their concerns to the Board because many times, there is no public input. He answered the first four questions/concerns already. Regarding the last comment, that those who live adjacent to the property want to keep this space open to avoid overcrowding and retain the aesthetic sense of open space, he thinks if he lived next to this lot, he would want to keep it open, too. That is human nature; people enjoy the sense of space where they live, especially if they are out in the yard. You want to enjoy your property and not have to fence it in to maintain your privacy. However, at the same time, it is not fair to a landowner to lose their rights to use their property if they can comply with the dimensional requirements, and use it in a way that maintains the character of the neighborhood and the sense of space in the neighborhood, and he thinks this proposal does that. He hopes the Board does not agree with that last concern, because that is an injustice to the property owner. He hopes they can grant the Variance and allow this to proceed.

Mr. Hoppock asked Mr. Phippard what other reasonable use this property could there be for this property, in this area. Mr. Phippard replied that he discussed that with Mr. Rogers prior to the meeting. He continued that the list of principal uses is not long in the Low Density District. Single-family residence is the primary use. Small group home is also on the list, but it is subject to a Conditional Use Permit from the Planning Board, and difficult to receive, depending on the circumstances. Other uses are a community garden or a conservation area. A .13-acre lot is not a significant land area for a conservation parcel. Most conservation parcels in Keene are very large tracts of land or adjacent to other conservation areas, creating a significant resource for wildlife habitat, recreation, hiking trails, etc. This property is not appropriate for that. It is a small lot to be a community garden. His vegetable garden behind his house, for example, would just barely fit on this lot. He does not think that is realistic for a community garden. He thinks a single-family home is the only reasonable use for a property like this, especially since it is in the middle of an existing single-family neighborhood. The only way the Hulslanders can do that is through a Variance.

Chair Gorman asked if there were any further questions. Hearing none, he closed the public hearing and asked the Board to deliberate on the criteria.

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

Mr. Welsh stated that to reiterate what he has heard from the Applicant, there does seem to be a short supply of building lots in Keene. It seems to indicate that the public interest is in finding building lots. He was on the committee that put the last Master Plan together, and there was an emphasis on encouraging in-fill development to look for small parcels of land that could possibly be developed. That was considered a good thing. Thus, he comes down on the side of this being in the public interest.

Ms. Taylor stated that to provide counterpoint, not every square foot of land is appropriate for construction or in-fill. She continued that "paving paradise" and putting up houses is not necessarily the way to go. Just because it is there, does not mean it is appropriate.

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

Mr. Hoppock stated that this is a classic illustration of the relief valve they are supposed to exercise when they grant a Variance. He continued that someone has owned this property longer than he has been alive, paying taxes on it. They had an opportunity to develop it, but for whatever reason did not, and he does not hold that against them. The Variance expired, and they are back again, for the second time in 30 years. He does not think a single-family dwelling would alter the essential character of the neighborhood, nor is it a Variance that would threaten public health, safety, or welfare. He thinks the first two criteria are met, and is rather persuaded that the rest of them are as well. He asked Mr. Phippard what other uses there are for this property, in this zone, and thinks that a community garden is not realistic. That is not what a property owner expects when they exercise their right to own property and have it protected from unreasonable denials of reasonable uses. He thinks a Variance is in order in this case.

Chair Gorman stated that he agrees and thinks that this is in likeness with the neighborhood. He thinks the concerns voiced by abutters are not valid, because any house in Keene could be rented. You do not need to say how many floors you are going to build, if the house is a reasonable use. Traveling on Belmont Ave., it is evident that this will be consistent with what is there. The lot has the ability to connect to City water and sewer, and this would not create safety issues or traffic issues. It will be a single-family home, tucked amongst other single-family homes, all on similar lot sizes, as Mr. Phippard illustrated and articulated. He is inclined to favor this Variance application.

3. Granting the Variance would do substantial justice.

Mr. Hoppock stated that he has a hard time seeing what the gain to the public would be if this Variance were denied, and the loss to the individual is significant, because these people have not had an opportunity to develop their land in any fashion, aside from the instance in 1980. He

thinks that substantial justice requires that the individual loss here would be significant and not outweighed by any gain to the public by leaving it the way it is.

Ms. Taylor stated that they have not heard any testimony from the property owner, and she has no idea what the development potential thought process would have been on the part of the property owner. Thus, it is hard to judge the substantial justice portion of it, because they do not have any testimony as to what the intent of the property owner was when the property was purchased. She does not know if any of these lots have been merged. Some lots look as they were probably purchased together and then combined, but she does not know. The Board has a complete lack of information on this criterion.

Chair Gorman asked if it is correct that this was a building lot in 1959 and met Zoning criteria at that point. He asked if that is Ms. Taylor's understanding. Ms. Taylor replied that it may have been, and quite possibly was, but she is not sure if that is relevant today.

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

Mr. Welsh stated that he thinks he has heard evidence on all sides of this one, from the quick description of the letter from 1990 to the testimony of the abutters indicating property values could go up or property values could go down, all of which presumes development of the property. It is also reasonable to wonder what happens to home values if the property is not developed. The Board has looked at a number of cases over the past couple months regarding vacant lots that were not well cared for and seen as diminishment of the surrounding property values, which is a trajectory this property could go if it stayed vacant. He does not think the Board has much evidence that this Variance would do bad things to property values. If he had to come down on one side or the other, he guesses that it would be consistent with the neighborhood and probably break even on property values.

Mr. Hoppock stated that to add to that, if the owners carry out their plan, which is to build a Cape-style or ranch-style single-family residence, odds are significant that it would enhance the values of the immediate area, including that of the owners. He continued that he is persuaded that this criterion is met.

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.

Ms. Taylor stated that she is probably in the minority, but to echo what Mr. Welsh stated, the Board consistently sees requests for Variances on properties that are too small to develop in the zones in which they exist. She continued that she took the time to go through some past case law. What they say, in summary, going back since before the first time this property had a Variance, was that the important first criteria is: is the property unique in its environment. Mr. Phippard demonstrated well that this parcel is not unique in its environment, because of the 68 parcels; there are not just those three others of the same size that he pointed out, but many parcels that do not mean the current standards, whether they are built on or not. She does not find that this particular parcel of land is unique in its setting. The case law supports that by saying that a parcel is not unique just because it does not have something, like a building or a garage, if it is the same size as all of the other lots in the area. She thinks the Board should apply the appropriate standard and not just approve everything because "Gee, it's the only vacant lot around."

Mr. Hoppock stated that he disagrees slightly. He continued that he thinks the lot can be claimed as unique because it is undeveloped and can be built within the confines of the setbacks. He is not sure about the other three, if they are in Variance to those measurements either and that might be useful to know, but that unique setting of the property and the fact that there is no other reasonable use for this property is what bothers him. He is happy to condition approval of this on the construction of a single-family dwelling, if that assuages fears. A home the size of what Mr. Phippard described fits right into this neighborhood.

Chair Gorman stated that he agrees with Ms. Taylor's points that this lot is not unique in size, but it is unique in vacancy. He thinks that 5.A.ii. is met - the use is reasonable, simply because the use exists everywhere around it. If it was not reasonable at one point, it is now, given that it will be the same as everything around it once it is developed. The 5.A.i. criterion is more difficult, in terms of uniqueness, but 5.B., special conditions that distinguish it from other properties, is easy to see. All the other properties have been afforded a use, this one has not. He understands that case law probably does side with what Ms. Taylor is saying, but he also thinks there is ample and adequate case law for the granting the property some form of reasonable use and that would go further than a community garden. He thinks this property meets the criteria of 5.B.

Ms. Taylor stated that that goes back to what is called a "Grey Rocks decision." She continued that what comes first under that is that the land be unique, but also that the hardship is the result of some unique condition of the land and not the personal circumstances of the owner. She thinks this is the personal circumstances of the owner, so she does not think it meets 5.B., either.
Chair Gorman asked if anyone had more to say about the criteria. Hearing none, he asked for a motion.

Mr. Hoppock made a motion for the Zoning Board of Adjustment to approve BOARD 22-06 with one condition that only a single-family residence be constructed on it. Mr. Welsh seconded the motion.

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

Met with a vote of 4-1. Ms. Taylor was opposed.

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

Met with a vote of 4-1. Ms. Taylor was opposed.

3. Granting the Variance would do substantial justice.

Met with a vote of 4-1. Ms. Taylor was opposed.

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

Met with a vote of 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
and
ii. The proposed use is a reasonable one.

Met with a vote of 3-2. Chair Gorman and Ms. Taylor 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.

Met with a vote of 4-1. Ms. Taylor was opposed.

The motion to approve ZBA 22-06 with the condition passed with a vote of 4-1. Ms. Taylor was opposed.

B) <u>ZBA 22-07:</u> Petitioner, White House Group, represented by James Phippard, of Brickstone Land Use Consultants, LLC, requests a Variance for property located at 441 Main St., Keene, Tax Map #112-020-000-000-000 that is in the Low Density District. The Petitioner requests a Variance to permit a personal service establishment in an existing building in the Low Density District where a personal service establishment is not a permitted use per, Chapter 100, Article 3.3.5 of the Zoning Regulations.

Mr. Welsh stated that his employer is an abutter of the property in question and he will recuse himself from this hearing. Chair Gorman asked if the Petitioner was aware and still wants to move forward with this application to be heard by the other four members. Mr. Phippard replied that he was aware that Mr. Welsh would request to recuse himself, and he himself does not feel that is necessary, but yes, his client wishes to proceed with the four-member Board.

Chair Gorman asked to hear from Staff. Mr. Rogers stated that this property, 441 Main St., is on the corner of the lower part of Main St. and the highway system where Rt. 101 and Rt. 12 join, and is in the Low Density District. This property received a Variance in 1984 to allow for professional offices only, calling out particular uses. He read the Board decision at the time: *"There shall be professional offices only, provided the occupants are low intensity uses, including but not limited to attorneys, architects, engineers, doctors, insurance agents, dentists, accountants, and the real estate office of the owner, excluding such traffic-generating uses such as travel agents, beauty salons, etc."* That is why the application is currently before the Board. Under the older Zoning Code, some of these uses, especially travel agent and possibly beauty salons and such, were considered professional offices, since many were by appointment only and licensed by the State, but the Board at that time felt the need to condition that approved use. Since then, with the new Zoning Code, the Personal Service Establishment is defined as *"An establishment that provides services of a personal nature including, but not limited to, barbershops or hair salons, spas, nail salons, laundromats, dry cleaners, tailors, tattoo or body piercing parlors."* The Applicant is before the Board because what they are proposing was specifically called out in the previous Variance that was granted.

Ms. Taylor asked if it is correct that the original Variance excluded things that were considered "personal service," and the new Zoning Code includes the very broad definition of "personal service." She questioned that if the Board were to approve the Variance that allows "personal service," would that be much broader than this specific request. Mr. Rogers replied that the request is for "personal care services," and that is, yes, a broad definition that brings in many different services. He continued that the previous Code might have spoken of them as more of a "retail service," although it is not straight-up retail. The current definition that the Applicant is seeking a Variance to allow to occur is a broad definition.

Ms. Taylor stated to Chair Gorman that it might be appropriate, later on, for the Board to consider some conditions.

Chair Gorman asked to hear from Mr. Phippard.

Mr. Phippard stated that he was presenting on behalf of White House Group. He continued that the property at 441 Main St. is well known as the big white house that sits on the hill and is considered a historic, gateway property to Keene. The Variance granted in 1984 was very important at the time. It is very large building if you consider it a single-family dwelling, with 5,000 square feet on the first and second floors and a 2,000 square foot basement. Even by today's standards, with big mansions being built on the lakes, this is a big house/building. In 1984, they came before the Board and received relief to lease out professional office space in the building. The debate at that time, and why it is described as "professional office space," was because they wanted to limit the uses to low intensity. He agrees with Ms. Taylor that if they can grant a use Variance it should come with conditions. They are not trying to throw away the previous Variance that was granted; they are trying to respect it. They think that over time, the occupations have changed and the definitions have changed. Keene did not have a definition for a "personal service establishment" in 1984. He does not know if it would have changed the result at all, but it came out of the development of the new Land Development Code (LDC). He was not even aware of the addition of this definition until Mr. Rogers called it to his attention.

Mr. Phippard continued that the request specifically before the Board is to allow a professional use, in this case, an aesthetician. The operator specializes in facials, lip treatments, eyelashes, eyebrows, and other services centered on the face. The Variance should also include a cosmetologist, which is a similar profession. Both are required to be licensed in the State of NH. In the 1980's when they argued about what a "professional office space" was, that was usually the first thing they cited, the requirement to be licensed, not just someone opening an office. Requiring a person be licensed tends to restrict the business to places where people call to make appointments instead of just walking in. It was not meant to include retail-type offices. That is why they were so specific. He included a copy of the 1984 approval, because that is what introduced this controversy. His client seeks permission to allow professionals like an aesthetician and a cosmetologist, provided they are licensed professionals and operate as sole proprietors. This is not a beauty salon with six or eight chairs, providing multiple services at the same time, with a lot of activity that would not be appropriate in this existing, residential neighborhood on that section of Main St. He thinks it is appropriate to have a condition that restricts this to sole proprietors with business by appointment only, with no walk-in service or retail-type service.

Mr. Phippard stated that he provided an existing condition plan. He continued that they are not proposing to change anything on the site. Eighteen parking spaces exist on the property. If all of the usable area for offices were used, at one parking space per 250 square feet, 16 parking spaces would be required. The existing site is appropriate for professional offices with the limited uses, and meets the current parking requirements.

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

Mr. Phippard stated that in 1984, the Board deemed it appropriate to allow professional offices in this building, and found it to be in the public interest, which he agrees with. He continued that since the pandemic started, so much has changed, including the way people do business. This property was affected more than most of the other businesses he works for. After 1984 when the Variance was granted, primarily psychotherapists and physical therapists, who operated by appointment only and were licensed by the State, occupied this building. It has worked very well since 1984. The tenants and their customers were respectful of the property, and it has served the property well. However, with the pandemic, all that changed. The therapists quickly learned that they could provide services online, and did not need physical office space. One by one, the offices in the white house became vacant.

Mr. Phippard continued that the building's principal occupant is JR Coughlin Real Estate, who has owned the building all along, and that is why *"real estate office of the owner"* was mentioned in the approval in 1984. They continue to operate that space in the building, but as realtors go, Mr. Coughlin is really a specialist. He does not have a dozen realtors working for him, and does not have the large, retail-type real estate office that you might see at Masiello or Re-max. The use has fit, and it fit that main restriction that was developed in the previous Ordinance. He thinks it is in the public interest to allow other professional office uses, as he has described them, sole proprietors, licensed by the State, appointment-only, in the building. That fills a need of the public. For an aesthetician or a cosmetologist, one person can make an appointment and occupy the space for 2 or 3 hours at a time. There is not a lot of turnover or activity. The new definitions of "personal service establishment" are not fair to people like that, who are operating as sole proprietors under those conditions, but the Board can address that in its conditions.

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

Mr. Phippard stated that the spirit here is best addressed by the conditions of the 1984 Variance. He continued that he and his client think that the use, as he proposed it to the Board, fits nicely under that condition, with those conditions in place. He is not asking the Board to open this up to all personal service establishments. He thinks they do need to be restricted, and that is appropriate, especially on this property, and that would meet the spirit of the Ordinance.

3. Granting the Variance would do substantial justice.

Mr. Phippard stated that he does not see value to the public if the Board denied this request. He questioned what benefit to the public would there be if they did not allow a sole proprietor, working by appointment only, in an office space in that building. He has to admit that there are existing uses in the building that fall under this definition of a personal service establishment. How this has occurred, he does not know. It is obvious did not go to the City for permission. They are professionally licensed sole proprietors, working in the building by appointment only, and it has worked very well. For the last 2 or 3 years as the therapists left and these new establishments entered, there have been no disruptions, no disturbance to the neighborhood, and

no excessive parking or noise created. They conduct all of their activities inside the building, which helps make this work. It would accomplish substantial justice, especially for the building owner, to allow these types of tenants, because these are the people looking for these spaces. They each occupy one or two rooms in the building, with a single employee and business by appointment only.

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

Mr. Phippard stated that he does not need to repeat all of what he said before. They have been doing it successfully at the site, very quietly. They do not exceed the number of parking spaces required on the property and have not created any disturbances.

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:

Mr. Phippard stated that in 1984, the Board agreed that the size of the building is a special condition for this property that results in a hardship to a normal, residential use as you would see in the Low Density District. He continued that they therefore granted the Variance to allow these offices. Where he wants to vary from the previous approval is to include the uses under "personal service establishment" under the right conditions: sole proprietors, a single employee in the building, appointment only, and licensed professionals. That protects the character of the neighborhood and of this property, and fulfills the requirement imposed in 1984 under the original Variance.

and
ii. The proposed use is a reasonable one because:

Mr. Phippard stated that he thinks those uses, as he is proposing them, are reasonable. They will not increase traffic or create excessive noise, and will not have any effect on the surrounding properties. He hopes the Board supports this request.

Mr. Hoppock asked if it is correct that Mr. Phippard is interested in a Variance to allow a personal service business, so long as the person is a sole proprietor, works by appointment only, and licensed by the State. Mr. Phippard replied yes. Mr. Hoppock asked if those are three conditions, Mr. Phippard invites the Board to adopt. Mr. Phippard replied yes.

Chair Gorman stated that Mr. Phippard mentioned uses going on right now that are similar to what he is requesting. He asked what has provoked the application, if it is already happening. Mr. Phippard replied that he thinks it came about because someone approached the City about a

form that is required for licensing by the State of NH, making it aware that this use is taking place on the property. He is trying to correct that situation.

Ms. Taylor stated that he said there is no parking on the north side of the property. She asked if it is the three spaces that are not supposed to be used. Mr. Phippard replied that he does not know the history of those three spaces, but when he went out to do the existing site conditions, he saw those spaces there. Mr. Coughlin restricts the use of those spaces to his office. His office gains access from that side of the building, so it is not open to the public and those spaces probably preexisted the condition from the Board. He asked Mr. Coughlin to speak to this.

J.R. Coughlin stated that he owns 441 Main St., Keene. He asked if the question is who has the use of the parking on the north side. Ms. Taylor replied that her question is the conditions of the 1984 Variance said there was not to be any parking on the north side of the building. Mr. Coughlin replied that there is a rental property across the street, and sometimes those neighbors park there, with his permission. He continued that it is also for order delivery and rubbish pickup.

Ms. Taylor stated that her question is now for Mr. Rogers. She continued that she is in a bit of quandary, if the condition of the original approval is not being observed. Mr. Rogers replied that he would caution the Board that this is a prime example of a condition that has been put on a piece of property with the Variance that is difficult to enforce. He continued that moving forward, if the Board were to place conditions, this is a good example to remember. He further stated that it is not sure how the enforcement or even interpretation of the condition, but his understanding is that it was meant for either the real estate office there, the owner of the building, and/or an agreement he had with the abutting property to use those spaces.

Ms. Taylor replied that it is ambiguous at best. She continued that her follow-up question is whether the intent of Mr. Coughlin's application is to keep the existing conditions intact. Mr. Phippard replied yes, and the intent is to allow the current occupants to remain, and to specify more clearly, what "personal service establishment" use can be, with the right conditions.

Ms. Taylor asked if he would have any objection to the Board clarifying the parking, to say that the parking on the north side of the building is limited to the building owner, or similar. Mr. Phippard suggested "Not to be used by the occupants of the professional offices." Ms. Taylor replied yes, with the intent to limit the traffic on that side of the building, which seems to be part of the intent. Mr. Phippard replied that she is right, it was ambiguous the way the 1984 Board listed the condition. He continued that access to those spaces is by a separate driveway. Driving to those parking spaces, it looks like the driveway to the house next door, and it is. In observing the traffic going to the existing office users in the building, they all turn through the front and park in the area adjacent to King Ct. He thinks they are practicing what the intent was, but clarification would be beneficial.

Ms. Taylor stated that regarding Mr. Phippard's comment about sole proprietors, that might also have an enforceability issue. There are many different kinds of legal entities and it would be nearly impossible to try to limit it to someone who wanted to have, say, an LLC, but they are only one person. Mr. Phippard replied that his intent was to allow one employee in the space, and not have a business with three employees that can operate at the same time.

Chair Gorman asked if it would be aptly put to say that it would be a single member operation, so to Ms. Taylor's point, it could be a single member LLC, or a sole proprietor. He continued that he is more referring to the fact that this not a situation of, say, eight employees, rather, one professional who is making appointments, and that is a condition Mr. Phippard would be satisfied with. Mr. Phippard replied yes.

Ms. Taylor stated that she thinks it is apt to say that they would be a licensed professional, because beauticians, hair salons, barbers, and such, have to be licensed as well. She continued that she is not sure how to limit it, but she understands the intent. Chair Gorman asked Mr. Phippard if there are any uses he has in mind that would be licensed, or that are existing. Mr. Phippard replied that he himself is a sole member LLC and is not licensed, but he also has two employees, and does not think his business would fit. Chair Gorman replied yes, but he is not providing the type of service that they are alluding to here. Mr. Phippard replied true, but his business does not meet the intent of this request as he has meetings at his office with 8 or 10 people, all arriving in separate vehicles, making it a busy location. At other times, it is just him and his wife. He hopes the Board members have had the opportunity to visit the property. It is worth going in as it is beautiful, and needs to be protected and preserved. Mr. Coughlin and his family have done a wonderful job taking care of this landmark property for the City. He thinks that restricting the use, as described, continues the protection for the area, so the parking does not expand and they do not have to change the appearance.

Chair Gorman asked if members of the public had comments in support of this application. Hearing none, he asked if anyone wanted to speak in opposition. Hearing none, he closed the public hearing and asked the Board to deliberate.

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

Ms. Taylor stated that she does not believe this will be contrary to the public interest, as long as the Board can figure out the conditions to attach to it, especially since it will be contained within the building and there does not appear to be any intent to alter it structurally. It would simply be a continuing use.

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

Mr. Hoppock stated that this proposed use, like the other one, is consistent with the essential character of the neighborhood and would not do anything to alter it. He continued that it sounds like Mr. Coughlin is just trying to keep tenants and the space filled with viable businesses, which

also serves a public interest. He does not see that as a threat to the health, safety, or welfare of the area or the community. He thinks these criteria are satisfied.

3. Granting the Variance would do substantial justice.

Ms. Taylor stated that she does not see any harm to the public under this criterion, from the mere fact that apparently it has been happening without any disruption or public notice. Chair Gorman agreed.

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

Chair Gorman stated that he thinks they have touched upon it not affecting the exterior of the property, and there being no impact to the interior of the property, and a use that allegedly is already occurring. Thus, he thinks it is a wash. He does not think it will have a positive impact on values, but it does not have to; it just cannot have a negative impact, and he does not believe that it does.

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.

Mr. Hoppock stated that he agrees with the predecessor Board from 1984 that the size of the building can certainly be a special condition, then and now, especially when they are looking at ways to lease spaces. He continued that in his line of work, he deals with counselors occasionally, and most of them, if not uniformly across the Board, are remote. Some are reluctantly going back to in-person, but it is up to each individual. Counselors, who work remotely from home, save a ton of overhead and do not have to worry about paying someone like Mr. Coughlin rent, which is Mr. Coughlin's problem now. Mr. Coughlin has come upon a reasonable way to try to fill the space, maintain his property, and let it continue to exist the way it has been. He has no trouble identifying the size of the building as a special condition and then saying that no fair and substantial relationship exists between the general public purpose of restricting professionals in that building as it is applied to this property. It passes that test.

Ms. Taylor stated that she agrees with Mr. Hoppock, and the concept of a building providing its own special condition, so to speak, was the Farrar v. Keene case, which is the basic case that said that a building could by itself be a special condition. She thinks there is some concern, though, that the conditions be carefully outlined.

Chair Gorman stated that he agrees, and he thinks covering all these criteria and supporting them is directly correlated to conditioning it. Mr. Hoppock asked if they could discuss the conditions. Chair Gorman replied yes, and they also need to discuss Mr. Rogers's valid point. He continued stating that the Board needs to understand that while conditions could be placed, actually governing these situations is next to impossible. That said, they would put their best foot forward on some conditions that work for everyone and hope they are followed.

Mr. Hoppock replied that it is the honor system. He continued that Applicants tell the Board what their plans are, in good faith, and the Board takes them at their word. He is not too concerned about the Board's conditions being enforced down the road; he thinks that when people leave here they understand what the conditions are and will do their best to follow them. Chair Gorman replied that he thinks that no news is good news. He continued that if there is an issue, City staff will find out about it, and if there is not an issue, then it seems like they are coming close enough to the conditions.

Mr. Hoppock stated that he was going to bring forward the three conditions that Mr. Phippard suggested, but then Ms. Taylor mentioned the sole proprietorship and that being ambiguous. He would change that to an individual, without employees, who schedules appointments only with walk-in appointments, and holds a license by the State. He is of mixed mind about the three parking spaces to the north. He does not want to make this more difficult for Mr. Rogers's office.

Ms. Taylor stated that she is concerned, because it is just the flat out "no parking" and there are clearly identified parking spaces. She continued that she would like to see some limitation on the parking on the north side of the building, such as it being reserved to the building owner, so that it is clearly stated not customer parking. Chair Gorman replied that it could be for "occupants," not necessarily just the owner. He continued that it could be used by professionals who are renting there, or Mr. Coughlin himself.

Mr. Rogers replied that his recommendation was going to be to limit it to occupants of the building. He continued that the concern might have come before because as Mr. Phippard said, that driveway leads to a single-family home right next to his property. If it was for customers coming and going it would generate quite a bit of traffic right next to that single-family home, but if it was an occupant of the building they would probably come in at 8:00 AM to work then leave at 5:00 PM.

Chair Gorman asked if everyone agrees with having that parking be for occupants only, not clients. Other Board members agreed.

Chair Gorman asked if there were further comments about the criteria.
Ms. Taylor asked Mr. Hoppock on limitations to one individual, or an individual plus an employee. Clearly, the intent is not to have a crowd. Mr. Hoppock asked how many spaces they are talking about there.

Chair Gorman reopened the public hearing to hear from Mr. Phippard. Mr. Phippard stated that there are seven office spaces. Mr. Hoppock replied that if they limit it to an individual plus one employee, they are bumping up against parking problems.

Mr. Rogers replied that most licensed professionals have a workstation, such as a hairdresser with one chair. He imagines that some of the other professionals that Mr. Phippard mentioned would have a workstation. A possible recommendation would be to limit it to one workstation per individual. He agrees that two employees might have a higher impact in the Low Density District than the Board intends.

Chair Gorman asked, since the public hearing is open, if Mr. Phippard had any further commentary on this.

Mr. Coughlin stated that he has been in the building for 38 years, and watches the parking. He continued that it has to be low intensity, which it is. Services are by appointment only, and appointments are one to two hours, so it is not like people arrive every 20 minutes. He is there every day, watching the building and who is coming in, and he does a good job. He thinks this would be better, because before, there were about 10 therapists and they all had appointments and it was a lot of traffic. With this new use, there are not that many people doing it aesthetician services, and it is a lot less traffic.

Mr. Hoppock asked if they could limit each unit to one individual personal service provider. He asked if that would be a way to characterize it, instead of saying “proprietor.”

Chair Gorman stated that the Board understands that Mr. Coughlin polices the parking and does a great job with the building, but this Variance will go on with this property long after Mr. Coughlin no longer owns it. It is up to the Board to condition the approval to what fits the needs of the community and fits Mr. Coughlin’s needs to keep the building running well. He asked if Mr. Coughlin is in situations where people have two employees, or one employee plus themselves. He asked what Mr. Coughlin’s preference is in terms of employee limit per office.

Mr. Phippard stated that it would be nice to allow one employee. He continued that a person might have an assistant or secretary. He has an employee to answer the phone for him if he is out and helps take care of his business, but it does not generate more business as this is an accommodation. The ability to have an employee and still lease the space would be beneficial, but probably not mandatory. The users in the building today are all single person users. Mr. Coughlin stated that they have answering machines and things of that nature. Mr. Phippard replied yes, and email, to monitor what is coming in.

Chair Gorman asked if there were any other questions before he closes the public hearing again. Hearing none, he closed the public hearing.

Chair Gorman stated that with seven offices, if everyone had an employee, there is a potential parking problem. He continued that he also thinks that limiting it to one person might not be the perfect business model for everyone, but that behind the scenes, it will work. He does not know how many employees people have could be policed and is not sure the Board could control that.

Ms. Taylor stated that it seems that the original Variance regarding "professional offices only" stays intact, and that the Board is now adding the category of "personal services" to that "professional offices only." If the original Variance stays intact, that is why she wanted to clarify the parking, because it is ambiguous. If that stays intact, she does not have a concern with limiting specifically just the personal services aspect of that.

Mr. Hoppock stated that he thinks they can condition approval on one individual working per unit, who does it by appointment only, and licensed by the State, for whatever the particular personal service might be as they are talking about an aesthetician in this case. Then they want to deal with the parking. Chair Gorman suggested "northside parking to be used by tenants only." Mr. Hoppock suggested "building occupants only."

Mr. Hoppock made a motion to approve ZBA 22-07 subject to the following conditions:

- The personal service uses shall be restricted to one professional personal service provider per unit, who schedules by appointment only, and is licensed by the State for their particular profession or personal service.
- Parking on the north side of the building be restricted to occupants of the building.

Ms. Taylor seconded the motion.

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

Met with a vote of 4-0.

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

Met with a vote of 4-0.

3. Granting the Variance would do substantial justice.

Met with a vote of 4-0.

4. If the Variance were granted, the values of the surrounding properties would not be diminished.
Met with a vote of 4-0.

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
and
ii. The proposed use is a reasonable one.

Met with a vote of 4-0.

The motion to approve ZBA 22-07 with conditions passed with a vote of 4-0.

Chair Gorman recessed the meeting for a break at 8:30 PM. He called the meeting back to order at 8:36 PM. He stated that Mr. Welsh is rejoining and they are a five-member Board again.

C) <u>ZBA 22-08:</u> Petitioner, Brady Sullivan Keene Properties, LLC of 670 North Commercial St., Manchester, NH, represented by Amy Sanders of Fuss and O'Neill of 50 Commercial Street, Manchester, NH, requests a Variance for property located at 210-222 West St, Keene, Tax Map #576-009-000-000-000 that is in the Commerce District. The Petitioner requests a Variance to permit a multifamily dwelling with five residential units where residential uses are not a permitted use in the Commerce District per Chapter 100, Table 8-1 Permitted Principal Uses by Zoning District of the Zoning Regulations.

Chair Gorman asked to hear from Staff. Mr. Rogers stated that this property is on 210-222 West St., the Colony Mill property. He continued that in 2016 the Board granted a Variance for the multi-family uses, conditioned to 90 units. His understanding is that 89 units were built in the larger mill building. Some secondary buildings are on the property; one currently occupied as a casino, and was a restaurant prior. There is a newly constructed building with three units not yet occupied. The former candy shop was converted into a bank. The Applicant is before the Board tonight because of the condition placed on the original Variance for the multi-family of 90 units. They are requesting five units that they have in their application.

Mr. Hoppock asked if the five units are planned for where the casino is now. Mr. Rogers replied that is his understanding, but he would let the Applicant speak to the details. Mr. Hoppock asked if it is correct that they are one under the limit now. Mr. Rogers replied that his understanding is that they have developed 89 units out of the 90 that were proposed.

Mr. Welsh asked if the casino is a permitted use, or if a Variance was given to that. Mr. Rogers replied that that was a permitted use, under the Code as "indoor recreational use."

Ms. Taylor asked Mr. Rogers if the original condition for the 2016 Variance was 90 units for the *property* or 90 units in that building that was the Colony Mill building. Mr. Rogers replied that it was not really in the description in the notice of decision. In the minutes, the Applicant said that

it was going to be in the main building at that time, but even during the testimony, which might have been before they had the bank as a possible tenant, there was conversation about possibly converting that building into some units. The Board applied no stipulation to the Variance they granted other than the number of units, not necessarily the location on the property.

Ms. Taylor stated that the application references Table 8-1. She asked why it did not reference the permitted uses in the Commerce District, which is Article 5.1.5. Mr. Rogers replied that it could be that the Applicant initially saw Table 8-1 and did not realize there were smaller tables within the districts themselves. Ms. Taylor asked if they are essentially the same. Mr. Rogers replied they are absolutely the same.

Chair Gorman asked for further questions for Mr. Rogers. Hearing none, he asked to hear from the Applicant.

Amy Sanders from Fuss & O'Neill introduced Ben Kelley, representing Brady Sullivan Properties, LLC, as the owner. She continued that the intent is to convert the existing casino building to five residential units. Four of the units would be two-bedroom, and one unit would be one-bedroom. It would be conducted entirely within the existing building, without any major external changes to the building. It would keep the same aesthetics and feel that currently exists on the property. They feel that this is a justified use because Keene needs residential units.

Ms. Sanders stated that she would go through the criteria.

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

Ms. Sanders stated that housing is a fundamental challenge and is in high demand in Keene. She continued that permitting the existing building to be converted to residential units helps to achieve one of the goals of the Comprehensive Master Plan, which is to provide additional housing within a conveniently located area. This property is certainly convenient. The area around it has commercial units, existing residences, and trails, and it is close to downtown, so it is walkable. Additionally, the Colony Mill Marketplace building that exists on the property includes 89 apartment buildings, so the residential use is compatible with the surrounding uses that exist on the site today.

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

Ms. Sanders stated that converting the existing building into residential units would create additional housing opportunities in a convenient location that is adjacent to a recreational trail and within walking distance of various businesses and the downtown. Those all meet the spirit and intent of the Ordinance.

3. Granting the Variance would do substantial justice.

Ms. Sanders stated that the Variance would allow for additional residential units that are greatly needed in the city. She continued that residential housing units would be developed consistent with the Comprehensive Master Plan, within an existing structure and conveniently located.

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

Ms. Sanders stated that converting the existing building would have no impact on the surrounding property values. It will be consistent with its existing appearance. She does not think anyone would notice much of a difference, except that the residential uses would use a lot less parking than perhaps the casino currently. Overall, the character would feel the same and it would not have an impact to surrounding properties.

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:

Ms. Sanders stated that this is a unique building within the property and sits on the lot centralized and almost hidden from the surrounding streets by the existing mill building. She continued that the surrounding area could support and benefit from an increase in residential housing. The surrounding area includes various businesses, recreation, cultural opportunities, and opportunities for residents to work, play, dine, and shop.

and
ii. The proposed use is a reasonable one because:

Ms. Sanders stated that as previously mentioned, there is a shortage of housing in Keene and this proposed use would provide additional housing units surrounded by existing various amenities that make it a desirable location to live.

Ms. Sanders stated that that she is happy to answer questions.

Ms. Taylor asked if these would be market rate apartments. Mr. Kelley replied yes. Ms. Taylor asked if it is correct that they would not qualify as "affordable housing." Mr. Kelley replied that from a tax credit standpoint, they do not qualify as "affordable housing."

Ms. Taylor stated that she was unable to figure out which apartments are where, from what was in the packet. She asked the Applicant to walk the Board through which apartments are on which floor. Mr. Kelley replied that there are two townhouse-style units, which is why it is a little difficult to read. He continued that the first and third are the townhouse-style units, if you are looking at it from left to right. Three of the four two-bedrooms are two bed, two bath units. From

a use standpoint, the building is a little over 6,000 square feet. It is efficient with five nicely sized units with no common area. The first one would have well over 1,000 square feet. Ms. Taylor asked for him to point out which is which. Mr. Kelley stated that he is calling the one bed, one bath unit the third unit and that is townhouse-style. The top view is the second floor. The first unit is also the townhouse-style with second floor space above with the master suite upstairs.

Ms. Taylor stated that when she looks at this she sees four units. Lines around them might help. Michael Hagan, Plans Examiner, stated that the top of the page on the "#2" plan is the fifth unit. He continued that that is one-bedroom unit on the second floor. The first one on the left-hand side has the top and bottom, with a living room, kitchen, and bathroom on the first, all the way on the left, and then upstairs there are two bedrooms. Right next to that on the second floor is a separate unit coming up from that main entrance. That one is a one-bedroom on its own. On the first floor are the other three units.

Chair Gorman asked if the Board had further questions for the Applicant. Hearing none, he called for public comment, beginning with anyone speaking in favor. Hearing none, he asked if anyone wanted to speak in opposition. Hearing none, he closed the public hearing and asked the Board to deliberate.

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

Ms. Taylor stated that she does not think this application is contrary to the public interest, but she wishes that every application the Board sees did not try to justify itself on a housing need. She continued that she does not know if there is a housing need for market rate apartments as opposed to affordable housing, but she does not see anything that has been presented that says this is against the public interest.

Mr. Hoppock stated that Ms. Taylor's words summed up his view on this. He continued that even at market rate, it is in the public interest to increase the housing stock.

Chair Gorman stated that he agrees.

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

Mr. Hoppock stated that this is an interesting development from the 90 units previously approved, because now it fits into the character of the neighborhood. He continued that they are just adding more residential units to a segment of land that was developed for residential purposes. He does not find any problem with this criterion, either.

Ms. Taylor asked Mr. Rogers if this changes the parking equation. Mr. Rogers replied that he is not sure if the Applicants address it in their application, but this site has abundant parking. He continued that it would meet the ten spaces required for this use, and the amount of required parking spaces could possibly be a decrease from those required for the current use.

Ms. Taylor asked if this would go before the Planning Board. Mr. Rogers replied that it might go before the new Minor Project Review Committee. He does not believe this rises to the Planning Board level, under the new LDC standards, but he would have to check. Ms. Taylor replied that she raises the question because for that building, it is a significant change in use. Mr. Rogers replied that is correct. He continued that some of the triggers for Planning Board review would be if they were to be doing work outside, but he heard from the Applicant that minimal outside work would occur. If that changed, it could end up at the Planning Board.

3. Granting the Variance would do substantial justice.

Mr. Hoppock stated that this is one of those cases in which granting the Variance could cause a gain to the individual/owner as well as the public. He continued that it would fulfill a housing need, and the owner would be putting the property to use where there is public demand for it.

Chair Gorman stated that he agrees.

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

Chair Gorman stated that he does not think this would substantially change the character of the property or the neighborhood, in terms of aesthetics, given that no work would be done to the outside of the building. He continued that he does not see any possible adverse impact to surrounding property values by creating five new dwelling units where there already are 89. He does not think it would raise surrounding property values, but he does not think it would diminish them, either.

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.

Ms. Taylor stated that she does not have any problem with it being a reasonable use. She continued that her concern is the special condition of the property and its zone. She is still weighing in her own mind whether that is adequate to create a hardship. It is a commercial property that had a commercial use, and now they would change it to a residential use. She is not sure the hardship.

Chair Gorman stated that he sees a certain element of uniqueness to the property, given that it is so large. It needs to be adapted to today's needs. It will not be a mill anymore, and clearly will not be a shopping mall as it was when he was a kid. Now, it is primarily residential, with the

exception of the restaurant, the bank, the three-unit commercial building that was just constructed, and this casino. He thinks the size and scale of this property makes it unique, which could be viewed as a hardship.

Mr. Welsh stated that during his 20 years here he has seen four or five different uses in this building, which last a few years. He always presumed that one of the difficulties with the commercial use of the building is its hidden nature, as the Applicant referred to, and he thinks that is not a liability at all, when it comes to residential use of this property.

Chair Gorman replied he agrees it is in a unique location to be a commercial use, given that it does not have visibility from any of the streets, especially now that the rest of the property is not used commercially.

Ms. Taylor stated that going back to her question; the commercial practicality is different from what the uniqueness of the property is. She continued that she is trying to find the special condition of the property that makes it unique. She moved here in the 1980's, and until the casino, this building always had some sort of restaurant use. She is questioning what the demonstrated hardship is that has resulted from this unique piece of property. Chair Gorman asked if there is any merit in re-opening the public hearing and asking for more input. Ms. Taylor replied probably not; she is just struggling aloud.

Mr. Hoppock stated that its size, configuration, and location make it difficult for commercial use. He continued that he thinks the owners are doing the next best thing, filling a need for housing by developing it for housing. That is unique to that site. It is so large it can accommodate these numbers.

Ms. Taylor stated that they just constructed a three-unit commercial building on the site. She asked Mr. Hoppock if that goes counter to his statement that this is not an appropriate commercial site. Mr. Hoppock replied that he thinks the commercial building just constructed will be a storage facility. Chair Gorman replied that it is a three-unit building but has excellent visibility, in contrast to the casino. Ms. Taylor stated that she thinks it will be a drive-thru Domino's Pizza but does not know what the other two units will be. Mr. Hoppock replied that a pizza place would be consistent with serving residential dwellings.

Chair Gorman stated that he thinks that the newly constructed building is in a different situation than this one, because it is not buried in the center of the complex. It has much better commercial visibility and accessibility. Mr. Hoppock asked if it is across the street from where the bike path starts. Chair Gorman replied yes, right on Island St.

Mr. Rogers stated that Ms. Marcou has pulled up the map again. He explained the location of the newly constructed building in relation to the building in question.

Chair Gorman stated that if they are going to grant this Variance, he thinks the motion should confine the five units to that building, because there is the possibility that if they approve five units they could go in the main building, for all the Board knows. Then this building could eventually be used for something else, without placing specific parameters on the five units.

Mr. Hoppock asked if this building has a specific address. Is it 222 West St., or 210 West St.? Chair Gorman asked Mr. Rogers if the entire property is a single address. Mr. Rogers replied that it has multiple ones. He continued that he believes this building would be 216 West St., while 210 West St. starts where the bank is, and the main building is 222 West St. Chair Gorman replied that they could approve the units for building 216 West St.

Chair Gorman asked for further comments. Hearing none, he asked for a motion.

Mr. Hoppock made a motion to for the Zoning Board of Adjustment to approve ZBA 22-08 to permit a multi-family dwelling complex with five residential units permitted as a permitted use in the Commerce Zone, contrary to Chapter 100, Table 8-1. Those five units will be restricted to building 216 West St. Mr. Welsh seconded the motion.

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

Met with a vote of 5-0.

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

Met with a vote of 4-1. Ms. Taylor was opposed.

3. Granting the Variance would do substantial justice.

Met with a vote of 5-0.

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

Met with a vote of 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
and
ii. The proposed use is a reasonable one.

Met with a vote of 4-1. Ms. Taylor was opposed.

The motion to approve ZBA 22-08 with the condition passed with a vote of 4-1. Ms. Taylor voted in opposition.

D) ZBA 22-09: Petitioners, Scott and Kerry Bachynski of 136 Hastings Ave., Keene, requests a Variance for property located at 136 Hastings Ave., Tax Map #523-039-000-000-000 that is in the Low Density District. The Petitioners request a Variance to permit both the rear and side setbacks to six feet where 20 feet is required for the rear and 10 feet is required for the side setbacks in order to install an 18 foot above ground swimming pool, per Chapter 100, Article 3.3.2 of the Zoning Regulations.

Chair Gorman asked to hear from Staff. Mr. Rogers stated that this property is in the Low Density District. He continued that he has a correction: the notice of hearing states that 20 feet is required in the rear setback, when actually there is an exception within the LDC that would allow for swimming pools to be within 10 feet of the rear setback. Thus, the Applicants are asking to have six feet setbacks where 10 feet are required, both at the side and the rear, making this a smaller ask.

Ms. Taylor stated that on this application and the next one, too, she noticed that where it says "Zoning District," the text "Zoning Districts" is just typed in, as opposed to what the district really is. Mr. Rogers asked where she sees this. Ms. Taylor replied section 2 of the application. She asked staff to double check this when the applications come in.

Ms. Taylor asked if the area that aboveground pools sit on adds to impervious surface or not. Mr. Rogers replied that it could, if a swimming pool is installed properly, as it is highly unlikely that a pool like this would just be set on top of the grass. Most likely, the grass would be removed and some type of compactable material would be placed, because putting a pool on unstable ground is not the best idea for the pool's longevity.

Ms. Taylor replied that the reason she is asking is that it says "percentage of lot covered by structures," existing and proposed, and then says "percentage of impervious coverage, structures plus driveways," and it says "proposed: N/A," which does not match up with the percentage of the lot covered by structures. She found that confusing. Mr. Rogers replied that he assumes the Applicants are speaking to the fact that the change to the percentage that they are doing is the number that is allowed for the overall of the structures plus driveways and parking areas. He continued that the coverage is going to be a higher number, with the Applicants were looking at it since the first percentage speaks to pools, he is assuming that is why there is no increase in the square footage on the second percentage. He stated this was an item Staff should have picked up on. Ms. Taylor replied that it does not include driveways, and she does not know what the percentage is, or what it would be, or if it meets, or is correct. She was hoping for guidance from Mr. Rogers. Mr. Rogers replied that they are at the 17%, which includes the house and this new

pool. He can do some quick calculations, but just looking at what is in front of the Board, he thinks that the additional percentage of what that driveway and turnaround lane is will probably be minimal. However, Ms. Taylor brings up a valid point that they should be looking at some of these issues. He can see that in some circumstances this could be a problem, though he does not in this case. Ms. Taylor replied that she is not familiar enough with the percentages and where this information is in the new Code in order to figure it out.

Chair Gorman asked if there were any other questions for Mr. Rogers. Hearing none, he asked to hear from the Applicants.

Scott Bachynski stated that the only reason he and Kerry Bachynski are even here is the Code says any pool above 24 inches would need a building permit, which more or less means any pool you buy from a store. He continued that he did not even know they needed to do this, until he called. His neighbors do not understand why they are seeking a Variance and think they should install the pool, but they do not want to do that, because this house has been in his wife's family for many years and they plan on having children and staying there.

Kerry Bachynski stated that she and Mr. Bachynski are requesting a Variance to six feet from the rear to allow an 18-foot above ground swimming pool to be installed.

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

Ms. Bachynski stated that it would not alter the property values of the abutters.

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

Ms. Bachynski stated that the yard surrounding the proposed pool location is fully sectioned off by six-foot privacy fencing. She continued that it will have no visual or other impact that the setbacks are designed to preserve. She did not know it was 10 feet in the rear for a swimming pool, so that maybe helps them.

3. Granting the Variance would do substantial justice.

Ms. Bachynski stated that it will cause no harm to the public or abutters. She continued that the pool installation and use will comply with all requirements imposed by the proper building permit and City Ordinances. A professional installer will install the pool. They will level the ground and prepare it. Everything will be done to Code.

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

Ms. Bachynski stated that this lot is in a desirable residential area that attracts mainly families; it is not apartments. This property has recently had multiple exterior improvements. She and Mr.

Bachynski have repainted; put up the vinyl fencing and a new, metal-shingled roof; and done landscaping and tree removal. They are working on the inside, too. Their property is good. She does not think [the swimming pool] would diminish surrounding 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:

Ms. Bachynski stated that she realizes that not being able to have a pool is not considered a hardship, so this (criteria) was a little difficult, but the lot is unique. She continued that you can see on the plans that the lot is sort of a rhombus, with the house in the center and slightly offset. They do not really have a backyard. There is just 33 feet from the exterior wall of the house to the rear property line. They were told that they cannot put a pool on the right side of their property because the City water and sewer lines are there. Thus, the only place the pool could feasibly be installed is on the rear west corner of the lot. In the photos, you can see where the house is located and how it slopes down, and how the left rear is the only place where a pool could be. It is the most level. Given the current setback, they would have to pay considerably more to level the space closer to the house. In addition, the practical and visual appeal would increase if the pool could be installed with the proposed Variances. Installed closer to the house and therefore higher on the slope, the pool would be more visible to the abutters. If that was a concern at all, and abutters do not want to see the above ground pool, the further back into the yard the better.

and
ii. The proposed use is a reasonable one because:

Ms. Bachynski stated that the proposed use is a reasonable one because it will allow the owners to continue to improve the property, thereby increasing the value of the property.

Ms. Taylor asked about the picture. She asked if the location of the play structure is approximately, where they want the pool. Mr. Bachynski replied yes, they would be moving the swing set to the right hand side of the house.

Ms. Taylor stated that she looked this up on the City's GIS and put the layers on, printed it out, and brought it with her. She continued that regarding all the blue, she did not know if there were wetlands or if this is in any kind of flood area. That was her only concern. Mr. Rogers replied that he needs a minute to pull that up on the map and look at it.

Mr. Hoppock asked if the Bachynskis' yard slopes off into the corner in the map. Mr. Bachynski replied that it is the flattest spot in their whole yard. Ms. Bachynski added that it then slopes up. Mr. Hoppock asked if they are saying that off-picture, the slope was concerning them. Ms.

Bachynski replied yes. Chair Gorman asked if it is correct that that is the lowest point of the property and the flattest. Ms. Bachynski replied yes. Mr. Bachynski replied that they have a neighbor who has offered many times to let them use his pool, but they would like their own. He does not think anyone would want to see it in the front yard.

Mr. Hoppock asked if "18 feet" is the diameter of the pool. Mr. Bachynski replied yes.

Mr. Welsh stated that they mentioned that the right side of the yard has sewer and water, and the City told them not to put the pool there. Mr. Bachynski replied yes. They did improvements to the house, including plumbing, and had many problems with roots and trees going to the sewage lines, so they took all the trees down and put up a fence in its place. He continued that they just assumed the City did not want anything built on top of the sewer lines. He called and spoke with two people at City Hall; one was supposed to call him back and Corinne Marcou called him back instead and went through the rules with him and Ms. Bachynski, which is the reason why they are here.

Mr. Rogers stated that to try to answer Ms. Taylor's question, he pulled up GIS mapping. He continued that with the City's mapping system, you could add different layers. When he included the wetlands and floodplain layers, nothing indicates in this neighborhood and he would be shocked if it did. He sees what Ms. Taylor said appear to be bodies of water on the mapping from 2015, and he has no idea what those represent. The 2020 version of that map does not have those blue areas. He thinks it is a glitch in the GIS mapping system.

Chair Gorman asked if anyone had further questions for the Applicants. Hearing none, he asked for public comment. Hearing none, he closed the public hearing and asked the Board to deliberate.

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

Mr. Hoppock stated that he did not hear anything that would suggest that this application would present a situation that would be contrary to the public interest. The Bachynskis have a fence around the yard and have thus taken safety precautions already, or privacy measures, however you want to define it.

Ms. Taylor stated that if the abutters were going to object, she is sure the Board would have heard from them. That is probably one of the stronger gauges of what the public interest is.

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

Mr. Hoppock stated that he sees nothing in the application that presents a threat or danger to public health, safety, or welfare or would alter the essential character of the neighborhood. In fact, they heard about there being a pool next door, so this would be consistent with it.

Chair Gorman replied that he agrees, and thinks the fence helps any privacy issues that may arise.

3. Granting the Variance would do substantial justice.

Mr. Clough stated that because of the siting of the house, there are not many choices. It is centered, so if you are trying to put a pool in any corner, that limits it. He does not see any issue with this criterion.

Chair Gorman stated that he thinks the benefit to the property owner outweighs any adverse impact to any of the abutters. As Ms. Taylor pointed out, if they had a problem with it, they would probably be here.

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

Mr. Hoppock stated that there is nothing in the record that would show any value diminution anywhere as a result of this project.

Mr. Welsh stated that in listening to the Applicants, it sounds like the surrounding property owners are enthusiastic to see this happen.

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.

Mr. Hoppock stated that he thinks the special conditions on this property are the sloping land away from where they want to put the pool, leaving that area partially within the setback available to them, and the location of the water and sewer lines. He continued that if you ever had a problem with trees growing into sewer lines, you know that is something to avoid. He cannot imagine anyone would want to put a pool on top of that. Other lots probably have sewer lines in them, but they are not interfering with the use of the property. When you look at that special condition, applying the setback restriction to this lot makes it unfair and creates the hardship.

Chair Gorman stated that he agrees, and does not believe there is any better place on the property for the pool. He thinks it is reasonable to want to have a pool on your property, and this is their best attempt at it, given all the restrictions that their property creates.

Ms. Taylor stated that she agrees with Mr. Hoppock and Chair Gorman. She continued that she wants to note that when the Board is presented with these requests, sometimes it is a matter of gradation. For example, if they had wanted to put, say, a two-story addition on the house that would go within four feet of the property line, she might have a problem seeing the hardship, but when you look at the nature of the application and the configuration of the property, she thinks it makes sense. Chair Gorman replied that is well put and he agrees.

Mr. Hoppock made a motion for the Zoning Board of Adjustment to approve ZBA 22-09. Ms. Taylor seconded the motion.

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

Met with a vote of 5-0.

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

Met with a vote of 5-0.

3. Granting the Variance would do substantial justice.

Met with a vote of 5-0.

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

Met with a vote of 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
and
ii. The proposed use is a reasonable one.

Met with a vote of 5-0.

The motion to approve ZBA 22-09 passed with a vote of 5-0.

E) <u>ZBA 22-10:</u> Petitioner, Steve Sweeney of 146 Armory St., Keene, requests a Variance for property located at 146 Armory St., Tax Map #529-020-000-000-000 that is in the Low Density District. The Petitioner request a Variance to permit the

installation of a proper driveway with one foot from the property line instead of the minimum of three feet, per Chapter 100, Article 9.3.2 of the Zoning Regulations.

Chair Gorman asked to hear from staff. Mr. Rogers stated that this property is in the Low Density District, down the street from the back of Fuller School's recreation field. He continued that they are seeking a Variance from the part of the Zoning Code that requires one- or two-family dwellings to maintain a three-foot buffer from driveways and parking areas. Concern here, much of the time, is with drainage; water flowing off the travel surface or parking surfaces is to be maintained on your property. He will let the Applicant speak to the hardship here, but the picture the Board has shows the driveway being proposed where there is not enough room to put a travel lane and maintain that three feet.

Ms. Taylor stated that the picture confuses her. She continued that #146 is the subject property and asked if it is correct that the white dash above it, #150, is on the neighboring property. Mr. Rogers replied yes, a house has been built there now. When this GIS mapping was taken it was a vacant lot. The agenda packet shows the house that is there. The gray piece is the driveway for that #150 property, not for the Applicant's property.

Mr. Hoppock stated that the picture on the introductory page has a rock wall between a tree and what looks like a driveway, going into the opening in the foundation wall. He asked if that is the driveway, a garage, or where the driveway would go on this property. He is trying to figure out the location. Mr. Rogers replied that his understanding is that most likely previously when he had a small vehicle that was a drive-under garage space for this property. He is not certain what the current use is, but where the actual driveway will be, addresses Ms. Taylor's issue. The new house shown sitting back a bit is new and is the neighbor. He thinks the driveway will be going to the right of the blue house. Mr. Hoppock replied that he would let the Applicant speak to that.

Chair Gorman asked if there were further questions for Mr. Rogers. Hearing none, he asked to hear from the Applicant.

Steven Sweeney of 146 Armory St. stated that he has already a permitted driveway there. He continued that he wants to make the driveway more usable. Right now, you have to choose whether you are in mud season or not and whether you are going to park there. Right now in front of his property, there is actual parking on the street. Where the rock wall is, there is a garage underneath the house, where that was originally a parking spot that he no longer uses. He is not looking to add that into the property as a driveway additional to the permitted driveway that is already there.

Chair Gorman asked if that is visible in the photograph. He asked if it is on the other side of the retaining wall. Mr. Sweeney replied that it is on the opposite/north side of the retaining wall. He continued that what he is looking to make a more usable driveway with either Surepak or recycled asphalt. He is asking for a one-foot Variance instead of three-foot because his driveway

is not directly on the edge of his house. In winter, there is frost, and he wants to keep his driveway a little further to the side of the house to minimize the wear on the house's foundation.

Chair Gorman asked how far from the house. Mr. Sweeney replied that now it is set at about a foot, and he wants to go a foot further from the edge of the house. Chair Gorman replied that literally, if he did not get the couple feet on the property line side; he would be up against the foundation. Mr. Sweeney replied that is correct.

Ms. Taylor stated that the picture in the agenda packet is a little different from the one on the screen. She asked to see the GIS picture again. She asked if it is correct that Mr. Sweeney wants this driveway the full length of his property. Mr. Sweeney replied yes, which was already in the property pictures in the GIS. Ms. Taylor replied that it did not come through and she is trying to understand. She asked if the driveway permit Mr. Sweeney gets is for access off the road. Mr. Sweeney replied yes. Ms. Taylor asked the purpose of it going the whole length of the property. Mr. Sweeney replied in case someone in the future wanted to put an actual garage in the back. Ms. Taylor asked where Mr. Sweeney parks now. Mr. Sweeney replied on the street. Ms. Taylor asked what he does when there are parking prohibitions in the winter. Mr. Sweeney replied that he has not run into an issue with that yet. If there will be a bad storm, he parks on the side of the house where the driveway is.

Chair Gorman asked if it is correct that Mr. Sweeney's vehicle is not actually on the street when parked there, because there is a vehicle space set back off the street. Mr. Sweeney replied yes, there is a wooden barrier wall in front of the house with probably seven feet between that and the road for parking. During school hours, Armory St. is lined with vehicles. He will get rid of the parking in the front, making the space tapered. Chair Gorman stated that in a way, it could be said that Mr. Sweeney will make it more conforming, because that parking in the front line of the house would not be allowed by the current Zoning regulations. Mr. Sweeney replied yes, that would all be cut back down to the road to make it more of a front yard.

Mr. Welsh stated that it sounds like Mr. Sweeney would be getting rid of the bush in the picture. Mr. Sweeney replied yes.

Chair Gorman asked if there were more questions. Hearing none, he stated that Mr. Sweeney can proceed through the criteria.

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

Mr. Sweeney stated that people at other properties do not have to park on the street. He continued that the Variance would allow more usable driveway by allowing vehicles to park closer to the property line and a little further from the house, allowing better access to both sides of the vehicle and allowing maintenance of the driveway.

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

Mr. Sweeney stated that the driveways are laid out in the same fashion along the street; the driveways between 145 and 149 have approximately the same layout as his.

3. Granting the Variance would do substantial justice.

Mr. Sweeney stated that it would allow vehicles not to be parked on the side of the road, allowing more room for navigation and a clearer sight line down the road for other drivers, and allowing easier plowing of Armory St. during winter months. He continued that the drop-off for Fuller School is along Armory St., directly in front of the house. During pick-off or drop-off for the school, the road is one lane. Having vehicles parked on the side of the home would allow the street to be more passable during these hours.

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

Mr. Sweeney stated that he does not think this would have any negative effect on the surrounding properties because it would not impede on any other property. It would allow for uniformity on the streets. He will make his front yard more appealing, which will help the property's value. All properties on Armory St. have parking on the side of the homes.

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 because:

Mr. Sweeney stated that it would cause him hardship if he were not allowed to put in the proper driveway, which would allow him to park off the street. He continued that this makes his home less desirable than other homes in the area. The public would benefit from the cars being parked in a proper driveway, due to there being more room to drive on Armory St., especially during Fuller School's drop-off and pick-up.

Chair Gorman asked how close Mr. Sweeney's property line is to the house of the abutter to the side of the proposed driveway. Mr. Sweeney replied that the abutter has their driveway between his property line and their house, so it is probably about 20 to 25 feet. Chair Gorman asked if Mr. Sweeney could speak to the space that is going to be between the abutter's driveway and his driveway. He asked if it is like a lawn area. Mr. Sweeney replied yes, it is grass.

Ms. Taylor stated that Mr. Sweeney partially addressed this before and she did not quite catch it. She asked if the wall that is on the other side of the bush that Mr. Welsh mentioned is on Mr. Sweeney's property or the abutter's. Mr. Sweeney replied that it is on his property.

Ms. Taylor asked if Mr. Sweeney is only one foot from the property line and he has a car there, how does he get in the passenger side, if he parks head in. Mr. Sweeney replied that he has room. There are 16 to 17 feet between his property line and the house, so there is room to open the doors fully on each side of the vehicle and on that side of the yard. Ms. Taylor replied that she is missing something, then, because Mr. Sweeney says the driveway will only be a foot from the property line and she assumes that wall is probably slightly on his property. Mr. Sweeney replied that he has, from the outside of the rock wall where the bush is over to about 15 or 16 feet, he believes. Ms. Taylor replied that maybe they are not talking about the same wall.

Chair Gorman asked Mr. Sweeney to come to the screen and point to what he is describing. Mr. Sweeney did so, and determined that the "wall" Ms. Taylor was asking about is in fact the abutter's paved driveway. Chair Gorman replied that it looks like the abutter's driveway is not three feet from the property line. Ms. Taylor asked if the proposed driveway would go where the bush is. Mr. Sweeney replied yes.

Chair Gorman asked if it is correct that Mr. Sweeney said there are 16 or 17 feet between his boundary and his house. Mr. Sweeney replied yes, from the edge of the house, he think it is about 15 feet. Chair Gorman asked how wide he proposes the driveway be. Mr. Sweeney replied about 9 or 9.5 feet.

Ms. Taylor asked why Mr. Sweeney does not have three feet to work with. Mr. Sweeney replied that he would have, but it just pushes it up against the side of the house. Ms. Taylor stated that with a 10-foot wide driveway and about 15 feet to the property line, you could still do it, but maybe her addition is off. Mr. Sweeney replied that if you get out of the vehicle you are essentially getting out onto the lawn.

Mr. Hoppock replied that he would want to keep snow build up away from the foundation. Mr. Sweeney replied yes, and also, a fence runs along the property line, which is not visible in the picture, but it starts about eight feet back from the front of his property and runs the entire length. Mr. Hoppock asked if it is the neighbor's fence. Mr. Sweeney replied yes. Chair Gorman stated that Mr. Sweeney needs to be able to get out of his passenger door. Mr. Sweeney replied yes, and if there were not a fence there, it would not be a big deal.

Ms. Taylor stated that was the foundation of her original question, if you are driving head in, how do you get out of the passenger side while staying on your property. Mr. Sweeney replied that is why he wants the one foot, so that there is ample space to get out of the vehicle. Chair Gorman stated that he wonders if the driveway is a foot from the fence, a car door is much bigger than that and questioned how an opened car door wouldn't hit the fence. Mr. Sweeney replied that he could open the doors on his truck, on both sides, in the drive area. Mr. Hoppock asked if his truck is higher than the fence. Mr. Sweeney replied a little bit. Mr. Welsh stated that he assumes Mr. Sweeney wants the swing of the vehicle door to be over the pavement, instead of over the grass. Mr. Sweeney replied yes. Chair Gorman replied that the driveway would then be wider than 10 feet, he thinks, with door-swing on both sides of the vehicle.

Mr. Rogers stated that obviously, there are multiple pieces of this, such as the right-of-way access point/curb cut, the driveway, parking space, and traditional parking spaces per the Code would require a 9'x18' area that you could park. Obviously, a little wider is beneficial, but mostly what you see for parking space itself is about 9-feet wide. Chair Gorman replied that this is all coming together. If you have a 10-foot driveway with a foot on the side of it, you are good, because a car can fit in a nine-foot spot and open its doors. There would be about three or four feet of space away from Mr. Sweeney's foundation, and one foot on the opposite side, with a 10-foot wide driveway.

Chair Gorman asked if there were any further questions from the Board. Hearing none, he asked for public comment.

James Thompson of 149 Armory St. stated that he is here on behalf of the neighborhood to express their support. He continued that he does not think there is any downside to this for anyone on the street. He cannot express the views of people who are not here, but perhaps he could express how he could came to his own perspective, which was reaching out to Michael Grotton at 150 Armory St. In his conversation with him, Mr. Grotton also expressed no concerns with the driveway.

Chair Gorman closed the public hearing and asked for deliberation.

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

Mr. Hoppock stated that he sees nothing in the application that would be contrary to the public interest. He continued that if anything, Mr. Sweeney is making an effort to reduce the congestion on the street, so it would improve the public interest.

Chair Gorman stated that he agrees. He thinks a big of part of this is getting rid of that parking in front of the house, which does not even meet the Zoning requirements. Getting a driveway on a property that is constrained to have one, getting the cars off the street, especially in an area where there is a lot of school traffic, all makes sense.

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

Chair Gorman stated that the intent of the Ordinance is to prevent run-off from someone's driveway from adversely impacting an abutter, and that is why he asked the questions about what would be on the opposite side of the driveway. It turns out it is, in fact, lawn. There is also a fence there, which helps the cause. He thinks that the grass buffer between the two driveways preservers the intent of the Ordinance.

3. Granting the Variance would do substantial justice.

Chair Gorman stated that it is reasonable for someone to have a driveway. He continued that as he stated, the property does have constraints. Mr. Sweeney is doing his best to meet his needs without adversely impacting his house. Chair Gorman stated would not want a driveway one foot off his foundation, either, for reasons including snow removal and frost.

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

Mr. Hoppock stated that there is no basis to believe that to be true.

Mr. Welsh stated that they have heard from neighbors and they have attested that this is not a problem for them.

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.

Mr. Hoppock stated that this is a small lot, about a quarter of an acre. He continued that the available space on this lot for a driveway is not much, due to the size. That special condition would make applying the setback rule unfair to this property.

Chair Gorman stated that he agrees.

Mr. Clough made a motion to approve ZBA 22-10; 146 Armory St. Mr. Hoppock seconded the motion.

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

Met with a vote of 5-0.

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

Met with a vote of 5-0.

3. Granting the Variance would do substantial justice.

Met with a vote of 5-0.

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

Met with a vote of 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
and
ii. The proposed use is a reasonable one.

Met with a vote of 5-0.

The motion to approve ZBA 22-10 passed with a vote of 5-0.

V) New Business

Chair Gorman asked if there was any new business. There was none.

VI) Adjournment

Chair Gorman adjourned the meeting at 9:58 PM.

Respectfully submitted by,
Britta Reida, Minute Taker

Reviewed and edited by,
Corinne Marcou, Zoning Clerk