ADOPTED

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

# ZONING BOARD OF ADJUSTMENT
# MEETING MINUTES

**Monday, June 6, 2016 6:30 PM City Hall, Second Floor Committee Room**

**Members Present:**
Joseph Hoppock, Acting Chair
Jeffrey Stevens, Vice Chair
David Curran
Nathaniel Stout
Joshua Gorman, Alternate (arrived at 6:35 PM)
John Rab, Alternate

**Staff Present:**
Gary Schneider, Plans Examiner

**Members Absent:**
Louise Zerba, Chair

## I. Introduction of Board Members-

Chair Hoppock called the meeting to order at 6:30 PM and introduced the Board Members.

## II. Minutes of the Previous Meetings – May 2, 2016

Mr. Stout gave a correction to the minutes of May 2, 2016: on page 10 of 29, 6 lines down in the first paragraph, the words "stay up late" should be "stay open late."

Mr. Stevens noted a correction to make a little more than halfway down the 6th page – the minutes quote him as saying he "does not feel comfortable giving the owner freedom with the wording on the sign," and he did not mean the wording. He thinks he meant something along the lines of "time and change rate of the wording of the sign." Chair Hoppock replied that he recalls that was the gist of it.

Mr. Stevens made a motion to approve the minutes of May 2, 2016, as amended. Mr. Curran seconded the motion, which carried unanimously.

Chair Hoppock stated that although it is not on the agenda, the Board needs to make a motion to have a re-hearing for Barlo Signs.

Mr. Rab stated that since Joshua Gorman, an alternate member of the ZBA, is now present, he will have Mr. Gorman take his spot.

Chair Hoppock stated that RSA 677:2 is the statutory standard they need to follow to give Barlo Signs a re-hearing. He asked if anyone had comments.

Mr. Stevens stated that he disagrees on a couple of the bullet points in relation to the Barlo's letter to the Board requesting a rehearing, such as the claim that the Board did not allow the sign because it was not "liked." He continued that he voted against this application but stated in the minutes that he does not have a problem with LED signs, so that was not his motivation. Regarding the third section about timing, the issue has been murky for the Board since the Arizona case. He thinks the third bullet gives Barlo Signs a reason for having a re-hearing. He voted against their request initially, but sees that they have a case for a re-hearing and would feel more comfortable if the Board makes sure they made the right decision.

Chair Hoppock asked Mr. Stevens to explain what the third bullet point is. Mr. Stevens replied that Barlo Signs says that the Board recently granted a Variance for once a week electronic reader board message changes, and says that requiring Keene Cinemas to change the sign once a week would require them to have a much larger display area of electronic signage. He continued that his new thinking on this is: if the Board required gas stations to change their signs' copy only once a week that would not be fair. They have a track record of allowing gas stations to change their signs more frequently than weekly. So, Barlo Signs has a point.

Mr. Stout stated that he does not see that the Achilles Agway and Keene Cinema situations are similar enough to go by the same rules. The Board is here to uphold the Zoning Code and he does not see a good reason to change his vote against Barlo Signs.

Chair Hoppock stated that right now the Board only needs to decide whether the request provides good reason for a re-hearing. He continued that he was in support of the original application so this motion to re-hear should not come from him. He agrees with Mr. Stevens that there is good reason for a re-hearing but does not agree with everything in Barlo Signs's letter; they mischaracterized the Board's discussion. He would vote to grant the request to include the re-hearing on the next meeting agenda.

Mr. Stevens made the motion to rehear ZBA 16-18, which was seconded by Mr. Curran.

On a vote of 5-0, the Zoning Board of Adjustment agreed to re-hear ZBA 16-18.

Chair Hoppock asked Mr. Schneider to please put this on the agenda for the next regular meeting.

## III. Unfinished Business

## IV. Hearings:

**ZBA 16-14: Petitioner, Talon's/141 Winchester Street of 48 Junction Square Drive, Concord, MA, requests a Variance for property located at 141 Winchester Street, Keene, owned by 141 Winchester St., LLC, Concord, MA, which is in the Commercial District/SEED Overlay. The Petitioner requests a Variance from the requirements**

**requiring that the structure conform to onsite parking requirements in order to effectuate a permitted use on the premises per Section 102-3of'the Zoning Ordinance.**

**Petitioner, Talon's/141 Winchester Street of 48 Junction Square Drive, Concord, MA, requests a Variance for property located at 141 Winchester Street, Keene, owned by 141 Winchester St., LLC, Concord, MA, which is in the Commercial District/SEED Overlay. The Petitioner requests a Variance from the requirements holding that development or change of use requires the applicant to meet on-site parking requirements per Section 102-976 of the Zoning Ordinance.**

**Petitioner, Talon's/141 Winchester Street of 48 Junction Square Drive, Concord, MA, requests a Variance for property located at 141 Winchester Street, Keene, owned by 141 Winchester St., LLC, Concord, MA, which is in the Commercial District/SEED Overlay. The Petitioner requests a Variance from the requirements that a permitted use is not permitted without a Variance from parking and screening requirement, unless the Zoning Board of Adjustment's interprets a Variance of Sections 102-3 and 102-976 of the Zoning Ordinance as satisfying the requirements of Section 102-208 (2) of the Zoning Ordinance.**

Mr. Stevens recused himself and was replaced by Mr. Rab.

The petitioner displayed drawings on the easel. Mr. Schneider stated that the Board is already aware of this piece of property. Chair Hoppock asked the petitioner to speak.

Attorney Kelly Dowd stated that he is here representing the applicant. He continued that most members of the Board are familiar with this project because there was a question about whether there was a decision by the Zoning Enforcement staff, finding that this was a grandfathered use. That was brought to the Board on Administrative Appeal but was found that a Variance was required. That decision essentially construed Sections 102-3, 102-976, and 102-208(2), to address the change of use in an existing structure and it permits a change in the use of the existing structure as long as the building meets the on-site parking requirements. The applicants are seeking a Variance to allow a restaurant use, which is a permitted use, although it would not satisfy the on-site parking requirements and that is what they seek a Variance for.

Attorney Dowd continued that the applicant requests another Variance, seeking the Board's permission to have on-site parking 1,000 feet away from the building as a viable provision for dedicated parking within the requirements of the Zoning Code. On the easel, Attorney Dowd showed the existing conditions, explaining the three parking spaces that were eliminated when Aroma Joe's site plan was approved, and the current parking that exists. He showed the approximately 4,000 square feet of the building with approximately 2/3 of it that the Talon's restaurant wants to rent. There is no tenant now. Formerly there was a hot dog cart.

Attorney Dowd continued that the only physical changes would be walls removed for ADA reasons, and the addition of a dumpster. They are not changing the number of parking spaces; just going from three handicapped spaces to two. The rest of the proposal deals with internal changes within the building.

Attorney Dowd stated that the engineering report of the gentleman who conducted a traffic study is in the agenda packet.

Kim Hazarvartian, from TEPP, LLC, stated that he prepared a trip-generation analysis for the 4,000 square foot space, comparing previous uses with the proposed one. Previously a fast food hot dog place with no drive-thru used 700 square feet, and a specialty retail space used 3,300 square feet. Proposed is a quality restaurant of 4,000 square feet. The numbers for trip generation are in the memorandum dated January 29, 2016, in Table 1 as well as a bulleted list. The numbers come from the Trip Generation Manual from the Institute of Transportation Engineers (ITE). He continued that with a 4,000-square foot quality restaurant in this space, the calculation shows a reduction of 287 trips (total, in and out) during the weekday, a reduction of 28 during the weekday AM peak, an increase of three during the weekday PM peak, a reduction of 249 on Saturdays, and a reduction of four during the Saturday peak. The proposed change of use does not result in an increase of more than 100 vehicle trips in one day; it reduces the trips. The change in use would not result in an increase of trips during the peak hour, and on that basis, TEPP does not think there will be a significant increase in pedestrian trips. The site is near Keene State College (KSC) and residential uses, so it very likely that a number of those trips would be pedestrian rather than vehicle. The numbers in the ITE's Trip Generation Manual assume typical conditions with a preponderance of vehicle trips; here it is likely that a number of those vehicle trips would actually be pedestrians. This change in use for the property is not expected to change pedestrian safety in the area. They are not expecting an onslaught of new pedestrian activity and there are sidewalks and crosswalks for pedestrians to use.

Mr. Hazarvartian retrieved a memorandum dated January 28, 2016 from Steven Pernaw. He stated that it is mostly related to parking; he presents a parking analysis for the proposed uses but does not give an analysis for the previous uses for comparison purposes. He read an excerpt from it: "The intensity of a restaurant/bar, in terms of traffic generation, exceeds that of the former businesses in the building." The numbers are not in this memorandum but are in his memorandum.

Chair Hoppock asked what relevance Mr. Hazarvartian's study is to the parking situation. Mr. Hazarvartian replied that he did not analyze parking. He analyzed trip generation.

Attorney Dowd stated now that the Board has a sense of the proposal and its traffic impact, he wants to address the issues set forth in the Variance standards. He continued that this (proposed restaurant) is a permitted use in the zone. The question is allowing the applicant to change the use in the structure from one permitted use to another. First is the question of hardship. There was a discussion about what a "hardship" is and what a "special situation" is. This lot is .29 acres, with a 6,000-square foot building, and nine parking spaces. There is no way of adding parking to the existing lot and structure. The existing building cannot be utilized in conformity with the parking requirements. Aroma Joe's had about a third of the square footage. Their dedicated parking took up all of the parking spots so the other 2/3 of the building was non-rentable, with no parking spots. This is one piece of this. He continued that right now there is a deli but he does not think they have signed a written lease. They do not have exclusive parking. There is no way to use 2/3 of the building. This is a special condition.

Attorney Dowd continued that he brings to the Board's attention the 2005 case of Harrington v. Town of Warner. It involved a manufactured housing park's request to expand. They were not able to subdivide the lot due to wetlands. The Supreme Court found that the owner was allowed to exceed the limitations to the number of trailers in the park due to the existing use and the inability to subdivide the space. That was a special condition. He also points out a more recent case from 2011, Harborside Associates v. Parade Residence Hotel. Parade wanted signs for their business and the Supreme Court upheld the decision to allow that Variance because the building (pre-existing and large, on a small lot) was deemed a hardship. They could not add more parking other than by raising the building with a parking garage, which was not feasible – the special conditions caused a hardship.

Attorney Dowd continued that under the statue is a discussion about the fair and reasonable relationship between the purpose of the coordinates and the specific application to the property and proposed use being reasonable. There is a secondary piece, if that is not established, an unnecessary hardship will be deemed to exist, if and only if owing to the special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance. He believes there is a special condition here that distinguishes it from other properties in the area, and which makes it impossible to use this building for a viable rental if this Variance is not granted.

Attorney Dowd continued that regarding the two prior requirements under subparagraph A, the question of the fair and substantial relationship he represented in his submissions that the Zoning Ordinance and the Planning regulations are intended to affect new growth so the City can plan for new growth. He saw an interesting representation in Attorney Hanna's submissions to the Board, that this is not intended to affect new growth, it is supposed to effect existing structures. RSA 674:19 strictly restricts the Zoning Code from affecting existing uses or structures. It seems that if the Board's concern is not ensuring adequate parking, but taking existing building's uses and makes them non-conforming, it becomes an "inverse condemnation scheme." If they put in a requirement that is stricter than what exists, if it is intended to restrict the building from use, they are condemning it. He does not think that is a reasonable way of looking at this. The Zoning regulations are supposed to make sure a new building has enough parking, not condemn existing ones. This is an old building.

Attorney Dowd continued that the Supreme Court talked about the right to a reasonable return on a building. He does not know how essentially telling a landlord "You cannot rent the rest of your building" is reasonable. This is a permitted use. In this zone the idea of segregated zoning is to preserve the characters of the neighborhoods and keep consistency. If this Variance is approved there will be a permitted use that is consistent with what the City wants to see in this area of zoning. He thinks this meets both standards A and B.

Attorney Dowd continued that regarding the issue of the Spirit of the Ordinance and the public interest, the Supreme Court indicated that they are related. Any time a person requests a Variance they are asking the Board to make an exception to the rules. Regarding the question of whether the Board will follow the Code to the letter, no; that is the point of the Variance. That is where the "spirit" of the ordinance comes into effect. He believes these requirements are

intended for new uses, not existing ones. He does not know allowing a landlord to use an existing building in a Commercial Zone for a permitted use is setting any kind of dangerous precedent or is undermining zoning. There are statutory and Supreme Court protections for existing uses and preexistent structures. He thinks that is consistent not just with the intention of the City of Keene but also State law and Supreme Court determinations.

Attorney Dowd continued that there are a number of residential housing units in proximity to 141 Winchester St. The intention is to have a decent place to eat, drink, and socialize, which is walkable for residents in the area. The City of Keene's Comprehensive Master Plan (CMP) has indicated that the community wants to see mixed-use development of the appropriate density, public gathering spaces, bicycle and pedestrian infrastructure, and a focus on places and people more than automobiles. This restaurant would be a space like what Keene set forth in the CMP. In terms of the spirit of the ordinance, it helps to look at what the CMP says. This is a permitted use and desired by Keene, and thus clearly in the spirit of the ordinance. By allowing a landlord to use an existing building, they are not creating a precedent. The building is not being altered externally. They are not eliminating parking. It has the same footprint and same height.

Attorney Dowd continued that regarding the public interest, the Supreme Court makes a distinction between basic Zoning objectives, which it states as "whether it would alter the essential character of the locality or violate the fundamental police power by creating a threat to public health, safety, or welfare." There are two issues; one, whether this would violate the basic zoning objectives and change the neighborhood, but the answer is simple, because this is a permitted use. He did not go into depth about the topic of "threat to public health, safety, and welfare." He noticed Attorney Hanna made arguments related to this. If Talon's was not doing this restaurant and instead had a mill with smokestacks leaking toxins, or a business that put sewage in the drinking water, those would be public health issues.

Attorney Dowd continued that he thinks it is important that the only report the Board has is the traffic count computations. Looking at those calculations you see that the highest trip count for Saturday is 26 vehicles during the peak hour. Indicating that 26 traffic trips in a one hour timeframe on a Saturday night results in a safety problem, "strains credulity." You could probably say that if one more car drives down a Keene road and increases the chances of an accident happening but if they really thought like that, nothing would ever be built. This restaurant would not be an intense use. Having 26 cars on the street would not break the system. When balancing the question of the hardship and the question of the public interest, one can see that the hardship is severe and basically limits the use of 2/3 of the building. A restaurant use is consistent with the use in the zoning area, and that is well outweighed by the City condemning 2/3 of the building. He and the applicants are trying to resolve this, and get it done, and add to the tax base.

Attorney Dowd continued that granting this Variance would be substantial justice, because it would be consistent with Zoning and the CMP goals. It would allow that 2/3 of the building to be used.

He continued that it is unclear how the Variance would affect surrounding property values. There are real estate problems surrounding large parking places like Beacon Hill in Boston, but in other

places like Fitchburg there is plenty of parking and he does not think that it correlates well with property values. He does not think that 26 vehicle trips would diminish the surrounding property values. He asked Greg Johnson to speak.

Greg Johnson, Real Estate Agent, stated that he has been involved with this building for a number of years. He continued that parking is an issue in Keene no matter where you go. He explained his qualifications and experience, stating that he currently has two or three listings of downtown properties, was involved with Aubuchon's, and just signed a contract with a business at the Colony Mill. This property at 141 Winchester St. is in a zone that should be Central Business. He holds the City of Keene negligible for the fact that when they allowed dorms to be built they took away many local parking spaces that all businesses in the area used, and they should have re-zoned the area.

Mr. Johnson continued that there are 21 parking spaces on Ralston St. As a Zoning Board member in Swanzey, he went on field trips, which he encourages Keene's ZBA to do. They will never see more than five or six cars parked on Ralston St. – the parking is adequate. It would be nice to find a business like a yarn shop that has two or three vehicles per day, but that will not happen. Businesses are moving out of Keene, not in, like Bank of America, New England Auto Finance, and others that they will soon see. Working in the trenches, trying to lease commercial properties, talking to so many people, he can say that all of his contacts are people from high-traffic businesses. He does not think it would hurt or devalue properties. He has never had a car towed off of one of his properties.

Mr. Johnson continued that 141 Winchester St. today received a City tax bill for just under $10,000. Without the Variance they are requesting, they are only allowed to use 32% of the space. If that is the case, they should have a credit of 68% of that $10,000 tax bill. They always pay taxes based on the full amount. Looking at the property tax card you will see that they are set up for 6,306 square feet but without the Variance can only use a little over 2,000 square feet. That is a problem. He would want to get rebated. They had six months with Aroma Joe's, eight months with another tenant, and lost over $100,000 in revenue from rent. They have tried to be good neighbors, and put a lot of money into the building. Aroma Joe's spent $417,000 in improvements. He does not know what to say about the question of value, other than they have reached out to the businesses in the neighborhood and they say it is okay if someone parks at their building if there is a space available. He is trying to find tenants. It is tough in Keene right now. For example, he has a commercial property soon going out for auction because the owners got sick of trying to rent it. He and others are trying to increase economic development in Keene. Mr. Johnson concluded that he thanks the Board and hopes they see the problem and grant the Variance.

Chair Hoppock asked if anyone had questions for Mr. Johnson. Hearing none, he recognized Attorney Dowd.

Attorney Dowd stated that he has only spoken to the first Variance. Chair Hoppock asked if the second one is moot if the Board grants this first one. Attorney Dowd replied no, that depends upon the Board. He continued that they came up with 160 as the number of seats based on the square footage, and what the Health Code and Fire Code would allow. He is trying to work with

the Board. They need permission to change the use. They found someone who will give them off-site parking, although it is further away than they want.

Chair Hoppock asked to hear from members of the public who support this request.
Mr. Gorman stated that Attorney Dowd kept referencing the parking parameters in the Zoning Ordinance as being intent upon inhibiting the existing uses, and he keeps saying this is an existing use, but it is not. He asked if there has been a bar there before. Attorney Dowd replied that yes, they would be bringing in a restaurant that was not there before but that is not the issue. He continued that the problem is not the use; it is the "non-conforming use" – the fact that the building does not have parking. They are not adding or reducing parking, nor do they want to make the building bigger. They want a permitted use in the building.

Mr. Gorman clarified that what Attorney Dowd is talking about wanting a permitted use, not an existing use. Attorney Dowd replied that it is commercial activity in the building that does not meet the parking requirements. He continued that the only site plan in the City's file is from 1977, when there were 18 parking spots, but some were in the right-of-way on Ralston St. and some were eliminated because they were not 9-feet per ADA requirements. It got reduced to 12 spots. Then three were removed and there were only nine. 141 Winchester St. cannot add to those. If the Board approves this Variance it will not change the number of parking spots. It is a complicated issue. They argued to the Board that this does not require a Variance because they are not changing the structure, they are just using the structure as permitted under the Ordinance, but they did not win, so here they are on the Variance. The idea is, the use is a permitted use.

Mr. Gorman replied that Attorney Dowd kept saying "existing use." Attorney Dowd replied that it is an existing structure. He continued that they do not want to change or expand the structure other than knocking out internal walls and changing the parking slightly.

Chair Hoppock asked if Attorney Dowd agrees that the nature of the proposed use that they are asking for is what implicates Section 102-3, which is why they need the parking. Attorney Dowd replied yes. He continued that if they wanted to do a tanning or hair salon, a hot dog shop, etc., they would not need this Variance. But they do not want that. Chair Hoppock asked if that means Attorney Dowd agrees that there are other reasonable uses, since he just named three. Attorney Dowd replied that there are a lot of reasonable uses. He continued that he does not understand. The case of Vigeant v. Town of Hudson is interesting to consider. An applicant gets to propose a use and the Board either approves it or not. It is not a hypothetical matter. The question is whether the proposed use is reasonable or not, not whether there are other reasonable uses. Case law says yes, it is presumably reasonable.

Mr. Stout asked if the footprint will stay the same in the building despite Aroma Joe's leaving. Attorney Dowd replied yes. He continued that they are not taking up any more space.

Chair Hoppock asked to hear from anyone opposed to this.

Tom Hanna, of 41 School St., stated that he practices land use law in the area. He continued that he represents CED, an electronic supply store diagonally across from this property; and Tasoulas Realty; the Parodi/Parody family of New England Fabrics; and The Pub. He needs clarification

on whether the Variance they are addressing right now is actually all of the various Ordinance provisions referenced in ZBA 16-14, not just Section 102-3. The other ones indicate that if you change the use you need to comply with the current parking standards. The Board is not taking those one by one. Attorney Dowd addressed them collectively and they are all part of ZBA 16-14.

Chair Hoppock stated that he agrees. He asked if anyone disagrees. Hearing none, he continued that that is how it is noticed, anyway. He assumes that they are all together.

Attorney Hanna stated that Section 102-3 says that structures and land uses already in existence shall not be subject to the requirements of Division 7 or Article 5, relating to off-street parking, unless there is a change in use. Section 102-208 says that a use permitted in any zone and is a non-conforming building may be changed to another use providing that the new use meets all of the parking requirements. Section 102-976 states that no change of use shall be approved unless off-street parking requirements are met. Preliminarily, he would ask the Board to agree that all of the submissions made in the prior case that was heard at the February meeting will be part of this record. One reason is practical: when they addressed the Board on February 1, at the time there was an Appeal of an Administrative Decision, and also a Variance requested by the applicant. The Board did not break the testimony down case by case. The testimony by neighbors and City staff addressed the whole case – the proposed use, the Variance, and the appeal. Thus, it is appropriate that that be made part of tonight's record.

Chair Hoppock asked if he wants a motion that incorporates the record from the February meeting into tonight's record. Attorney Hanna replied yes. He continued that ZBA 16-04, ZBA 16-05, and ZBA 16-06 are the numbers. The latter two were withdrawn at some point, but his point is that the three were all addressed at that hearing.

Chair Hoppock made the following motion, which was seconded by Mr. Stout.

On a vote of 5-0, the Zoning Board of Adjustment agreed to incorporate the record of ZBA 16-04 into the record of this hearing.

Attorney Hanna stated that the owner of 141 Winchester St. bought the property knowing the tenants and the parking limitations. He continued that he knew the lot size was 12,632 feet where 15,000 feet is required in that Zoning District, and knew that it violated setbacks in the east and west. He knew that it violated the impervious coverage requirement, and he knew about the busy and difficult intersection. It is hard to turn left onto Winchester St. from Ralston St. The former parking spaces on Winchester St. were obviously inappropriate for any kind of long-term commercial use. They were dangerous to back out of, into the street. There were only nine spaces when the new owners took over. These factors do not make all of the potential uses of the building inappropriate, but they make a high-intensity use (like the proposed one) inappropriate. Denial of the Variance does not mean that the Board is denying all prospective uses for this property. There are many appropriate uses, as indicated by Attorney Dowd. During the primary presentation there was discussion about the denial of the Variance being the same as condemning 2/3 of the building. Those are incendiary words and that is not the case here. If this restaurant does not get approved, then Mr. Johnson will dedicate himself to finding a tenant. During the

past eight months he has been going for a home run with this sizable restaurant and bar. It is not appropriate to say there are no appropriate uses. Denial of this Variance does not make the building unusable. The reason that the City Council established these various provisions in the Ordinance was that it is consistent with the overall objectives of zoning, which are to try and make non-conforming uses restored to conforming. It gives a reviewing authority an opportunity to look at a proposed change in use to see if it is appropriate. The most egregious non-conforming aspect is the parking.

Attorney Hanna stated that he heard someone say that this property should be treated as if it is in the Central Business District or that this area should be changed to Central Business. He distributed copies of a zoning map of the area. He showed that Acadia Hall is the first piece of property that is in the Central Business District and all the area around is High Density or Commercial Districts. They can imagine all of the Commercial and High Density properties were zero lot lines, where you can build right to the lot lines and do not need any on-site parking. The goal of on-site parking is to keep the people who are parking off of the streets and to limit the municipality's obligation to provide infrastructure for parking. Downtown has zero lot line zoning and no on-site parking requirements, because there are municipal parking garages and many metered spaces, maintained by the City. Where 141 Winchester St. is, is not an area that should simply be changed to Central Business, and it is unfair to even indicate that the zoning designations in the neighborhood were not taken seriously by Planning and the City Council.

Attorney Hanna continued that he did not hear anyone bring it up tonight, but the written materials reference that this property is in the SEED district that allows for a Special Exception to the parking requirement. But this is not a SEED project. To his knowledge, there is only one SEED project in the district. SEED is an incentive to encourage green buildings. This building would not qualify, nor is it seeking to qualify, so to reference it is simply irrelevant.

Attorney Hanna continued that Attorney Dowd indicated that regarding hardship, the parking requirements are primarily intended for new construction. That is not the case. Attorney Hanna read to the Board the provisions of the Zoning Ordinance. The requirements are intended to give the Board oversight of changes of use in non-conforming situations. Any change in use requires the on-site parking requirement to be fulfilled. The materials also indicate that the applicant thinks the use will attract mostly pedestrians. However, the traffic consultant indicated that many of the vehicle trips referenced will actually be pedestrians. That is inconsistent. Intending your project to mostly be for pedestrians is highly speculative. A representative from Keene State College (KSC) will testify about the extent to which of-age college students will be driving.

Attorney Hanna continued that Mr. Johnson referenced the 12 months it took to get Aroma Joe's in. He did not say why Aroma Joe's left. It was because of the parking problem. Attorney Hanna distributed copies of a handout to the Board – a Keene Sentinel article from April 2, 2016, about the closure of Aroma Joe's. Attorney Hanna stated that although there may have been other factors, the owners of Aroma Joe's stated to the Sentinel reporter that it was the lack of known parking spaces and a drive-up option that ultimately led to the closure. They also said that if they could find a spot with the right visibility and parking they would have no problem opening a business in Keene. The Board cannot dismiss the fact that vehicles will be going to the restaurant, especially if it is a quality one like the traffic consultant said.

Attorney Hanna continued that parking is for not just patrons but staff too. The Pub has been in business for a long time and tried to assess how many employees would be needed for a 160-seat restaurant. It is approximately 30, counting the hostesses, bussers, wait staff, dining room manager, bartenders, cooks, prep cooks, and dishwashers. When there is a shift change there may be more than 30 people there for a period of time. This place will also need at least two bouncers, if not three or four like some places downtown like Scores. Mr. Pernaw's letter does indicate that the intensity of the proposed use would be substantially greater, regarding traffic generation, than the previous uses. It is not fair to say that the Talon's restaurant would be an expansion of the previous one; the hot dog stand may not have even had seats. The materials and remarks made indicate that the property has special conditions, such as the proximity to downtown. That is not a special condition distinct from the conditions of other nearby properties. The presence of metered spaces on Ralston St. also is not a special condition that differentiates this building from others on the street. The pedestrian traffic is not a special condition. The fact that the building is vacant is the plight of the owner, as it is the plight of many owners, but it is not a condition specific to the property. The Harrington case says "the burden must arise from the property, not the property owner." It must be specific to that property and not the area in general. This is a parking situation. You cannot claim a special condition as the reason you are applying for a Variance. They are applying to waive the on-site parking requirement. That cannot be the special condition that justifies the Variance.

Attorney Hanna asked if the Board is, at this point, staying away from discussing the request for a Variance for the parking distance. Chair Hoppock replied for the moment, yes, but they will get to it. Attorney Hanna stated that he will hold off on stating his other positions to see if the other speakers address them.

Chair Hoppock asked if there were questions for Attorney Hanna. Hearing none, he asked if anyone else wanted to speak in opposition.

Kamal Atkins, Vice President for Student Affairs at KSC, stated that he wants to speak in opposition, on behalf of the President of KSC. He continued that their principal reasons for opposing are the negative implications for the use of this location. It looks like the location targets KSC; it is in the high density area where KSC students live in proximity to this building as well as on campus. KSC believes there would be an increase in foot traffic from on- and off-campus KSC students, and an increase in vehicle traffic. That would add to their safety concerns about KSC students crossing in that already busy area. They also have safety concerns about off-campus students increasing the vehicle traffic. KSC works hard to maintain good relationships with the businesses and residents in the area. They have concerns about parking. They expect it to be very likely that rather than use the proposed parking 1,000 feet away, restaurant patrons would choose the closest parking, which is KSC's commuter lot right across the street. KSC would have to use more staff time, and maybe even hire additional staff, to enforce their parking guidelines. Also, a significant concern is this bar's proximity to campus. That is counter to KSC's mission as an educational institution.

Chair Hoppock asked if there were questions for Mr. Atkins. Hearing none, he recognized more speakers.

John Tasoulas, of 103 Winchester St., stated that he has a property there. He continued that he wanted to reiterate Attorney Hanna's points: this is a self-imposed hardship that Mr. Johnson has. He bought the property knowing the restrictions on it. Nothing has changed since he owned it. He imposed this hardship on himself by purchasing the property knowing full well the issues with parking, setbacks, and permeable materials. There are plenty of uses for this property instead of a high-intensity bar. He continued that what he heard from the traffic consultant is that the bar is anticipated to only have four more visits per day than a hot dog stand and bridal shop, and he does not believe that. If that is true, the bar will not survive financially. It would be terrible to have all the extra vehicles coming through that location. He knows from experience that people just park wherever they can. People will drive by a metered spot on the street to park in someone's parking lot or a place where they do not have to pay a meter. This will create a huge hardship to the neighborhood, including his property, and be a public safety issue. He is opposed to this. There will be lots of intoxicated people driving and roaming around. The "eyeball test" shows that nine parking spaces are not enough. The Variance is too great.

Attorney Hanna stated that he wants to draw attention to exhibits he submitted earlier, in the agenda packet. He continued that one has to do with value. He read excerpts, including the following from a letter from George Foskett, which he wanted on the record: "It is my opinion that the establishment of a 160-seat restaurant and bar in the building at 141 Winchester St. would have an adverse effect on the value of the other properties in the area because it would overburden the parking in an area where there is already inadequate parking for the existing uses. Owners of these other properties in the area would have the burden of policing their parking lots to prevent patrons of such a restaurant and bar from parking in their lots if no other parking is available. In my view, the increased traffic congestion will also adversely affect these businesses, because people will prefer to avoid the area."

Attorney Hanna continued that preferring to avoid the area was the testimony from many people at the February meeting. He submitted these minutes as part of his materials, and he wants Susan Thielen's testimony from that meeting specifically page 6 of 18 to be on the record. Her words were similar to Mr. Atkins's words. She said it would cost almost $16,000 for additional coverage, not including maintenance. There is a lot of parking right across the street in KSC's commuter lot, and the parking spaces there are about 75 to 100 feet from the crosswalk that goes to the southwest corner of The Pub. That will be a very desirable place to park and require security. The Pub hired security in conjunction with Aroma Joe's, in the beginning, especially. It was a burdensome expense and they gave it up at some point, and then Aroma Joe's closed.

Attorney Hanna stated that he also wants to draw the Board's attention to the letter from CED that is in front of the meeting minute's right after the staff report. In the second paragraph, Brian Charles Dodge says, "It is our concern that the patrons frequenting our establishment will find it difficult for the easy in and out for their daily work flow and an inconvenience to their jobs. This will have bearing on their livelihood and certainly will impact our revenue with definite loss of business. We also need to bring up the safety issue; we have large delivery tractor trailer trucks backing into our loading docks that frequently stop traffic when doing so. Parking on and near this street has become very difficult and congested. The safety of pedestrians also needs to be considered as this street is a major thoroughfare for KSC students."

Chair Hoppock asked if anyone had questions. Hearing none, he thanked Attorney Hanna for his comments. He asked if anyone wants to speak in support.

Attorney Dowd stated that he wants to address some points. He continued that the Keene Sentinel article says that Aroma Joe's wanted a drive-thru and more parking and could not find a site to satisfy that. You can see the lot in the zoning map that Attorney Hanna provided, and given its proximity to downtown, yes, you would anticipate a fair amount of pedestrian use. Mr. Atkins said that the restaurant would cause an increase in foot traffic and activity at the commuter lot. The applicants are proposing a restaurant that will serve alcohol. The Pub serves alcohol, but no one has heard about a "parade of horribles" at KSC because of The Pub's existence, so why would this proposed restaurant suddenly create problems?

Attorney Dowd continued that regarding the idea of "self-created hardship," he has in front of him New Hampshire Practice Areas, Volume 15, Land Use Planning and Zoning, Laughlin Chapter 24 Section 25, dealing with self-created hardship. It says: "The NH Supreme Court has never ruled that the fact that an individual purchased property with knowledge of restrictions is sufficient basis for denial of a variance." In most cases where the court has found that self-created hardship might exist it was due to changes to the land brought about by the owner, which s/he sought to use as a basis of hardship, rather than the purchase of property with the knowledge of restrictions. To say that Mr. Johnson has a self-created hardship because he bought this building knowing the situation is not a valid reason to deny the Variance.

He continued that regarding decreasing value, downtown has no parking requirements and he does not see anyone running to the Planning Board saying that they have to re-zone because all of the property values have diminished. That is a red herring. Regarding people parking in lots where they should not, the property owner can post signs saying they will tow vehicles, and a tow company will charge the owners of the cars that are towed, not the property owners, so it is not like the traffic impact from this business would be any different from that of prior businesses. It will not be a major issue. If KSC's commuter lot is so tempting for people looking for parking, why are not The Pub's patrons parking there?

Attorney Dowd continued that he and the applicants have clearly made a case for the five criteria. They brought a Variance with respect to the three Ordinances because two essentially say the same thing; one says you can change the use unless you do not meet the parking requirements, and the other says, basically; they both deal with addressing changes in the use in the event that the building meets on-site parking requirements. They are seeking relief under those two. The third is slightly different but he thinks if they have a Variance to change the use even though the parking does not comply with the on-site parking that would satisfy the third one but if the Board wants to construe that as a Variance, too, they can do that. Basically they are looking to change the use to a permitted use even though the building does not meet the on-site parking requirements.

Chair Hoppock asked if anyone had more questions.

Kim Ioannou, owner of The Pub Restaurant and Catering at 131 Winchester St., stated that a lot of comparisons are being made between The Pub and this proposed restaurant. She continued that The Pub is not a bar. It is a restaurant that has a service bar. Ask anyone ages 21-35 if they go to The Pub to drink, and they will say no. The Pub serves food and their clientele are families and seniors. Many are elderly and they come because The Pub has parking for them. The Pub pays rent to another business for The Pub's employees to park. The Pub's parking lot has signs about towing. When the restaurant is busy and crowded it can take a long time to determine which cars in the parking lot belong to your customers and which do not, which she sometimes has to do – such as noon time when the parking lot is full but the restaurant is not. Yes, when Aroma Joe's was in business part of the problem Aroma Joe's had with parking was that The Pub was paying a parking lot attendant to work from 7:00 AM to 2:00 PM to keep Aroma Joe's customers out of The Pub's parking lot. Attorney Dowd keeps comparing the proposed restaurant to The Pub but they are very different. The Pub is an established, family restaurant and people do not go there to get drunk. They do not overserve people. They are very strict on their policies and do not serve people coming in if they can smell alcohol on them. When The Pub has people's cars towed, people get very angry. Typically it is the younger people who have been drinking, and they retaliate with vandalism at The Pub and other such things. That is another burden The Pub has to deal with – monitoring their parking lot has repercussions.

Mr. Rab asked how many seats The Pub has. Ms. Ioannou replied 130. Mr. Rab asked the number of parking spots they have. Briefly conferring with another person in the audience, Ms. Ioannou replied more than 20, maybe about 22, with two handicapped spots. Mr. Rab asked how many employees. Ms. Ioannou replied about 30, and they park at another nearby business that The Pub pays to rent parking spaces from.

Mr. Johnson stated that when Aroma Joe's decided to close, the Sentinel article was incorrect in more ways than one. He continued that the parking situation was not the reason for closing; the reason was the lack of drive-thru. One of the partners in 141 Winchester St. owns a Dunkin Donuts in Massachusetts, and over 50% of a coffee establishment's business is drive-thru. Aroma Joe's is a franchise operation. A corporate decision was made to open one in Kittery, Maine instead where there was a better population and a drive-thru option. He can provide documentation about that.

Attorney Dowd stated that the proposed business is a restaurant that will have a bar. He continued that since that use has not been approved or put on the table, he cannot see how someone can compare The Pub to what does not exist yet. New Hampshire regulates liquor, and not overserving, and not serving to minors. Regarding staff, a 100-seat restaurant with 30 employees is a "crazy staffing ratio." He supposes a restaurant could do that. But the anticipated staffing level for this restaurant is nowhere near what The Pub has.

Nate Stavseth introduced himself and the person with him, Garrett Plifka, stating that they both worked at Scores (bar downtown). He continued that the capacity there was 285. On busy nights there were three bartenders with no servers, one bouncer, two floor staff members, and one cook. The restaurant he and Mr. Plifka propose for 141 Winchester St. would never have 30 employees.

Mr. Gorman asked if that confirms that Mr. Stavseth and Mr. Plifka will run a different type of operation than The Pub. Mr. Staffsen replied that someone had compared their proposed restaurant to Scores. Mr. Gorman asked if Mr. Stavseth and Mr. Plifka compare themselves to Scores. Mr. Stavseth replied that someone else compared them to Scores.

Ms. Ioannou replied that that is her point. She continued that these two owners came to meet with her before this started, and said that they "are opening a bar next door." If they are going to be like Scores, they do not need cooks and all of those employees. If they are going to be like The Pub, The Pub never has fewer than eight people in the kitchen. If they want to run a business properly, they will need all of those employees.

Chair Hoppock closed the public hearing at 8:23 PM and asked the Board to deliberate. He re-read the notice for ZBA 16-14.

Mr. Stout stated that he noticed little discussion on the change of use. He continued that in previous meetings they talked at some length about the fact that a change of use would happen regardless of whether Aroma Joe's was there. That remains the case. He read from Section 102-207: "the Zoning Board of Adjustment may under appropriate circumstances permit a change from a non-conforming use to another non-conforming use if such use is more in conformity with the spirit and intent than the prior use and not more injurious or obnoxious to the neighborhood than the previous use." He continued that that has direct bearing to this situation and will weigh on his vote.

Chair Hoppock stated that he thinks the Variance request is contrary to the public interest. The harm to the public is greater than any loss to the individual. There is already congestion in the Ralston St. and Winchester St. area. He does not see any benefit or safety improvement to granting this Variance. The purpose of the Zoning Ordinance in this sense is safety, and managing the traffic flow in a congested area. This should not be exacerbated, which is what would happen if the Variance is granted. A 140-seat restaurant would alter the character of the neighborhood. Lots of cars will be driving by trying to find parking. That will impact the neighborhood and parking lots. He does not think substantial justice would be done. The loss to the individual is outweighed by the gain to the public. There is no injustice in this case. He agrees with Mr. Foskett's comments – it would be a loss to the neighborhood. He is not convinced there is a hardship. He will not support this.

Mr. Stout made a motion to deny ZBA 16-14. Mr. Gorman seconded the motion.

Chair Hoppock asked to go through the Findings of Fact, and Mr. Schneider stated that that is usually only done if the motion is to approve the application. Brief discussion ensued about the process. Mr. Gorman withdrew his second, and Mr. Stout withdrew his motion.

Mr. Rab made a motion to approve ZBA 16-14. Mr. Curran seconded.

Chair Hoppock went over the Findings of Fact:

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

*If the Variance were granted, the spirit of the Ordinance would be observed:* Denied 0-5.
*Granting the Variance would do substantial justice:* Denied 0-5.

*If the Variance were granted, the values of the surrounding properties would not be diminished:* Denied 1-4. Mr. Gorman voted in favor.

*Unnecessary Hardship*

A. *Owing to special conditions of the property that distinguish it from other properties in the area, denial of the Variance would result in unnecessary hardship because:*
   i. *No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property:* Denied 0-5.
   ii. *The proposed use is a reasonable one:* Denied 0-5.

By unanimous vote the Zoning Board of Adjustment denied the application for ZBA 16-14.

**ZBA 16-15**: **Petitioner, Talon's/141 Winchester Street of 48 Junction Square Drive, Concord, MA, requests a Variance for property located at 141 Winchester Street, Keene, owned by 141 Winchester St., LLC, Concord, MA, which is in the Commercial District/SEED Overlay. The Petitioner requests a Variance allowing off-site parking beyond 300 feet from the site per Section 102-978 of the Zoning Ordinance.**

Chair Hoppock asked Attorney Dowd if he wanted to proceed with this. Attorney Dowd stated that since the Board has indicated that the petitioner cannot change to a new permitted use, they cannot do a restaurant, he does not see the point in worrying about off-site parking. He continued that therefore, he requests the Board to withdraw this without prejudice.

Mr. Rab made the following motion, which was seconded by Mr. Curran.

On a vote of 5-0, the Zoning Board of Adjustment withdraws ZBA 16-15 without prejudice.

**ZBA 16-22**: **Petitioner, Prime Roast Coffee of 660 Marlboro Road, Keene, requests a Variance for property located at 660 Marlboro Road, Keene, owned by Fern & Rake, LLC, of 50 Woodbury Street, Keene, which is in the Industrial District. The Petitioner requests a Variance to permit the front of the building to be the primary frontage for signage per Section 102-1282 of the Zoning Ordinance.**

Mr. Rab stated that he had to recuse himself from this matter. Chair Hoppock, Mr. Stevens, Mr. Curran, and Mr. Stout remained. Chair Hoppock recognized the petitioner.

Judy Rogers stated that the petition is for her building at 660 Marlboro Rd. She continued that last year she rehabilitated a brick mill building to move her coffee roasting production facility there. As a next step, she wants to put the primary sign on the road-facing side of the building. She believes that the Sign Ordinance uses language that defines "primary" with the word "egress." There is no door on this wall. She is asking to put a sign here.

Chair Hoppock asked her to go through the five criteria for them. Mr. Schneider gave her a copy of the five criteria for reference. Mrs. Rogers stated that granting this Variance would not be contrary to the public interest, she does not think. She continued that she has a question – is she right in saying she needs a Variance? Mr. Stevens replied that he believes so. Mr. Stout asked for an administrative opinion on that.

Mr. Schneider stated that the "definitions" section of the Sign Code has three types of frontage, primary, secondary, and parking lot. All three refer to doors for purposes of egress. As Mrs. Rogers explained, the portion of her building that faces the right-of-way does not have any entry into the building. It was determined that it did not meet the definition of "primary frontage" in order to qualify for a sign. So she needs a Variance.

Mrs. Rogers stated that she could put a freestanding sign there but cannot put a sign on the building. She continued that, regarding the five criteria, she does not think the public interest would be affected. This is in an Industrial Zone; it is heavily trafficked, and there are other businesses in the area. Regarding the spirit of the ordinance, this would just be a sign, facing the road.

Chair Hoppock asked if she has a picture of what the sign would look like. Mr. Stevens replied that it is in the agenda packet. Mrs. Rogers replied that the image is a rendering, showing the idea of it – the final sign has not been determined.

Mr. Stout asked if the intent is to put the sign on the brick. Mrs. Rogers replied that it would be painted onto the building.

Chair Hoppock asked how Mrs. Rogers would explain the loss she would suffer if the Variance was not granted. He asked if that would be outweighed by the gain to the general public. Mrs. Rogers replied that she has a beautiful building that represents her company, without her company's name on it. She continued that she thinks the public would like to know what the building is there for.

Mr. Stout asked if she has checked with the Zoning regards to the specifics of the sign if they grant the Variance. Mrs. Rogers replied that she is asking for this to be her primary sign, so it would follow the same criteria as any other primary signs follow.

Mr. Stout stated that the sign depicted in the rendering may or may not meet the standards. Mrs. Rogers replied that the sign will comply with the primary frontage regulations. She continued that she does not see that a sign would reduce the value of the surrounding area. It is a commercial building and should have a sign.

Chair Hoppock asked Mr. Schneider if it would be okay for the Board to approve this so long as the sign dimensions are in accordance with the regulations. Mr. Schneider replied yes.

Mr. Stout asked if the frontage would remain as is (the wall with the proposed sign) or if the frontage would be the actual front of the building. Mr. Schneider replied that she could possibly

have two primary frontages. He continued that the one on the driveway side would probably be considered parking lot frontage. Mr. Stout replied that if the primary frontage was the south-facing wall where the sign will be granted, he is comfortable with that.

Chair Hoppock asked what direction the sign faces, in the rendering. Mr. Schneider replied south, facing Route 101. He continued that the Board could say that will be considered the primary frontage for sign purposes.

Chair Hoppock asked if anyone wanted to speak in support.

John Rab, of 232 Court St., stated that most Board members tonight were on the Board when there was a similar case in which Vermont Cabinetworks was forbidden by the Sign Code to have a sign facing Route 9 because it was not the primary frontage. He continued that the Board unanimously decided to allow the sign facing Route 9, because it was easier for someone driving by to find the building, instead of having them driving around confused and causing traffic problems.

Chair Hoppock asked if the configuration of the land would be considered a unique property. Mr. Rab replied yes, Route 101 is a main artery. He continued that he supports granting this Variance.

Chair Hoppock asked if anyone wanted to speak in opposition. Hearing none, he asked for a motion.

Mr. Curran made a motion for the Zoning Board of Adjustment to approve ZBA 16-22 for a sign on the south side of the building that meets the primary frontage sign requirements for the zone. Mr. Stout seconded the motion.

Chair Hoppock went over the Findings of Fact:

*Granting the Variance would not be contrary to the public interest:* Granted 4-0.

*If the Variance were granted, the spirit of the Ordinance would be observed:* Granted 4-0.

*Granting the Variance would do substantial justice:* Granted 4-0.

*If the Variance were granted, the values of the surrounding properties would not be diminished:* Granted 4-0.

*Unnecessary Hardship*

- *B. 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:*
  - *iii. No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property:* Granted 4-0.
  - *iv. The proposed use is a reasonable one:* Granted 4-0.

By unanimous vote the Zoning Board of Adjustment approved the application for ZBA 16-22.

**ZBA 16-23**: **Petitioner, Prime Roast Coffee of 660 Marlboro Road, Keene, requests a Variance for property located at 660 Marlboro Road, Keene, owned by Fern & Rake, LLC, of *50* Woodbury Street, Keene, which is in the Industrial District. The Petitioner requests a Variance to permit signage at the 660 Marlboro Road, Prime Roast Roasting facility to advertise the Prime Roast Coffee Main Street cafe per Section 102-1292 (13) of the Zoning Ordinance.**

Chair Hoppock recognized the petitioner. Judy Rogers stated that the building is at the intersection of Route 101 and Swanzey Factory Rd., which is busy. She continued that the building is attractive. She would like to have an element of her sign be directional, to direct traffic off of the premises and toward Main St. where her (Prime Roast) café is. This building on 660 Marlboro Rd. is not open to the public. It is solely for production. She wants a sign so people know what the business is, but it is important that people not enter the premises creating more turning/entering movements at that intersection. She wants part of the sign to say something like "coffee shop on Main St." so people go past the building and to Main St.

Chair Hoppock asked if this is a content issue. Mrs. Rogers replied that it is an off-premise issue. She continued that it would be her business sending customers to her business's other location. Mr. Schneider stated that directional signage is allowed if it is directing people to places on the property, such as "deliveries here," "entry," "exit," and so on and so forth.

Chair Hoppock read from the Reed case from Arizona, which says that a Zoning Board cannot regulate the content of a sign. He continued that it seems like that is what they are being asked to do here. He asked if the reason she needs a Variance is because it is off-site. Mr. Schneider replied yes, because the sign would be directing people to another building in another part of town, which is off-premise.

Mrs. Rogers stated that the point is to direct people off of the premises for safety. She continued that it will be good for the property and intersection to not have more traffic. It will be good for her business to send people to Main St.

Mr. Stout stated that the rendering looks nice. Mrs. Rogers replied that they worked hard to find a way to direct people off to Main St. without having a negative message such as "do not enter." She continued that she likes the idea that they are sending people to beautiful downtown Keene from one of the gateways to Keene.

Mr. Stout asked if there is a sign on the east elevation. Mrs. Rogers replied that it is a brickhouse roaster something. She continued that that will not change.

Mr. Stevens asked if she receives deliveries here. Mrs. Rogers replied that it is a small property. She continued that they get deliveries via tractor trailer truck at her warehouse across the street on Swanzey Factory Rd., and move it by hand.

Mr. Stevens asked, did not the Board have an application like this previously; such as with the Keene Apartments sign that was on the second floor of the same building? Has the Board seen this kind of situation before other than that? Mr. Schneider replied that he cannot recall off the top of his head.

Chair Hoppock asked if anyone wants to speak in support.

Josh Gorman, of 85 Park Ave., stated that he wanted to speak on behalf of the building and the project itself. He continued that it was vacant for years. It is now something they all should be proud of. He thinks the spirit and intent of the Sign Ordinance regarding off-site signage does not really quantify itself in this instance.

Chair Hoppock asked if anyone wanted to speak in opposition.

Darryl Masterson, of 44 Willow St., stated that he wanted to speak but not in opposition. He continued that he likes the rendering and thinks Mrs. Rogers did a fantastic job. He continued that this sign would go well with another sign in town that everyone likes. He sees no reason to deny the Variance, provided that the sign falls within the size regulations.

Chair Hoppock asked if anyone else from the public wished to speak. Hearing none, he closed the public hearing at 8:59 PM and asked the Board to deliberate. He read the notice aloud.

Mr. Stout made a motion for the Zoning Board of Adjustment to approve ZBA application 16-23. Mr. Stevens seconded.

Chair Hoppock went over the Findings of Fact:

*Granting the Variance would not be contrary to the public interest:*
Mr. Stevens stated that for the record, this is a unique situation; in the sense that a business owner wants a sign saying what her business is but does not want foot traffic because it is ancillary to the primary location. It is not just the second location of a coffee shop with cross advertising. Everyone is pushed downtown.
Granted 4-0.

*If the Variance were granted, the spirit of the Ordinance would be observed:* Granted 4-0.

*Granting the Variance would do substantial justice:* Granted 4-0.

*If the Variance were granted, the values of the surrounding properties would not be diminished:*
Granted 4-0.

*Unnecessary Hardship*

*C. 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:*

*v.* *No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property:* Granted 4-0.

*vi.* *The proposed use is a reasonable one:* Granted 4-0.

By unanimous vote the Zoning Board of Adjustment approved the application for ZBA 16-23.

At 9:02 PM, Chair Hoppock recessed the meeting, and called it back to order at 9:09 PM. Mr. Rab rejoined the Board.

Chair Hoppock reported that the applicant for ZBA 16-34 has volunteered to reschedule to July 5, 2016. Mr. Schneider replied that he has to open that agenda item and vote on a motion.

Chair Hoppock took the agenda out of order to address ZBA 16-34.

**ZBA 16-34:/ Petitioner, Elm City Properties, LLC, of 16 North Shore Road, Spofford, NH, requests a Variance for properties located at 0 Grove Street, Keene, owned by Jeannette Wright and Michael Lynch of 150 Meetinghouse Road, Hinsdale, NH, which is in the High Density District. The Petitioner requests a Variance to permit the current open lot to be converted to a parking lot per Section 102-422 of the Zoning Ordinance.**

Chair Hoppock read the notice for 16-34 aloud.

Mr. Rab made the following motion, which was seconded by Mr. Stevens.

On a vote of 5-0, the Zoning Board of Adjustment rescheduled 16-34 to the meeting on July 5, 2016.

**ZBA 16-32: Petitioner, Irving Oil of 190 Commerce Way, Portsmouth, NH, requests a Variance for properties located at 650 Park Ave., Keene, owned by Paul Saba, 1474 Rt. 9, Spofford, which is in the Commerce District. The Petitioner requests a Variance to permit LED (electronic messaging) price changers per Section 102-1292 of the Zoning Ordinance.**

Mr. Schneider showed the property on the map on the easel. Chair Hoppock asked if the Board had questions for him. Hearing none, he recognized the petitioner.

Richard Westergren, of Poyant Signs, for the manufacturing, installation, and maintenance of Irving signs, stated that they have a permit in hand for the drawing of a freestanding sign, labeled 1B.1 in the agenda packet, with manual price panels that need to be changed by hand. He continued that he is here tonight because they want to make the panels LED, so they are changeable with a remote control, so a person does not have to climb a ladder to change the sign. The price of gas is changing almost daily. Most gas companies are now using changeable LED signs. This sign will not be a message center; it will just have price numbers, with no electronic messaging whatsoever. It dims during the evening hours, using a light sensor. Irving wants to bring the sign to the 21st century. There are multiple signs like this in Keene.

Chair Hoppock asked what the hours of the gas station are. Mr. Westergren replied that he does not know, but the sign would go off after business hours. Chair Hoppock asked if he means there would be no illumination when the store is closed. Mr. Westergren replied that is correct.

Mr. Stout asked if the electronic signage will meet the requirements of the City Code. Mr. Westergren replied yes. He continued that they have a permit in hand.

Mr. Curran asked if the price of gas on photo B is accurate. Mr. Westergren replied no. He continued that that was probably the price on the day the drawing was made.

Mr. Rab stated that in paragraph 1 Mr. Westergren said this technology is accepted, approved, and used in many locations in Keene. Mr. Westergren replied yes, the other Irving gas station has signs like this, and that is the one he was concerned with. He continued that there are others in town. Mr. Schneider stated that he can name others – T Bird on West St., Robertson's gas right before the bypass, the Mobile station with the Dunkin Donuts drive-thru, Cumberland Farms, and so on and so forth.

Mr. Rab asked if all of those locations have LED signs under Variances. Mr. Schneider replied yes. He continued that there were a couple conditions placed on them. Chair Hoppock asked what conditions. Mr. Schneider replied that the size was to be limited to nine inches. Chair Hoppock asked if Irving already has that approved. Mr. Westergren replied that Irving is permitted to 12 inches. Mr. Schneider stated that if the numbers are changed manually there is no size limit. Mr. Westergren stated that photo 1B.1 shows exactly what he has a permit for – the 12-inch high numbers on the manual price panels that need to be changed by hand.

Mr. Rab asked if the LED sign could be changed daily but without blinking. Mr. Westergren replied that there will be no blinking.

Mr. Stout stated that there are only two prices on the (proposed) new sign but three on the other. He asked what the regulations are about this. Mr. Westergren replied that he was just showing gasoline and diesel. Mr. Stout asked if it is the owner's choice, not a State requirement. Mr. Westergren replied that on the pumps, you need three prices.

Chair Hoppock asked if anyone wanted to speak in support of or opposition to this Variance request.

Mr. Rab asked Mr. Westergren if he is okay with the Board setting a condition that the sign not blink or flash. Mr. Westergren replied that these will not blink or flash. Chair Hoppock asked him if it is an issue to not have the signs illuminated after hours. Mr. Westergren replied that he does not know if there is 24-hour access to the pumps – if so, they will need to be lit. He does not know if a gas station is allowed to be open 24 hours. The signs would have to be lit in conjunction with the hours.

Mr. Stevens stated that Mr. Westergren said that the signs dim. Mr. Westergren replied yes, they have a self-dimming feature. He continued that that was a problem with early LED signs, but now they are all dimmable. LED signs have come a long way.

Mr. Schneider stated that the Board can do what they want, but the two conditions that they have granted in other cases are the size of the numbers, and the frequency in which the prices change, so they do not get into an issue like with Key Road Cinemas.

Mr. Westergren stated that the pricing is dictated by market. Chair Hoppock asked Mr. Schneider what the frequency limitations were. Mr. Schneider replied that the Board's issue with Key Road Cinemas is that the signs would change every two to four seconds. The Board denied it but approved the rehearing. Chair Hoppock replied that this is different; they do not have fluctuating signage. Mr. Westergren stated that this will only change when the market prices change, once a week or once a day. It will not be a constant changing message center.

Mr. Stout stated that the Irving owner would have no interest in changing the content of the sign unless they need to. He continued that he doubts they would ever see hourly changes. He is not worried about the interval. He does not remember what the Board did before regarding the size of the numbers, but he is fine with 12 inches and does not find it offensive.

Mr. Stevens replied that he was on the Board during the meetings in which the Board was asked to approve signs with a height of 9 to 10 inches. He continued that that was what the applicants were asking the Board to approve – it was not that the Board chose that size or thought that size was more appropriate than 12 inches.

Chair Hoppock stated that he is happy to vote in favor of this, subject to these plans. Mr. Stevens asked if they should comment on the frequency of the change, now that they are in this new territory and have to think about it. Key Road Cinemas is a great example.

Mr. Stout stated that he thinks that is up to the Sign Code folks, not the Zoning Board of Adjustment. Mr. Rab replied, but the Board has to grant the Variances, so they can put conditions on. Mr. Stout replied that the Board cannot set universal conditions. Mr. Rab replied no, but they can address each individually. He continued that he advocates granting this based on the condition that the signs not be flashing or repetitious. Mr. Schneider suggested the word "static." Mr. Rab agreed that he advocates for a static sign.

Chair Hoppock closed the public hearing at 9:26 PM and asked what the desire of the Board is.

Mr. Rab made a motion for the Zoning Board of Adjustment to approve ZBA 16-32 on the condition that the sign's numbers remain static and not blinking or flashing. Mr. Stevens seconded and stated that this fits in exactly with what the Board has approved in seven or eight other places. He continued that he thinks this fits perfectly with what an LED sign can provide.

Chair Hoppock went over the Findings of Fact:

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

*If the Variance were granted, the spirit of the Ordinance would be observed:* Granted 4-1.

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

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

*Unnecessary Hardship*

*D. 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:*

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

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

By unanimous vote the Zoning Board of Adjustment approved the application for ZBA 16-32.

**ZBA 16-33: Petitioner, Cumberland Farms, Inc., of 100 Crossing Blvd., Framingham, MA, represented by Carolyn Parker, of 3 Lorion Ave., Worcester, MA, requests a Variance for properties located at 162 Main Street, Keene, owned by Cumberland Farms, Inc., of 100 Crossing Blvd., Framingham, MA, which is in the Commerce District. The Petitioner requests a Variance to permit LED pump topper price signs per Section 102-1292(3) (6) of the Zoning Ordinance.**

Carolyn Parker stated that she represents Cumberland Farms. She continued that four years ago they received approval for the sign and LED pump toppers. They did the sign but not the pump toppers because Cumberland Farms has a SmartPay program (with 10 cents off a gallon for members) and they did not want to put the standard pump toppers in because they knew they were coming out with an updated version. She is in her third year of speaking to towns like this and is finding that towns do not like the signs, so they made adjustments. She brought an LED pump topper sign to show the Board tonight. The first number is an example of the brightest type, and then the numbers diminish in brightness. She continued that a film goes over the numbers to reduce the glare. This is an alternating sign and can change from between 0 to 60 seconds. These signs would be on the pumps, 90 feet from the roadway, not visible to people driving by. The main price sign on the roadway will be static at all times. Cumberland Farms is just trying to accommodate the SmartPay program somehow on the premises.

Chair Hoppock asked if it changes whether you are a SmartPay member or not. Ms. Parker replied that the price drops 10 cents.

Mr. Stevens asked if there is a timeframe in the regulation, for the pricing on the pump that is being displayed. Ms. Parker replied that they called all the states and let them know that they were doing this, and the states had no problem. Mr. Stevens asked if there is a regulation saying you have to have a price above the pump. Ms. Parker replied yes. Mr. Stevens asked if having it change every 60 seconds would be too long. Ms. Parker replied yes. She continued that the height is regulated, and this is the same square footage as it would be if it did not have the SmartPay information. On the sign she brought as an example, the first number shows the brightness with no coating, the second number shows the brightness with two coatings, the third

number shows 4 coatings. Different municipalities approve it in different ways, such as "two coats of film, set at 30 seconds," for example.

Mr. Curran asked what kind of coatings they are. Ms. Parker replied 3M Scotch Guard film.

Mr. Stout asked if she is suggesting that all three numbers on the sign would be coated equally. Ms. Parker replied yes. Mr. Stout asked, if the Board agrees to the brightness shown on the third number, does that mean she would put four coatings over the whole sign? Ms. Parker replied yes.

Mr. Rab asked if she could go to a 30-second flash. Ms. Parker replied yes. She continued that it is not on the main roadway.

Mr. Stout stated that he fills his vehicle up with gas at the locations where he has a membership. He continued that he does not understand the necessity for this. He thinks that they, as a Board, are opening up a wide window here. They have gotten by for hundreds of years without flashing messages like this. He is hesitant, especially given the restrictions on the changing nature. He thinks the Sign Code was written to avoid signs like this.

Ms. Parker stated that SmartPay is now a trademark of Cumberland Farms, so it is incorporated into all of their gas stations. She continued that she has a photo of what a typical sign would look like if Cumberland Farms was creating a new gas station – it would be a static sign, with prices shown for regular and SmartPay. That is part of the design for a new building. But for existing Cumberland Farms gas stations, they put an alternating strip in between, except this location is not doing that. They are leaving the sign by the street static. They want to incorporate the SmartPay information on the property. The pump topper signs are perpendicular to the road, so drivers will not see them. This is not a message board for people driving down the street.

Chair Hoppock asked if anyone wanted to speak in support or opposition. Hearing none, he thanked Ms. Parker for bringing in the sign to show them – the Board appreciates it. Ms. Parker replied that Cumberland Farms is not trying to sideswipe the City. She continued that she has been to about 100 hearings now.

Chair Hoppock stated to Mr. Schneider that he does not remember seeing this type of sign before. Mr. Schneider replied no; things are changing.

Mr. Rab stated that he thinks the spirit of the ordinance was to avoid signs of this nature. Ms. Parker replied that if they do not want the SmartPay information then she needs approval for static, LED pump toppers. Chair Hoppock asked if that would be a different application. Ms. Parker replied no, she would just withdraw the SmartPay part of her application and it would be static. She distributed copies of a handout to the Board and Mr. Schneider, speaking to them as she did so.

Ms. Parker stated that she had mentioned that they would make the numbers amber, but if that is no longer a criteria – seeing that the Board did not make the other petitioner make the numbers amber – Cumberland Farms wants to keep them red.

Chair Hoppock read the modified request aloud and asked, if it does not say SmartPay on it, would it be subject to a separate notice? Ms. Parker replied no. She continued that she has both requests; she would just withdraw the request for the Variance per Section 102-1292(3) and leave the request for the Variance per Section 102-1292(6). Animated signs are prohibited, says (3), and (6) is about electronic copy signs that are activated. Chair Hoppock replied that since the (6) is noticed, he would have no problem passing this on as an alternative.

Chair Hoppock closed the public hearing at 9:43 PM and asked the Board to deliberate.

Mr. Stout asked if they will act on the request based on the handout that requests LED pump topper signs per Section 102-1292(6). Ms. Parker replied that she can withdraw the request for (3) if that makes it easier to approve. Mr. Stout asked if, procedurally, they can make the motion to deny the one section. Chair Hoppock replied that the motion would be to approve a sign consistent with what is shown in the handout; they just would not even mention (3).

Mr. Rab made a motion for the Zoning Board of Adjustment to approve ZBA 16-33 to the extent that it is a static pump topper sign with a four-layer coating. Mr. Stevens seconded.

Mr. Stevens stated that the static sign fits in as a much more suitable option regarding the spirit of the ordinance.

Chair Hoppock went over the Findings of Fact:

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

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

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

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

*Unnecessary Hardship*

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

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

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

By unanimous vote the Zoning Board of Adjustment approved the application for ZBA 16-33. Chair Hoppock stated that they are granting a Variance to Section 102-1292(6).

**ZBA 16-35:/ Petitioner, Kadle Properties, RRT/Daniel and Madeline Kadle of 668 Main Street, Peterborough, NH, requests a Variance for properties located at 668 Main Street, Keene, owned by Daniel and Madeline Kadle of Peterborough, NH, which is in the Low**

**Density District. The Petitioner requests a Variance to be permitted to retain the current designations of Office use and Institutional use and add Restaurant to the permissible mixed uses per Section 102-601 and 102-361 of the Zoning Ordinance.**

Mr. Schneider oriented the Board to the property's location, on the map on the easel.

Dan Kadle, of P.O. Box 141, West Peterborough, stated that he and his wife Madeline Kadle appeared before the Board last month to propose uses for 668 Main St. He continued that the Board suggested the application was a bit ambitious, so now they are submitting one proposed new use: a restaurant. They feel the request is reasonable, regarding the use of the land. They propose a small café, with small occupancy. The property has already been renovated. They do not foresee any changes to the property which change the character of the surrounding neighborhood or have a negative impact. He can address questions. He is confident that the Board reviewed the application. He asked what they need clarification on.

Chair Hoppock stated that in the application he did not find the parking layout for the restaurant use. Mr. Kadle replied that they did include that, on the 11x7" paper. Mr. Stevens found it and showed Chair Hoppock where it was.

Mr. Curran asked what the total seating would be. Mr. Kadle replied up to 20.

Chair Hoppock stated that Mr. Kadle has an Office Use by Variance and an Institutional Use by Special Exception. Mr. Kadle replied yes, and initially it was Institutional Use, which runs with the land, and they applied for that around 2003. He continued that he applied for the Variance for Office Use around 2006 and received that. He continued that the request is to retain those uses and add the restaurant. Chair Hoppock clarified that he wants three uses. Mr. Kadle replied, in the spirit of mixed-use. Chair Hoppock asked if he already has that. Mr. Kadle replied yes, but the problem was that these permissible uses they have proven to be limited, to the point where they cannot secure a tenant for the building. With the granting of this use they could have a more viable property and utilize it more. Presently it is vacant, except for his office. Chair Hoppock asked if he means his computer and technology business. Mr. Kadle replied yes. He continued that he researched a definition for "mixed use:" development on one zoning lot that combines uses with commercial and/or office, consisting of one or more buildings, with a reference to Section 102-303(b).

Chair Hoppock asked if Mr. Kadle is noting that his hardship is looking for greater use of space so he can market it. Mr. Kadle replied yes, so he can use it and secure a tenant. He continued that the hardship is as they look at the ordinance for zoning and the characteristics of the property weighed against the area and what is permissible in the Low Density District. This presents a hardship, regarding being able to use the property as a viable property.

Chair Hoppock asked what the special conditions of the property are. He continued that he hears Mr. Kadle talking about the district, but wants to know about this property. Mr. Kadle replied that the limitations of it are: when you look at the designations for use, Office and Institutional, they have spent over a year, at great expense and effort, trying to find a tenant to make single use of the property with these designations. No one has expressed interest to putting that building to

a full, single use, thus, the underutilization of what could be a viable property with a Variance. This specific area, as he said in the application, is slated for mixed uses within Keene proper and surrounding areas. It is considered a gateway and is a major artery. Page 5 of his application, at the bottom, is about Route 12 N and S. He cited references to the CMP. It is a core initiative and vision of the City to promote mixed uses. There are several references to making a gateway community available with accessibility to a wide array of products and services. There is also mention of commercial areas south of Route 101 between Routes 10 and 12. Also, the CMP says, "mixed uses in neighborhoods should be encouraged and community connections between neighborhood mixed-use areas, schools, and other amenities provided."

Chair Hoppock stated that if this were approved, Mr. Kadle would have uses for industrial, restaurant, and office. He asked if that would increase the density. Mr. Kadle replied no, because if you look at the characteristics of the property, the dimensions and the parking, they potentially have 16 to 17 parking spaces. He continued that John Rogers, Acting Code Enforcement and Health Director came and looked, and estimated that. Inherently the property would limit how many customers they would have at once. Most businesses have an inherent office use anyway; they go hand in hand.

Chair Hoppock asked why he would need the Institutional Use to continue. Mr. Kadle replied that that runs with the land. He continued that it is a given for that area. Several locations in Keene have been granted Institutional Use. The side of Main St. that his building is on, in particular, has institutions. Even if he were to cease that use, which he does not intend, he could re-adopt that use (school, medical offices, or medical facility) without an application before the Board because it runs with the land.

Mr. Curran stated that it sounds like he is trying to keep too many options open. He continued that it could be smoother to narrow it down. This is too many uses. Mr. Kadle replied that if they look at the proposed café, they see that it still leaves a great amount of the property available, like offices remaining to be utilized. He continued that they do not envision having the whole building as a restaurant, so they need the other uses. He is asking to pursue this mixed-use designation. Having multiple uses is the spirit and intent.

Chair Hoppock stated that the combined effect of the Institutional Special Exception and the Office Variance overburdens this lot, which is in a Low Density District. He continued that that is his problem; the multitude of uses. Mr. Kadle replied that based on the inherent characteristics of the building, you might be able to have three uses. For example, the psychologist (institutional use) in one 12x12 room, then an office, maybe an attorney with one room (office use), and then the remainder could be 2/3 of the building for a restaurant. Regarding the volume of activity for three uses, there would be one person at a time going to the psychologist, one or two people going to the attorney, and so on and so forth. When there were gynecological offices there, it was one or two doctors and nurses, and a diagnostic company, with a revolving set of patients coming in. They had no problems whatsoever. During that time, his neighbor said/suggeseted that there had been no problems with that level of activity. A sit-down café would be akin to a diagnostics company. As stated in the previous meeting, it is effectively a double corner lot. They could expand parking if needed, but he does not envision that. He envisions a couple uses at a time,

like a restaurant and office. Compared to his previous, ambitious application, this is a conservative approach – wanting to add one use instead of several.

Mr. Stout stated that he is still struggling with the hardship. He asked Mr. Kadle to consider the unique setting of the property and tell him why this property is unique such that a zoning restriction applied to it would interfere with its reasonable use. Mr. Kadle replied that when he first acquired the property, he surveyed the area, and looked at the uses in the area. He continued that it is a neighborhood of commercial and residential uses. The property is situated in a place where it is akin to a commercial setting. That is one reason why he was permitted to pursue office uses. It has an over 50-year history of mixed uses, residential and commercial. For example, the church used to be a bar, and there is retail, interface, armory, government, apartment complexes, Davis Oil with fuel tanks, Granite City Electric, with heavy trucking, and so on and so forth.

Mr. Stout stated that Mr. Kadle is talking about the other properties. He continued that he wants to know about Mr. Kadle's property. Mr. Kadle replied that the limitation is the use. It is in the Low Density Zone. There are already many commercial activities in the area. The use designations they have are inherently limiting and do not permit them to secure anyone to take over the property. Chair Hoppock replied that that is not hardship, under the law.

Mr. Rab asked what the special conditions are. Mr. Kadle stated that it has been established by the ZBA as a commercial property within the Low Density Zone.

Mr. Rab stated that the permitted use is Institutional, which is reasonable, and Mr. Kadle is doing that. He continued that he also has a Variance for Office Use. He already has mixed use. He asked, what makes it so special where he needs a third use that is not a permitted use? Mr. Kadle replied that when he sought the Office Use it was because with his type of business he was not able to make full use of the property, thus the need to bring in someone else. He has researched case law, and typically the burden is more weighed on whether the proposed use is reasonable. This is reasonable because it would not diminish property values; it would probably bolster them. There would not be proposed significant changes at all. They have the right setbacks and screenings and barriers between abutters, and ample parking, and the lot size is large enough. The burden is not really how the ordinance proposes the burden, the weight is on whether the proposed use is reasonable and that is what they should focus on. Mr. Stevens replied that that is one of the five prongs. There are four others. He continued that an applicant could meet four out of five.

Mr. Kadle stated that to focus on burden: he has a commercial property he cannot utilize. He is restricted to the uses granted. The people he has spoken to say they cannot put the property to a single use. It is not conducive to the layout of the property, thus it is limiting and puts a burden. In the previous application they came to the Board requesting a nursery, greenhouse, and restaurant. It was indicated that they were seeking carte blanche. It was immediately established that if he came back with nursery and restaurant, it would be denied. So he came back with one added use to what they have already been granted. Every entity has offices. It goes with running a business. It runs with the use of the property. Institutional Use is permitted in the area

automatically. Mr. Rab asked, by Special Exception? Mr. Kadle replied yes, but it is already granted.

Mr. Stout stated that it is a Low Density lot, and it is irrelevant whether or not they agree that it should be. He continued that Mr. Kadle already got a Special Exception and a Variance. He should refer to it as a Low Density lot, which it is, and not put the burden on the Board to justify a second Variance based on the fact that it has a Special Exception and a Variance. That is a cat chasing its tail. The more they give him, the more Mr. Kadle has to ask them for. He sympathizes, but Mr. Kadle has not come up with a plan. He has come up with another Variance. He is not seeing the hardship.

Mr. Rab stated that he is a great proponent of mixed use. He continued that he thinks they should have more provisions in a number of zones. He is struggling with the spirit of the ordinance and the hardship. He does not see it meeting those two burdens.

Chair Hoppock stated that he is confused about the restaurant piece. He continued that Mr. Kadle described the history, has helpful information, and addressed the criteria. He sees 14 parking spaces and one handicapped spot. He does not see a 20-seat restaurant. He counted 13 seats. Mr. Kadle replied that there could be more seats in the adjacent room. Chair Hoppock asked what the rule on parking is. Mr. Schneider replied one spot for every four seats. Chair Hoppock replied that he meets that. Mr. Schneider asked if that indicates that the whole property is a café. Chair Hoppock replied that he is not sure how parking would work if there was, say, a psychologist also seeing eight clients a day.

Mr. Stevens asked if they are now getting into space that was included in the Variance for the Office Use. Mr. Schneider replied that it was his understanding that Mr. Kadle can either use it now as Institutional, Office, a mixture of the two, or a residence. Mr. Stevens asked if he means that it does not necessarily matter what portion is used for what use. Mr. Schneider replied that that is correct. If you permit a restaurant use and the entire building was used for that, the other two uses would be abandoned.

Mr. Stout asked if all three apply if only part of the building is a café. Mr. Schneider replied that they could. Mr. Stout asked if that means all three could be functional at once. Mr. Schneider replied yes. He continued that another option would be to tear it all down and build a larger structure. Mr. Kadle replied that that is true. He continued that regarding “abandoning” the other uses, his understanding is that those uses not being active do not necessitate abandonment.

Chair Hoppock stated that if the Board approves his Variance request for a cafe, hypothetically, they can condition it on the termination of the Variance and Special Exception that are there now. Mr. Kadle asked if that would be counter to the intent of mixed-use. Chair Hoppock replied not in his opinion. He continued that he agrees with his colleagues that it would be overburdened, and he sees problems showing this Variance would be in the spirit of the ordinance or that there is a hardship.

Mr. Kadle asked how this Variance request being granted would overburden the property. Chair Hoppock replied that if all three uses were combined, it would overburden; it would be too much

use on one relatively small lot that is in a Low Density zone intended for Residential Use. He read aloud Section 102-361, Intent, of Division 6, Low Density "The intent of the low density district is to provide for low density/low intensity residential lots for single family dwelling units. Intentionally excluded are commercial/industrial uses since they are not appropriate for a residential zone." He continued that what Mr. Kadle proposes creating is a much higher density of use, with three uses. He heard that Mr. Kadle does not want to abandon either of the two uses he already has. That goes against the spirit and intent of the Zoning Ordinance.

Mr. Kadle stated that his research showed that "Constitutional property rights must be respected and protected from unreasonable zoning restrictions. The NH Constitution Part 1, Articles 2 and 12, guarantee all persons the right to acquire, possess, and protect property. Chair Hoppock stated that they understand what the law is. He continued that they can debate whether these are reasonable restrictions; he thinks they are. They should focus on the five criteria.

Mr. Stevens stated that Mr. Kadle is good example of being granted exceptions to not limit him to the Low Density District. He already has two exceptions to not limit him to that Low Density District. That is exactly what has been done so far.

Chair Hoppock asked if anyone wanted to speak in support or opposition. He continued that Mr. Kadle can speak again after that. Mr. Kadle asked if he can go through the five criteria. Chair Hoppock replied yes, but he has kind of been doing that all along.

James Frederickson, of 675 Main St., stated that he has lived across the street from the property in question since 1985. He continued that when he moved there lower Main St. had two basic businesses other than residential - Interface, the armory, and a restaurant that is now a church. He is against the restaurant being allowed. There was one many years ago. It was quite a nuisance to residents. The church property became a church with a zoning change. A restaurant may start out quiet but with a liquor license, who knows. Businesses have a way of changing with new owners. Mr. Kadle had a "for sale" sign up and took it down. If he sells and the Variance stays with the property who knows what it will be in 10 years. All the commercial properties beyond lower Main St. are in Swanzey, further down. The basic neighborhood is residential.

Gerry Frederickson, of 675 Main St., stated that she is firmly opposed to the Board granting this Variance. She continued that adding a restaurant use is a bad fit and a poor idea, because they have endured two restaurants, which bring litter, drunk driving, odors, unruly customers, break-ins, noise, and so on and so forth. Those establishments were grandfathered in and they cannot return unless they have another Variance. When the church came in they were happy because the restaurants could not come back without another Variance. The neighborhood would be harmed financially and visibly. They can only absorb one small business. Low Density is the correct designation for this area. There are many more homes than commerce on this stretch. A restaurant by its very nature cannot be a good neighbor. She asks the Board to reject this inappropriate and self-serving proposal. Property values would decrease with a restaurant there and it would impact the character of the neighborhood.

Eddie Fitz-Simon Sr, of 678 Main St., stated that he agrees with the previous speakers and is opposed to the restaurant use. He continued that Mr. Kadle has had his variances. It does not

mean he gets another variance to try another avenue. If the building is half empty he will want something else. He has had his opportunities and needs to work with what he has and maybe do better marketing or look at his rental prices. A restaurant would not be a good fit. Just a farm stand created a lot more traffic in the area, with cars stopping in front of houses, not pulling into the parking lot. That created a traffic issue alone, let alone adding a restaurant. He is opposed.

Mr. Kadle stated that regarding the property values, these statements are not based on evidence. It is hearsay to suggest that by implementing a small café, which would not be on the whole property, it will incite lots of more traffic, jams, problems with behavior and policing and whatever else. These claims are unsubstantiated. He has had a great reputation for many years. The burden is the inability to use the property.

Mr. Kadle continued that Chair Hoppock stated that the Board could have him abandon the other uses. He does not know how many applications the Board gets for mixed use spaces, but he looked at meeting minutes from the Town of Marlborough, and they had 12 requests for mixed use and no one was asked to abandon any uses in favor of another. He is not sure why he would be asked to do so. Regarding the claim that this additional use would overburden he property, if you look at the dimensions of the parking lot, the requirement is one parking space per four individuals. They have 17 parking spaces total. He can compare that with other properties that have been granted variances by the Board, which had fewer parking spaces despite having larger buildings. The Board needs to look at case law. A Supreme Court case indicated that the burden is on whether the use is reasonable. He has cited countless examples of the unique setting. He is in an area surrounded by commercial activity for many years. This goes to the unique characteristics of the building. As Mr. Fitz-Simon said, he has had the variances, yes, but when you cannot put those uses into a viable use of a property the property will be subject to the merits of its use and whether or not it can sustain itself. The burden is not being able to secure tenants. It might be akin to someone having an industrial use there and that was abandoned because it was too small for that. A small café, occupying one room of the building and another adjacent room, is hardly burdening it when more than half of the building is left for other uses.

Mr. Kadle continued that Planning Director Rhett Lamb came to look at his site and operations, and he also met with City Manager Medard Kopczynski to talk about what the activities would be. It did not require site plan review despite the number of students and teachers. He had three businesses there all working harmoniously and not one complaint from any of his neighbors. Mr. Frederickson said the uses going on, doctors, diagnostics, school, etc., work well in the building. The burden is not being able to put the building to use. It is going on a year and half that he has tried to secure tenants.

Mr. Kadle continued that regarding the “for sale” sign, he made an investment with acquiring and maintaining that property. He invested in Keene. People tonight talk about businesses leaving Keene. He is an investor and an entrepreneur. At the last Board meeting Mr. Stout made a comment about not being able to agree based on dreams. You need an entrepreneurial spirit and to base it on dreams. That is what he and his wife have done, and they have put a lot into the property and the city. The Supreme Court has said many times that the focus is reasonable use. He is not asking for something unreasonable like a rock crushing plant. He is requesting the café

use because his school is still active and he cannot abandon his students there. The office use goes with the building. He hopes to have someone who could make use of that.

Chair Hoppock asked how many students the school has. Mr. Kadle replied that it depends; there is a decline based on economy. That is a reason to pursue additional uses. He cannot fully utilize the building with his business.

Mr. Kadle stated that he is going to address the specific requirements. It would not be contrary to the public interest because it would rejuvenate a mostly vacant commercial property with respectable, sustainable businesses. This is a reasonable request for reasonable uses. The majority of the property has been vacant since 2015 and he has been searching for a tenant. He has not been able to utilize the office for his business because he goes off site. The spirit of the ordinance would be observed because the spirit is to promote public safety, health, comfort, prosperity, and general welfare for the citizens. These uses are reasonable, not outside the character of the neighborhood. There have been retail and restaurants and institutions in the area. Look at that in comparison to any perceived impact. It would be far less an impact than, say, the trucking and fuel service behind his property. His building would have a very low impact.

Mr. Kadle continued that granting this Variance would do substantial justice because it would benefit the citizens of lower Main St. and the Elmwood St. neighborhood, and also tourists coming through this major artery. It would allow a largely vacant commercial building to offer great potential uses to small businesses and individuals from its present limited use. The proposed uses would melt well and go with the character of the other businesses and mixes uses in the area. It is situated amongst all these other commercial properties. The Board has to recognize that. The CMP shows that the City of Keene's vision is for mixed-use neighborhoods and they should respect and honor that. Each neighborhood should be encouraged to have mixed uses, not only village centers, but an array of housing choices and types, single homes, condominiums, townhomes, and so on and so forth.

Mr. Kadle continued that the volume of traffic, when he first got the property, was about 20,000. Now it is down to 18,750. Regarding the comments about his building potentially generating more traffic, there are a few thousand to work with. Having 15 or 16 parking spaces does not negatively impact traffic. He quoted the CMP's comments about paying particular attention to mixed-use, and stated that the neighborhood is Low Density, yes, but when they look at the concentration of uses in the area, they see that it is mixed-use.

Mr. Kadle began speaking to the next criteria, and Mr. Stout requested Chair Hoppock intervene to speed the process up because he feels that Mr. Kadle is repeating himself.

Chair Hoppock asked Mr. Kadle to skip to the section on unnecessary hardship, since several Board members are having trouble with that one.

Mr. Kadle asked for an example of hardship. Chair Hoppock replied that the Board cannot present his case for him. He asked Mr. Kadle to tell the Board what distinguishes his property from other properties in the area and explain why he has a hardship because of how the zoning is applied. It is not his financial hardship that is relevant.

Mr. Stout read from case law stating that a Variance cannot rest on financial hardship alone, nor alone on the personal circumstances of an owner, says Ryan v. Manchester. Chair Hoppock stated that the Harrington case is relevant, too.

Mr. Kadle stated that he is not focusing on the financial issues. Chair Hoppock replied that he has mentioned a dozen times the financial burden. He continued that he is giving him an opportunity to state the hardship. Mr. Kadle cited Ferrar v. Keene, the Supreme Court case that affirmed the lower court's reasoning that the criteria had been met, since the desired mixed use was allowed in the district and the Variance would not alter the neighborhood. He thinks that is the concern here. He respects his neighbors' concerns, but he and his wife are not proposing altering the building. When he went before the Board, in 2003 and 2006, it was well established that he was conducting business. He has a commercial property in a Low Density Zone with limitations. He cannot put that commercial property to use.

Mr. Stout stated that he is making a financial argument. Mr. Kadle replied that business is being conducted there is his point. How else can one define the burden? Ample case law is out there. Mr. Stout replied that he does not have any burden that he has proven to the Board relative to using his property relative to Low Density. Not once has he said he is restricted to using it. He already has a Variance and a Special Exception.

Mr. Kadle asked if just a restaurant would be a reasonable use. Chair Hoppock replied that that is not the application. Mr. Rab replied that they cannot answer that. Chair Hoppock stated that Mr. Kadle has not proven hardship and he is overburdening the property. He has covered the grounds thoroughly tonight. He asked if anyone else wants to speak.

Ms. Frederickson stated that she and Mr. Frederickson have a photo of the sign Mr. Kadle had, saying "commercial property for sale." He could not sell it because it was not commercial property. The photo shows a lot of traffic, too, including a car stopped right on the road.

Mr. Kadle stated that the City of Keene granted Ricks' Vegetables and Flowers stand, and that is creating the impact, not him. He continued that it is beyond the scope of this discussion.

Mr. Kadle attempted to speak about Mr. Roundtree. Chair Hoppock replied that that is irrelevant.

Chair Hoppock closed the public hearing at 10:54 PM, stating that Mr. Kadle is not offering anything new and it is almost 11:00 PM.

Mr. Rab stated that he wants to state for the record that at no time during this meeting did the Board tell Mr. Kadle that he had to abandon his other uses. They had a discussion about how it could create an abandonment situation. Chair Hoppock replied that is correct; he does not have to abandon the previous uses. He said hypothetically the Board could approve on condition of termination of the other two. Mr. Rab replied or the other two could be abandoned under the ordinance after a period of time had passed.

Mr. Rab made a motion to approve ZBA 16-35. Mr. Curran seconded the motion.

Chair Hoppock went over the Findings of Fact:

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

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

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

*If the Variance were granted, the values of the surrounding properties would not be diminished:* Denied 3-2. Mr. Curran and Mr. Rab voted in favor.

*Unnecessary Hardship*

*F. 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:*

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

*xii. The proposed use is a reasonable one:* Denied 0-5.

By unanimous vote the Zoning Board of Adjustment denied the application for ZBA 16-35.

## V. New Business:

Mr. Schneider stated that there is a special meeting on June 20. Mr. Rab replied that he cannot make it. Mr. Schneider stated that it involves one piece of property now that wants to be subdivided. They have multiple variances. Mr. Stevens asked clarifying questions about the area.

## VI Communications and Miscellaneous:

## VI. Public Session: (if required)

## VII. Adjournment

The meeting adjourned at 11:08 PM.

Respectfully submitted by:
Britta Reida, Minute-Taker