City of Keene
New Hampshire

ZONING BOARD OF ADJUSTMENT
MEETING MINUTES

Tuesday, September 15, 2020 **6:30 PM** **Remote Meeting via Zoom**

Members Present:
Joshua Gorman, Chair
Joseph Hoppock, Vice Chair
Joshua Greenwald
Jane Taylor
Arthur Gaudio, Alternate
Louise Zerba, Alternate

Staff Present:
John Rogers, Zoning Administrator
Corinne Marcou, Zoning Clerk

Members Not Present:
Michael Welsh

Chair Gorman began by announcing the Board will hear petitions for Belmont Ave., Church St. and Wyman Rd. He further stated the two petitions for Hundred Nights, Inc. will be heard on Tuesday, September 22, 2020 at 6:30 PM. Any questions for these petitions can be directed to the Community Development Department, City Hall.

I. Introduction of Board Members

Roll call was conducted. Chair Gorman stated that alternate member Arthur Gaudio will be a voting member tonight. He continued that alternate member Louise Zerba will participate in discussions but abstain her vote.

II. Minutes of the Previous Meeting

Chair Gorman stated that the Board adopted the minutes from June 1, 2020 at their September 8, 2020 meeting.

Chair Gorman called the meeting to order at 6:30 PM. He read a prepared statement explaining how the Emergency Order #12, pursuant to Executive Order #2020-04 issued by the Governor of New Hampshire, waives certain provisions of RSA 91-A (which regulates the operation of public body meetings) during the declared COVID-19 State of Emergency. He explained the procedures of the meeting and how the public can participate.

III. Unfinished Business

None

IV. Hearings

a) ZBA 20-12:/ Petitioner, Janis Manwaring of 50 Belmont Ave., Keene, requests a Variance for property located at 50 Belmont Ave., Tax Map #598-034-000; that is in the Low Density District. The Petitioner requests a Variance to permit a change to a detached garage into an Accessory Dwelling Unit (ADU) where a detached ADU is not a permitted use in the Low Density District per Section 102-896 of the Zoning Ordinance.

Chair Gorman opened ZBA 20-12 and asked Mr. Rogers to present comments. Mr. Rogers stated this property is in the Low Density District where an attached Accessory Dwelling Unit (ADU) would be allowed under the current Zoning Code, but detached ADU's are not allowed. This is an Ordinance change that occurred in 2017 when the State changed its RSAs about ADUs and required municipalities to allow for ADUs in all districts that allow single-family homes, where previously the City of Keene only allowed ADU's in the Low Density District. The City of Keene now allows ADUs in all districts that allow single-family homes, but only attached. Detached ADUs are allowed only in the Rural District as well as a few other districts.

Mr. Greenwald asked what the rationale was for allowing only attached ADUs versus detached ones. Mr. Rogers replied that the State separated them out into the categories of attached versus detached, but the City had not. He continued that the City then changed its Ordinance to align with State requirements. Staff's thoughts for having attached ADUs was to try and maintain the single-family dwelling look.

Ms. Taylor asked Mr. Rogers what the intended square footage is of this proposed ADU. She continued that the Ordinance states ADU's can be between 400 and 1000 square feet and she was curious where this one fits in. Mr. Rogers replied that 576 square feet is the proposed size for this ADU. He continued that the Ordinance for the attached ADU is a minimum of 400 square feet and a maximum of 800, so this petition would fit in that category.

Mr. Hoppock asked if there are any parking restrictions. Mr. Rogers replied they do require two additional spaces.

Chair Gorman opened the public hearing and explained how the public can participate.

Chair Gorman recognized Daniel Manwaring, son of Janis Manwaring, co-owner of 50 Belmont Avenue.

Mr. Manwaring stated that he, his wife Cindy Qu, and his mother Janis Manwaring are at 50 Belmont Avenue. He continued that they are asking to be granted a Variance on a detached ADU because they fit all the other requirements for an ADU except for the fact that they have a detached garage that was on the property before they acquired the property. Granting the Variance would not require any structural changes to the property, especially as far as the actual building or parking.

Everything is in place and would fit the requirements and the Ordinance for the ADU.

Chair Gorman asked him to elaborate on the five criteria.

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

Mr. Manwaring stated that an ADU is permitted in the Low Density District if it is attached to the residence. He continued that his proposed ADU is in a detached garage but it is a similar size to the Ordinance's size requirements. He and his wife will live in the ADU and his mother will remain in the house,meeting the requirement that the owner live in the primary residence. It is similar in size to what is proposed by the Ordinance. Finally, it is consistent with the residences and values in the neighborhood.

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

Mr. Manwaring stated that the Spirit of the Ordinance will be observed because he and his wife will be living there. He continued that the original concept of the ADU was to offer a senior family member privacy and independence with close family support and this is the case as his mother is getting older and he and his wife would like to be there to support her. The garage is 576 square feet and will have one bedroom, one bathroom, a kitchen, and a living area, as required in the Ordinance.

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

Mr. Manwaring stated that no new structure is required to create this ADU. He continued that the garage has stood on the property for over 25 years and has been well-maintained and is in good shape. The garage and house together take up a small fraction of the lot, only 18%. None of the neighbors will be impacted by having this structure too close to their boundaries, which was an original concern of the Ordinance.

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

Mr. Manwaring stated that if the Variance were granted, the values of the surrounding properties would not be diminished because the property values would actually be increased. The current garage is assessed at $7,200. The ADU with its living features will mean the taxes will increase for this property despite little exterior changes to the garage. It is doubtful that the property values in the neighborhood will be affected. He and his wife will only have one car so traffic will be minimal. It is most likely that neighbors and visitors will notice little difference in the exterior of the property, as most single-family homes in this area have two to three cars.

5. *Unnecessary Hardship*

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

i. No fair and substantial relationship exists between the general public purposes of the Ordinance provision and the specific application of that provision to the property because:

Mr. Manwaring stated that there is significant hardship in meeting the requirements because the house is at a four foot higher value than the door to enter the house, therefore it is not possible to build a breezeway to attach the garage to the house which would make it possible to turn the garage into an attached ADU in normal circumstances. It is probable that the previous owner built the garage separate from the house.

ii. The proposed use is a reasonable one because:

Mr. Manwaring stated that ADUs are permitted in the Low Density District supporting the need for families to have a family member close by. This garage, though detached, has been present on the property for over 25 years and is now needed to be converted to an ADU. In the neighborhood there are many detached garages – for example, on Belmont Avenue, half of the garages are detached, as is true on Colby Street, and one in three on Brown Street. All the homes have steps to the homes higher than the garage. Most of the original homes were built for workers of Kingsbury and other manufacturing companies in the 1930s. It is possible that garages were built later as cars became part of our way of living. When his mother bought the home 25 years ago the garage was already detached. It is not possible to build a breezeway to connect the garage to the house. Because they can meet all other requirements in the Ordinance, they are asking that the Variance be granted to waive that the ADU be attached to the house. Again, no building needs to be added to facilitate this ADU and the percentage of the house and garage size in relation to the lot will remain small, at 18%.

Chair Gorman asked if there were any questions from the Board.

Ms. Taylor asked if Mr. Manwaring could clarify that the proposed ADU is the entire garage. Mr. Manwaring replied that is correct. Ms. Taylor stated that she lives in a house where the garage is about 5.5 feet lower than her house, so she knows from personal experience that it is not impossible to connect the two with a breezeway. She continued that she has concerns about what the Special Conditions of the property are. She referenced Mr. Rogers who had stated earlier that two parking spaces were required for the ADU and she believes that there are probably two required for the primary residence, so she wants to make sure that even if the applicant only has one car currently, that there are four off-street parking spaces at this location.

Mr. Rogers replied that that is correct; they would have to provide information for four parking spots during building permit process. Cars parked stacked one behind the other in the driveway might be a possibility. Previously the garage itself was providing the two parking spaces for the house. Mr. Greenwald asked if expanding the driveway is a possibility. Mr. Rogers replied that the parking area on the lot is a possibility as there seems to be space available to add additional parking to the side of the garage. Mr. Greenwald asked if it would meet appropriate setbacks. Mr.

Rogers replied that this drawing indicates that it would.

Chair Gorman asked if Mr. Manwaring wants to add anything relative to Ms. Taylor's comments relative to the breezeway idea and her struggle to see that there is a hardship there. Ms. Taylor clarified that she was asking because the Board needs to find some sort of special condition of the property. She continued that she is struggling with whether or not the statement in the application that they are unable to build a breezeway is correct, because her own garage is about 5.5 feet lower than her house and she was able to build a breezeway between the two. There were a few steps involved but this house already has steps. She would like clarification because she does not understand the hardship.

Mr. Manwaring stated that he first wanted to answer the parking question; there is definite room for more than four cars in the driveway. He continued that, when the house was built, the driveway was paved extra wide, extending a little beyond the garage and is more than deep enough to permit about three cars. Regardless of how many cars he and his wife currently have the driveway could support four to six cars.

Mrs. Manwaring stated that she and her family explored briefly with a contractor, should this Variance be granted, the idea of building a breezeway. She continued that it is not that she does not believe Ms. Taylor but she does not see how they would do a breezeway. It is a two-story house and a one-story garage and it did not make sense and seemed very expensive, so they decided to ask for this Variance since the garage meets all the other criteria for an ADU.

Mr. Hoppock asked if it is correct that they will have one bedroom and one bathroom in the ADU. Mr. Manwaring replied yes. Mr. Hoppock asked if they have plans to expand the number of bedrooms or bathrooms. Mr. Manwaring replied no, he and his wife are accustom to small spaces and know they can work well if designed well. Mr. Hoppock asked if it would be connected to City water and sewer and if that is part of the building permit. Mr. Manwaring replied yes.

Mr. Gaudio asked how they will heat it. Mr. Manwaring replied that they will adhere to the Code regarding insulation and spray foam, and cellulose on the ceiling. He continued that since it is such a small space they plan to do a mini split, which is energy efficient and more than enough for that small space.

Chair Gorman opened the hearing to public comment and explained how members of the public could ask questions via Zoom or telephone. Chair Gorman asked staff if there are any members of the public wishing to speak. Ms. Marcou replied no. Chair Gorman stated that hearing no public input, the public hearing is now closed. He continued that the Board will now deliberate.

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

Mr. Gaudio stated that he thinks it would not be contrary to the public interest for a few reasons, but mainly because it would not change the size or the nature of the property and it would still have the same general appearance. That point probably goes with the second criteria also. There is nothing about the application that would

give evidence that is a threat to public safety, welfare, or health. There is nothing there to be concerned about. It passes those two.

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

Chair Gorman stated that he agrees with Mr. Gaudio's point relative to this. He asked for other comments.

Ms. Taylor stated that she has some concerns about this point. She continued that after hearing Mr. Rogers' explanation, there was clearly a reason, although she does not know what it was, when the zoning was changed, that it would be changed specifically in the Low Density District so she has concerns about that. She is not sure if her concerns rise to the level of voting against the petition, but she has concerns, if the Low Density District allowed ADUs previously and that was narrowed to only attached ADUs.

Mr. Greenwald stated that he agrees with Ms. Taylor that it is somewhat of a concern, but for him it does not rise to the level of voting no. He continued that in this case, in creating a breezeway, the Ordinance would operate in a vacuum because it is not realistic to do that, even though it *could* be done; anything can be done with money. It is his opinion that aesthetically it would destroy the character of the neighborhood and the house just to satisfy the need for an attached ADU to get approved.

Chair Gorman opened the public hearing to ask Mr. Rogers to weigh in on the reasoning to the Ordinance and give any relevant information. Mr. Rogers stated that when the State changed the RSA, a lot of other municipalities did not allow ADUs. The City already did and were thus ahead of the curve. With the changes from the State, the City staff went through the process to change the Ordinance through City Council vote. This change was about trying to maintain the single-family home aesthetics, whether in low, medium, or high density zones. Maintaining the single-family home aesthetic was the main purpose of the change.

Chair Gorman asked if the idea was that the breezeway would make it appear like a single-family home, because it was all connected. Mr. Rogers replied that it could be that, and they have to also think about all the different styles of houses in the City. There are many larger houses, such as the Victorian homes on Court Street and Washington Street where converting a garage to an ADU may not happen but creating an ADU within the existing footprint of the house itself could. The general purpose of the change was to maintain the aesthetic of the single-family lot.

Mr. Gaudio stated that it is the same aesthetic difference between an attached garage and a detached garage. He continued that it could said that attached and detached dwelling units are the same thing, as far as the aesthetics go. Mr. Rogers replied that that is a decision for the Board to determine.

Chair Gorman thanked Mr. Rogers and closed the public hearing again. He asked for further comment on Criteria #2. Hearing none, he moved on to Criteria #3.

3. Granting the Variance would do substantial justice because:

Mr. Hoppock stated that he does not see a public gain achieved by denying this request, and weighs that against the loss to the home owner, which would be significant. He stated granting the Variance would do substantial justice for that reason. He does not see a gain to the public by denying the petition. It would not impact density; it would not hurt parking; it would not weigh against the neighborhood or create a safety issue or block air or light. None of those factors apply. And the structure will not change size.

Chair Gorman stated that he agrees with Mr. Hoppock. He continued that he thinks the only thing missing, to keep the Applicant from being here, is the breezeway, and he is not sure that adding one would change things much. It has been fairly well documented that it will be a family-living situation, which is what ADUs are geared toward; and that it would have minimal impact on the exterior aesthetics for the neighborhood appearance.

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

Mr. Greenwald stated that is accurate. He continued that he does not think it will have any sort of impact; it will neither improve nor diminish any of the neighborhood property values. He further stated the change will improve the property while also providing some negatives as the property will no longer have a garage. But it will have an ADU, and from what the applicants are describing, it will be very well renovated. It is his opinion that granting the Variance would not negatively impact the neighborhood.

5. *Unnecessary Hardship*

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

i. *No fair and substantial relationship exists between the general public purposes of the Ordinance provision and the specific application of that provision to the property because:*

and

ii. *The proposed use is a reasonable one*

B. Explain how, if the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Mr. Hoppock stated that he would rely on subparagraph (B). Chair Gorman stated that he agrees. Mr. Hoppock stated that the Special Conditions are demonstrated by the size of the property. The size of the garage has not changed. Its footprint has not changed. The configuration of the topography of the land has not changed. The

difficulty they will have, and what it will do to the character of the neighborhood if they put a breezeway in as discussed before, is it might not be conforming to the other houses in the neighborhood. If you recognize the hardship and try to correct the hardship you will impact the other factors they have been discussing. That is the point about Special Conditions; it could affect the essential character of the neighborhood if drastically altered. He thinks that under subparagraph B, there is a Special Condition of the property that distinguishes it from others in the area and the property cannot be reasonably used in the fashion they would like. A Variance is necessary to enable the use they are proposing, and Mr. Hoppock stated he does not think the Board should deny a reasonable use that is not going to affect the neighborhood.

Ms. Taylor stated that she suspects that if there is unreasonable hardship it should be determined under subparagraph A, because subparagraph B requires that if you were to deny the Variance the property could not be used for the purpose for which it is zoned, and it is clear that this property can be used as a single-family residence. She does not think it is a matter of the property not being able to be used in strict conformance with the Ordinance. It is more that if there is a hardship it is due to the relationship between the garage and the house. Although economics cannot be the sole factor in determining hardship, it can be a consideration.

Mr. Gaudio stated that he thinks it falls under subparagraph A and he proposes a discussion. He continued that regarding subparagraph Ai, *"No fair and substantial relationship exists between the general public purpose,"* that is having a single-family house with an ADU and insisting that it be attached versus detached. There is no fair and substantial relationship between the public purpose of the Ordinance and the specific application. Regarding subparagraph Aii, the proposed use is a reasonable one, with a family member to live in the ADU, to give assistance to other family members.

With Chair Gorman asking for a motion to grant a Variance for ZBA 20-12, Mr. Greenwald made a motion. Mr. Hoppock seconded the motion.

The Board reviewed the Findings of Fact.

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

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

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

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

Unnecessary Hardship

A. *Owing to special conditions of the property that distinguish it from other properties in the area, denial of the Variance would result in unnecessary hardship*. Granted 5-0.

With a vote of 5-0, the Zoning Board of Adjustment approved ZBA 20-12.

b) **ZBA 20-13:/** Petitioner, Theodore Chabott of 245 Church St., Keene, requests a Variance for property located at 245 Church St., Tax Map #573-060-000; that is in the Medium Density District. The Petitioner requests a Variance to permit the construction of a three car garage within five foot setback where ten feet is required per Section 102-791 of the Zoning Ordinance.

Chair Gorman opened ZBA 20-13 and asked Mr. Rogers to present comments. Mr. Rogers stated that this property is in the Medium Density District and the Applicant is requesting to create a three car garage with only a five foot setback, where ten feet is required per the Zoning Ordinance. He continued that the Applicant will further explain, that the he has purchased the lot right behind his which is on Kirk Court. The Applicant's intention is to move his existing garage to the other lot after merging the two lots into one. The map in the Board's packets shows it in an L shape lot with frontage on Kirk Court, as well. The intent is to move the small one car garage to the new section and behind the house, build a three-car garage with a setback of five feet instead of ten.

Chair Gorman asked if the Applicant has merged the lots. Mr. Rogers replied yes, he will be merging the lots. He continued that the garage would not be allowed on the other property unless the two properties were merged, because a garage is not an allowed primary use on its own lot. Chair Gorman asked if it was currently a residential, building lot. Mr. Rogers replied yes. Chair Gorman asked if it is correct that it will not be conforming, if the Applicant chooses to subdivide the two lots at a later time. Mr. Rogers replied that he assumes the Applicant would have to re-draw and pull that lot off, with the new garage if the Variance were granted, the side setback would be conforming but the rear setback would not be, unless he re-drew the property line to match the setbacks required.

Ms. Taylor stated that she sees an outline of the property with the additional lot. She continued that it looks like the one-car garage is still pictured as being on the original lot and there is a new, large building behind the residence. She asked for clarification. Mr. Rogers replied that the small building on the right-hand side is the one-car garage. He continued that the larger structure behind the house he believes is a swimming pool. He is not sure if it is active. His understanding is that it would be filled in and removed. Ms. Taylor replied that she is still confused as to what is where. Mr. Rogers showed the main house, the swimming pool, and the one-car garage just to the right that would be moved to the south on the new portion of the lots that would be merged. Where the swimming pool is currently is the location of the proposed new three car garage. Ms. Taylor asked where the garage is going to be moved to, is that the side line they have under consideration. Mr. Rogers replied that the existing garage that is being relocated will meet the side setback. It will be moved a little toward the southwest, and from what is shown on the proposal, it meets all the setbacks. Ms. Taylor stated that she still does not understand.

Mr. Gaudio asked if the new garage will be on the east or west side of that lot. Mr. Rogers replied that the new garage will go just about where the pool is shown currently, the side setback on the left-hand side, which is what they are seeking a Variance from.

Mr. Greenwald asked if the proposed garage will be accessed from the Church St. side. Mr. Rogers replied yes, from the existing curb cut on the Church St. side. Mr. Rogers stated that if the applicant desired a second curb cut there would be an allowance but he would have to go through the Public Works Department, the City Engineer, and with the process for a single-family home to have a second curb cut. Chair Gorman stated that he thinks applying for a second curb cut is a Planning Board issue as well. Mr. Rogers replied that the rules have changed; curb cuts can now be approved administratively.

Chair Gorman opened the public hearing and explained how members of the public can participate, via Zoom or telephone.

Chair Gorman recognized the homeowner, Ted Chabott.

Mr. Chabott stated that his proposal is to move the one-car garage onto the back property. He continued that those two pieces of property have already been merged. He wants to build a three-car garage basically in the pool area within five feet of the side setback in order to have ample room to swing into the garage from his property as his property is narrow. Moving the garage five feet back is what the Variance request is for.

Chair Gorman asked him to go through the five criteria and why he believes his property is suitable to be granted this Variance.

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

Mr. Chabott stated that the garage would be behind the house, barely visible from the street. He is requesting the setback so the vehicles would have proper room to swing into the garage.

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

Mr. Chabott stated that the garage would sit five feet from the property line instead of ten feet, which his neighbor has no objection to.

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

Mr. Chabott stated that it adds value to the neighborhood.

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

Mr. Chabott stated that he is spending several thousand dollars to build this garage so it should be an asset to the neighborhood.

5. *Unnecessary Hardship*

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

i. No fair and substantial relationship exists between the general public purposes of the Ordinance provision and the specific application of that provision to the property because:

Mr. Chabott stated that the reason for the Variance is that his property is only 57.5 feet wide, and he wishes to build a garage on the same footprint as the swimming pool except five feet toward the west so he can have ample room to swing his vehicles into the garage.

ii. The proposed use is a reasonable one because:

Mr. Chabott stated that he is 77 years old and is finding it more difficult to work on his classic cars in alternate locations and would like to work on them in his own house in his senior years.

B. Explain how, if the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Chair Gorman asked if Mr. Chabott wants to elaborate on subparagraph B.

Mr. Chabott stated that it will be barely visible from the street. He continued that he will vinyl side the garage to match his house so it will blend right in.

Chair Gorman asked if the Board has questions.

Mr. Gaudio asked if is there any reason why Mr. Chabott, instead of moving the one-car garage back to the rear lot, could not build the three-car garage where there is plenty of space. He continued that he could even use the same driveway and swing around to it, or as mentioned earlier, get another curb cut to get to it directly from Kirk Court without invoking the need for a Variance.

Mr. Chabott replied that he thought the Board might ask that, and he has multiple reasons. He continued that firstly, on the Kirk Court lot; he has gardens and blueberry and raspberry bushes. If he put the garage there he would have to remove those. If he were to build a garage on that property he would have to set it way back so that if anyone ever wanted to build a house in front they could. That would need a curb cut and new driveway. But the main reason is the Kirk Court property is about four feet lower than the main property and is in the flood plain. He would have to spend a lot of money to do a lot of filling, to be able to put the garage in that location.

Mr. Gaudio replied that he would have to do that for the single car garage, too. Mr. Chabott replied that he is planning on raising it three feet off the ground instead of one foot like it is right now.

Mr. Greenwald stated that he had a question for Staff, asking for clarification on the two lots having been merged. Mr. Rogers replied that was correct. Mr. Greenwald asked if that it means the Kirk Court lot is no longer a building lot, nor could it be, being only .2 acres. Mr. Rogers replied that is correct. Mr. Greenwald stated that he was not sure if the applicant knew that.

Mr. Chabott stated that lot was never considered a building lot because of its size. He continued that about five years ago the City raised his taxes because they came up with new rules saying that size lot is a viable building lot.

Chair Gorman asked Mr. Chabott if it is correct that he has already merged the two lots. Mr. Chabott replied yes, he did that on the advice of the City because they said he would not be able to move the one-car garage onto that property without merging the properties first. Chair Gorman stated that the reason for the merger was because you cannot have a use separate lot that is just a garage; that is not an allowable use, so by merging the lots Mr. Chabott was able to have the garage there, so that is accurate, but he thinks now it is no longer a building lot since it has been merged. Mr. Chabott mentioned the thought of someone putting a single-family home there down the road, which he thinks is what led Mr. Greenwald to his question. Chair Gorman asked if Mr. Chabott understands that the Kirk Court lot is no longer an independent, buildable lot. Mr. Chabott replied no, he did not have that understanding. Chair Gorman asked if that affects or impacts Mr. Chabott's stance here tonight. Mr. Chabott replied no, he does not think it will. He continued that he was not ever planning on using it as another building lot.

Chair Gorman asked if that would impact Mr. Chabott's stance on Mr. Gaudio's previous question about building the garage more in a location that is indifferent to these setback restrictions that actually met the restrictions. Mr. Chabott replied that he does not know how to answer that, other than to say he would rather have the garage closer to his house than out on that back lot. Chair Gorman replied that is fair. He stated he wanted to make sure Mr. Chabott wanted to proceed with this process and that that is his first preference, knowing now what he knows about the lots being merged. Mr. Chabott replied yes, this is his preference.

Ms. Taylor stated that her understanding is that you cannot have an accessory building on a separate lot and that is why there was advice to merge the two lots. She continued that she thinks what would have to happen, whether or not there is enough size there to be a buildable lot, is there would have to be a re-subdivision, which is not the simple on merged lots. Mr. Gaudio had raised the question she was going to ask, because once the lots are all one after a merger, the question is whether the three-car garage can be fit somewhere on the lot. She thinks personal preference is not adequate.

Ms. Taylor stated that her remaining question is probably for Mr. Rogers, and maybe it is not a factor because after merger it is essentially one lot. She questions whether the addition of the garage and extra pavement cause any permeable surface issues, or are those requirements still met now that the two lots have been combined? Mr. Rogers replied that when the building permit is applied for the garage, that is for a criteria to be reviewed, to make sure those requirements are met. He assumes that they would be taking something that might not be conforming at the moment and making it better by merging these two lots, where you have that

whole second lot that is green space and adding it to a lot that might be non-conforming and not have enough green space. So Mr. Chabott would possibly be taking a condition and making it better, because he is also taking an area that was covered by a swimming pool and replacing it with a garage.

Chair Gorman asked Mr. Rogers for clarification about Ms. Taylor's comment that you cannot have an accessory use on a building lot. Mr. Rogers replied not in this district. He continued that in certain districts you could have a parking lot or storage, but that is not an allowed primary use in the Low Density District.

Mr. Hoppock stated that he is looking at the picture of 0 Kirk Court. He asked how close the propose three-car garage is to an abutter. Mr. Rogers replied that the second structure, the swimming pool, is the ballpark area for where the garage would go, and that is the property line where Mr. Chabott is looking for the Variance for the five feet to the left. It looks like the house is close to Church Street, not on Kirk Court. Mr. Hoppock asked Mr. Rogers to show the location of the driveway on the map. Mr. Rogers showed how the driveway goes right to the current one-car garage.

Mr. Hoppock asked Mr. Chabott why it could not be a two-car garage and serve his needs, without encroaching on any setbacks. Mr. Chabott replied that he would still want it five feet from the property line so he would have ample space to swing into it, because his property is narrow at only 57.5 feet. He continued that he has three classic cars and thus would like a three-car garage. He is also planning to add a lift in the garage to be able to work on his cars during his senior years. The Variance would be to set the three-car garage toward the west, toward Main St., five feet instead of ten feet, so he can have ample room to swing into the garage on his narrow piece of property.

Ms. Taylor stated that she is still troubled by why he cannot put the garage on the back portion of the merged lot, because it looks like it is 115 feet by 75 feet. Mr. Chabott replied that he could, but it is lower and he would have to do a lot of filling and do another curb cut, and it would be further away from his house and he would need to put in a new driveway. He continued that right now he has a driveway and would just have to add a few feet onto it. He further stated he would prefer the three car garage behind his house.

Chair Gorman asked if there were any more questions from Board members. Hearing none, he asked if there were questions from members of the public. He called on Patricia Allen.

Patricia Allen, of 95 Wyman Rd., asked if there are noise concerns about having work done on classic cars in a residential neighborhood. Chair Gorman asked if she is asking about zoning restrictions placed on such activities. Ms. Allen stated that she is new to Keene and not familiar with the Zoning Code or the City's Ordinances. Chair Gorman stated that Mr. Chabott works on his own cars in his home, not as a business. Mr. Rogers replied that is correct, Mr. Chabott would not be allowed to build a garage in this location to run a business working on other people's cars. He continued that the City's noise ordinance would apply if needed, such as if Mr. Chabott was using loud equipment late at night, or out in the driveway, but he assumes that would not happen.

Andrew Weglinkski, of 28 Valley St., stated that Mr. Chabott takes good care of his property. He continued that he is a good neighborhood and he has seen Mr. Chabott's property, cars, and blueberry bushes, which Mr. Chabott generously shares with neighbors. He appreciates that there are no other neighbors that have issues with this proposal, and neither does he, but he prefers the new garage to be on the Kirk Court. With that being said, he understands Mr. Chabott's reasoning's for wanting the new garage behind his home. He finished by stating Mr. Chabott is a great neighbor and he defers to his reasoning about this.

Chair Gorman closed the public hearing for the Board to deliberate. He continued that he will re-open the public hearing if needed to ask questions of staff, the petitioner, or the public.

The Board reviewed the Findings of Fact.

Mr. Hoppock stated that he is not sure the fifth criterion is met. He continued that they do not have enough information about the project's potential to alter the essential character of the neighborhood. He doubts it would threaten health, safety, or welfare. He is not convinced the fifth criterion is met and is not sure if the Board should spend time on the other criteria if that is not met, because it is necessary to meet all the criteria.

Chair Gorman stated that they will thus start with the fifth criterion and move backwards through the others.

5 Unnecessary Hardship

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

i. No fair and substantial relationship exists between the general public purposes of the Ordinance provision and the specific application of that provision to the property because:

and

ii. The proposed use is a reasonable one because:

B. Explain how, if the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Mr. Hoppock stated that the only Special Condition he heard was the narrow driveway and that is obviated by the fact that Kirk Court would be an alternative, so the width of the lot is not really a Special Condition of the property. Mr. Chabott has other options, so he does not see how the width or location of the driveway is a Special cCondition that distinguishes it from other properties. The general purpose of the Ordinance is to decrease density and congestion and he thinks this could impact that. There is a fair and substantial relationship between that general purpose and the application to this property. It is clear to him that there are other options

available. That is indicative of that fair and substantial relationship exists, as opposed to not existing. He has a hard time convincing himself that this application meets the fifth criterion.

Mr. Greenwald stated that he has a question for Staff, stating that he will assume, that the garage Mr. Chabott is proposing will have direct entry into the home. Chair Gorman stated that he will briefly reopen the public hearing and asked Mr. Chabott to respond. Mr. Chabott stated that the garage will be separate from the house, sitting approximately six to seven feet away from the back of his house. Mr. Greenwald asked if Mr. Chabott would still have to walk outside of his house to access the garage. Mr. Chabott replied that is correct. Chair Gorman closed the public hearing again.

Mr. Greenwald stated that the hardship he is focused on is what Mr. Chabott was alluding to, the fact that he is 77 years old and his "commute" to his garage, where he does the activity that is his main passion right now. If that commute to his garage was "just" an extra 20 feet, that 20 feet might be more of a hardship to Mr. Chabott at his age than it would be to someone younger. He sees a hardship if Mr. Chabott is forced to put the garage further away from his home. His accessibility to it would be a hardship, even though yes, he could still access it, but not in the manner he wants or needs.

Chair Gorman stated that he sees what Mr. Greenwald is saying, but from his vantage point, the hardship needs to be a hardship of the property. He continued that as much as he wants Mr. Chabott to be able to enjoy his later years on his passion, which is very reasonable, the hardship needs to go with the property. The Board is not considering whether to give Mr. Chabott a Variance, they are considering whether to give 242 Church Street a Variance. He understands what Mr. Greenwald is saying and shares some of that same sentiment and would love for Mr. Chabott to be able to do this project the way he wants to do it, but unfortunately, he does not think it fits within the parameters of the hardship.

Ms. Taylor stated that unfortunately, age is not a Special Condition of the property, although there are times when she wishes it was. She continued that she is also having concerns, because the front part of the lot may be narrow but there is still ample space on the property to have a three-car garage without violating any of the setbacks. Having a garage is reasonable, but having a three-car garage on the front of this lot may not be reasonable. She thinks the project could be accomplished within the boundaries of the property without violating setbacks.

Mr. Gaudio stated that he agreed. He continued that the issue is with the property, and like Chair Gorman said, the property is not the hardship. He certainly understands Mr. Chabott's personal issue with this.

Mr. Greenwald stated that he speculates that had Mr. Chabott known the details about his allowable use for that property, his whole plan would have been different, even though Mr. Chabott stated it is not going to affect his decision. He continued that the fact that Mr. Chabott is moving his one-car garage back onto the merged property because potentially in the future someone might want to build a house there, and now he knows they cannot, Mr. Greenwald wonders, if the Applicant would have applied for a Variance This bothers him. He is not saying it amounts to Mr. Chabott's property having a hardship. Mr. Greenwald does not think Mr.

Chabott had an adequate chance to think through other alternatives for his three-car garage because he thought probably that other portion of the lot was going to be used. He goes back and forth on whether he thinks there is a hardship, because Mr. Chabott could in fact put the three car garage on the merged lot.

Chair Gorman asked if the Board has suggestions for how they may move forward. He continued that this does not leave a great feeling with him, either, but he just does not think the criteria have been met. He asked if, for general discussion purposes, the Board sees any merit to giving Mr. Chabott a chance to expound on any hardship, though they have given him ample opportunity to do so. He has essentially admitted that this is more of a want than a need. According to Chair Gorman, it seems like the Applicant could still accomplish his mission of having a three-car garage directly where he lives, so that he can still have generally what he wants, just not exactly or specifically and with maybe a little more cost.

Ms. Taylor stated that she has concerns with opening the public hearing once they are in deliberations, but she sees two options: one, complete creating a record on all criteria and then vote, or two, Mr. Chabott could potentially, if he chose to, withdraw his application and not have a negative vote on the application which could, potentially, preclude him from bringing forward a reconfigured application.

Mr. Greenwald stated that for the record, he completely agrees with Ms. Taylor and he thinks option two would be most advisable because he thinks there is a lot of new information that has come to the applicant's attention and he might need more time to rethink what he needs to accomplish.

Chair Gorman replied agreement and stated why he specifically asked Mr. Chabott if he wanted to carry forward with this petition. He continued that he does not agree with Ms. Taylor that he cannot reopen the hearing, nor was he suggesting that. He was suggesting some sort of alternative, like she mentioned, a withdrawal of sort from the Applicant if he is interested, so he could take another reapply with a new application. That could be no Variance application at all, or Mr. Chabott coming back with a new version of the application.

Mr. Greenwald stated that he thinks Mr. Chabott needs to fully understand what his allowable uses are for the property now that he has merged them and what he can and cannot do. He might have thought that moving the one-car garage onto the Kirk Court property meant something else. It sounds like there was some misunderstanding between the Petitioner and the City or whoever he worked with to merge the properties. He personally would like Chair Gorman to reopen the public hearing to give Mr. Chabott the opportunity to withdraw his application.

Chair Gorman asked if Ms. Taylor agrees that that is a viable option. Ms. Taylor asked if he means withdrawing. Chair Gorman replied that he means giving the Applicant the opportunity, should he choose to do so. Ms. Taylor replied yes.

Chair Gorman asked if other Board members agree. Mr. Hoppock replied yes, but he shares Ms. Taylor's concern about reopening the public hearing for further fact-finding after deliberations commenced. He continued that it is sort of analogous to having the jury deliberate and then

having the trial resume in the middle; it makes him uncomfortable. Chair Gorman reminded the Board of the language: *"the Board will deliberate and decisions will be conducted in public, and if needed, the Chair will reopen the public hearing to ask any technical or procedural questions of the staff, the petitioner, or the public."* Mr. Hoppock replied that it is opinion that the Board can ask technical or procedural questions, but not substantive ones and asking Mr. Chabott if he would like to continue would be a procedural question.

Chair Gorman opened the public hearing to ask Mr. Chabott what his preference would be, to continue with the current application or to withdraw. Mr. Chabott stated that his preference is still to put the new garage where the swimming pool is now. He continued that if the Board does not approve the Variance, he guesses he could put it on the back property but he would rather not. He is not worried about building a house out there; that does not bother him a bit because he was not ever planning on selling it as a buildable lot or putting anything else out there.

Chair Gorman stated that in its deliberations the Board has come to a certain level of conclusion. He asked if Mr. Chabott would still like to continue with his current application. Mr. Chabott replied yes. Chair Gorman closed the public hearing. He asked the Board to continue to deliberate, moving on to criterion four.

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

Mr. Hoppock stated that he does not believe there is any evidence that this would impair surrounding property values. Chair Gorman stated that he does not think it would diminish surrounding property values, either. Mr. Greenwald agreed.

Granting the Variance would do substantial justice because:

Mr. Hoppock stated that he is having a hard time with whether the loss of personal preference is a loss that is outweighed by the gain to the general public. He continued that he is not sure this is met, either. Ms. Taylor stated that she agrees with Mr. Hoppock.

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

Mr. Gaudio stated that he disagrees; he does not think the Spirit of the Ordinance would be observed, because it could be complied with by using another approach.

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

Chair Gorman stated that he thinks Mr. Hoppock already covered this one a little bit, but generally speaking, this application does not appear to be contrary to the public interest. Mr. Hoppock stated that he does not think they have enough information about whether it would alter the character of the neighborhood to any degree and with the option that the garage be constructed on the Kirk Court lot, it is difficult for him to agree. He is not sure this criterion is met, but erring on the side of caution, he would say that it is, even though there is not enough information to really say.

Chair Gorman asked if there were any other comments from the Board on any of the criteria. Hearing none, he made a motion for the Zoning Board of Adjustment to approve ZBA 20-13. Mr. Hoppock seconded the motion.

Granting the Variance would not be contrary to the public interest. Granted 3-2. Ms. Taylor and Mr. Hoppock were opposed.

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

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

If the Variance were granted, the values of the surrounding properties would not be diminished. Granted 4-1. Ms. Taylor was opposed.

5. Unnecessary Hardship

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

Denied 5-0.

B. Explain how, if the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot b be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Denied 5-0.

Chair Gorman made a motion for the Zoning Board of Adjustment to deny ZBA 20-13. Mr. Hoppock seconded the motion, which passed by a unanimous vote of 5-0.

c) **<u>ZBA 20-14:/</u> Petitioner, David Borden of 55 Langley Rd., Keene, requests a Variance for property located at 173 Wyman Rd., Keene, owned by the Bruce L. and Phyllis R. Borden Revocable Trust, of 173 Wyman Rd., Keene, Tax Map #210-048-000 that is in the Rural District. The Petitioner requests a Variance to permit a three +/- acre lot with 2.85+/- acres of upland and 0.15+/- acres of delineated wetlands, where five acres are required per Section 102-791 of the Zoning Ordinance.**

Chair Gorman asked Staff to present comments. Mr. Rogers stated that this is a property located in the Rural District, with frontage on Wyman Rd. and Abbott Rd. He continued that there is a discrepancy between what the Assessor's database has for this lot's acreage and what the owner's survey shows. The survey is correct. It is a 26.5-acre lot. The applicant wants to be able to create two lots, with one lot where the existing house is, on the upper portion of the map, and the other lot would

have five acres of upland. The Applicant had a second Variance application submitted but has since withdrawn it as their surveyor was able to find enough upland to create a required acreage lot. The Applicant is asking for a lot to be created that has three acres where 2.85+/- acres is upland (dry land) and .15+/- acres is delineated wetlands.

Mr. Hoppock asked if it is correct that that is one of the two lots. Mr. Rogers replied yes, the second lot would be created if the Variance were approved; the Applicant would have to go through the process with the Planning Board to subdivide the 23.5 acres with approximately six acres of upland scattered throughout.

Ms. Taylor asked if additional upland acreage on the remaining portion of the parcel was found, why some of that acreage could not be added to make five acres, eliminating this request. She continued that might be a question for the Applicant and not Mr. Rogers. Chair Gorman replied that Mr. Rogers is nodding his head that yes, this is a question for the applicant.

Ms. Taylor stated that there is such a significant discrepancy between what the Assessor's database and the survey show, so she hopes the City is following some procedure to correct that. It looks like, according to the survey, that the abutter to the southeast gained some property. She does not know what the process is to have the maps corrected but hopefully the Community Development Department is talking with the Assessor's Department so this is corrected. Mr. Rogers replied yes, the Assessing Department will be making corrections though it will not be reflected until April 1 of next year, however.

Chair Gorman asked if there were any more questions for Staff. Hearing none, he opened the public hearing and shared information about how the public could participate via phone or the Zoom platform.

Chair Gorman asked to hear from David Borden, representing 173 Wyman Rd.

Mr. Borden stated that as a family member of the owners, he would review the criteria and then answer questions.

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

Mr. Borden stated that his request on a smaller than required lot size fits in with the current neighborhood characteristics. He continued that many lots in the area are much smaller than this request which he feels is reasonable.

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

Mr. Borden stated that the neighborhood would still be very rural in nature. He continued that wetlands would not be disturbed or built upon. The property will still have the required Rural District 50-foot setbacks.

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

Mr. Borden stated that this Variance would allow an additional building lot that

exceeds the size of many in the neighborhood.

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

Mr. Borden stated that the proposed 3-acre lot fits in nicely with the existing neighbors with no new building proposed. He continued that their survey map shows the proposed line noting that there is a stone wall that is a natural divider of that piece of property. His Uncle Bruce Borden maintained the property from the house down to the stone wall, always maintaining it as a well-kept and well-mowed property. A proposed buyer would like to farm the land and raise herbs, which is natural for that location. He further stated that this stone wall was chosen as the property line as the northern part is the best farmland.

5. *Unnecessary Hardship*

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

      i. *No fair and substantial relationship exists between the general public purposes of the Ordinance provision and the specific application of that provision to the property because:*

Mr. Borden stated that due to the fact that there is over 31 acres it does not appear to be unreasonable to have two building lots. He continued that a 3-acre division with existing buildings allows an affordable sale to take place and a second lot to be defined to conform to standards.

and

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

Mr. Borden stated that this subdivision fits nicely with the existing character of the neighborhood. Being finished with his presentation, he asked if anyone had questions.

Ms. Taylor asked if the property currently has City water and sewer or if it is well and septic. Mr. Borden replied the property has a well and septic. Ms. Taylor asked if there would be room on this proposed three acres, considering the wetlands, in the event that the septic failed. Mr. Borden replied that the septic will be brand new within the month, as a condition of the sale. He continued that it has a State-approved design and to be installed before the sale of the property.

Mr. Hoppock stated that on the map, north of Abbott Rd. there is a well site with a question mark. He asked if that is where the well will be. Mr. Borden replied no, that is an old well that was discontinued years ago. He continued that his Uncle had a new well drilled that is on the house side of Abbott Road which is marked on the map though the label is small.

Mr. Hoppock asked if there is a reason why they cannot move the proposed line south two acres. Mr. Borden replied that that is where they started in their thinking. He continued that as you can see from the upland delineation, it would take two acres of "prime upland," so it was hard to find enough upland to get five acres for the south, larger lot. Since the family was asking for a Variance, they thought cutting the lot size down would be a smart move to save the upland for the calculation of the other lot. His Uncle wanted to build a house there one time so he is familiar with the area. He continued explaining that if the boundary line were to be moved down to include the two acres for the northern proposed lot, the southern larger lot would not be as well configured. Not adding the two acres to the house lot does not affect it at all; it is a still very nice lot. The division of the stone wall really frames the property well. As the family discussed the best solutions for a subdivision, they evolved with this application believing it to be the best of their ideas. It made sense that the house is well suited for that three acre lot while saving the upland for the southern larger lot, giving that lot plenty of design opportunities for whoever purchases it.

Mr. Gaudio asked if Mr. Borden is saying that if they added the two acres south it would not leave enough for the other property to be used as a building lot, asking if this was an upland issue. Mr. Borden replied that the majority of the lot is wetlands. He continued that when they had it delineated, they found X amount of upland and it did not give a lot to work with on the second lot and the first lot has an approved septic system that is to be installed, and so by moving the line north, the two acres, it just made a lot of sense with the upland issue on the other one.

Mr. Gaudio asked for further explanation on the map. Mr. Borden replied that between the two pieces on this proposed line division they end up with six acres of upland. Mr. Gaudio asked if it is accurate to say that moving the property line two acres south would leave possibly leave one acre of upland on the southern larger lot, which does not meet the requirements. Further, Mr. Gaudio stated that if the boundary line was moved to split the property to make three acre lots which would make for two nonconforming lots. Mr. Borden replied that it is a little better than that. You end up with the 3-acre upland lot above with the house, and about six acres of upland on the second lot. Mr. Borden stated the family did not know there was six acres of upland on the second lot until the surveyor went back and delineated further upland. He continued stating there may be more upland on the southern larger lot, down along the border with Hillside Village but it is expensive to have the delineation done. He was under the impression at first that the upland had to be contiguous and then learned that it does not, hence the reason for the surveyor to return. Once there was more upland discovered, the second Variance application was withdrawn. He did state that there is a lot of wetland that is unbuildable. He is trying to make a marketable piece that someone could build upon and meet all the regulations. The logical thing to do to accomplish that was to shrink the house lot.

Mr. Gaudio asked if his understanding is correct that there is the three acre northern lot and six or so acres in the south, maybe somewhat non-contiguous, but putting them together makes nine acres. You cannot make ten acres to split the whole lot into two qualifying lots. Mr. Borden

replied that if they had kept the property line at the five acres they would have kept the second Variance request in for the lot that did not contain five acres of upland. Once they found that they had more upland, and that even though it was not contiguous it qualified within the Rural District requirements, they moved the line to make a smaller lot at the upper end. The house is quite old, needing a lot of work, and the Applicant stated a lot of concessions on the property had to be made sell it. The prospective buyers had no problem with the size of the property reducing gas they saw the prime acreage was north of the stone wall. As what is proposed this evening, they hope the Board will find their application in favor.

Ms. Taylor stated that she is confused now. She continued that she does not know if this is a question for Mr. Rogers, but asks if the upland has to be contiguous or not to qualify for the five acres. Mr. Rogers replied that under Section 102-1494 of the Zoning Code, the calculation of minimum lot size states *"For purpose of calculating the minimum lot size for the subdivision of land, there is a surface water resources defined in this article shall be excluded from the area used to calculate the minimum lot size."* He continued that it does not speak to anything along the contiguous portion of this. The Planning Board rules and regulations would address, and he believes this that is what the Applicant is attempting. For a subdivision to occur, the Applicant will want to try and create a buildable lot. He thinks that is what the Applicant is doing by seeking this Variance for the one lot at three acres and leaving possibly four acres of upland that someone would be able to develop. He thinks that is why they are asking for this one Variance with this one property and the second lot will have the five acres or maybe six, which although not contiguous, does meet the Zoning Code.

Ms. Taylor stated that it is hard to figure this out when the map the Board has been given does not show the entirety of the upland versus wetland because it is a prior map and there has been additional work done. She continued that is a reason she is having a hard time figuring this out. She asked if it is correct that the southern portion of the lot has about 6 acres of upland. Mr. Rogers replied in the affirmative that is what the stamped survey plan is showing. Ms. Taylor asked if he means the one the Board has been given or the subsequent one. Mr. Borden replied the subsequent one. Mr. Rogers stated that the application states, *"The existing house will have 3 acres, of 2.85 +/- acres of upland and 0.15 acres of delineated wetlands. The remainder of the land will have delineated uplands of 6.1 +/- acres and a total of 23.5 acres."* That is stamped by a licensed land surveyor and the City received on September 11. Ms. Taylor stated that the Board does not have that map in front of them. Mr. Rogers replied that it came in after the agenda packets were sent to the Board.

Ms. Taylor asked Mr. Rogers, if the three acre lot is what is requested, is it relevant how much is upland or wetland. Mr. Rogers replied that the City did ask the Applicant to make sure to delineate what there was for upland and wetland, but since they are already asking for a Variance from the five acres required, at that time it would be a decision of the Board, if the Board feels that the 2.85 acres of upland and .15 acres of wetlands is an adequate size for a lot in this district. Ms. Taylor replied that it sounds like the split of upland versus wetland is not necessarily a function of the Zoning Ordinance, it is more for the Board's information. Mr. Rogers replied that

is correct. He continued that it is also for the future when the applicant goes to the Planning Board to request the subdivision. Staff felt it was important for both the Zoning Board of Adjustment and the Planning Board to have that information.

Ms. Zerba stated that she thinks Mr. Borden mentioned that there are adjacent properties of about three acres or equivalent to what he is proposing, and she would like to hear more about that. Mr. Borden replied that he did not have that specific information with him though he did discuss this application with the consultant David Bergeron who is very familiar with the area. He continued that Mr. Bergeron stated that 90% of existing properties in this area did not meet the five acre requirement.

Chair Gorman asked for public comment. Walter Mess, of 95 Wyman Rd., Apt. 2305, stated that he lives in Hillside Village, abutting the property. He continued that he speaks only for himself as a resident, not any of his neighbors or Hillside Village management or ownership. He looks out onto this property, which abuts the Hillside Village's meadow area. He is confused by a couple of things, particularly the maps, though some of it has been addressed. The application states that there are 31 acres. There is the Ash Brook Swamp of 5.2 acres, which really does not abut the Borden Farm, which he thinks is not part of the discussion. He does question the septic tank asking if this was for the new proposed lot or the old lot. Another question relates to the shaded area on the map, stating that it is quite irregular. Is it a correct assumption that the irregularity is to make up acreage. . He wonders if that is really the intent of the Zoning Board to look at it that way. He continued that he is not sure what the section of the map that says "upland not delineated" means. Is that a Zoning category? Or does that mean it is up for sale? Or to be used for somebody else?

Chair Gorman asked Mr. Borden to reply. Mr. Borden stated that the lot is a very irregular lot. He continued that the surveyor did his best to define a separate, 5.2-acre piece; that is closest to Hillside Village. The only explanation he has is that section of property was used as a haying field. Historically, people owned haying fields and would get the permission from the neighbors to across their land once a year to cut the hay. The haying field portion of the lot, and the rest of the southern portion of the lot, is all wetlands and it will remain so. He inquired at the Monadnock Conservancy and this section of the land is a "supported wildlife corridor". The possibility exists that new owners could possibly build a house then add the remaining wetlands into conservation or in current use; either way it would stay conservation land. People from Hillside Village should not see any difference to the property with the subdivision. It will be the same woods that have always been there. The probable house location would be on the shaded area, the designated upland area. Regarding the "upland not delineated" note seen on this map, there has been a map submitted after that the first map, which does have the upland delineated. This second map does show another location that might contribute to the eventual design of a house. Upland is the dry land, and the plant symbols designate wetlands. It is a very interesting site, full of possibilities for wildlife and conservation. He continued stating that the northern end close to the proposed line would there be a building lot available. They have found six acres of upland, making it a conforming lot within the Rural District. Mr. Borden continued that that the

new septic system is to go with the old house, on the three acre lot. He continued that it is all approved and will be brand new within the next month.

Chair Gorman called on Mr. Mess again. Mr. Mess stated that the only other confusion he had was the "upland not delineated" section. He state that it may not be relevant to the Zoning question but asked if this section was considered a building lot, and if the Applicant is thinking of it in those terms? Where it says "upland not delineated," that was an earlier drawing. The final drawing, which the Board does not have in its slide show tonight, will show more cross-hatching in that area. Theoretically, yes, that area where the note is and the cross-hatched area to the north of it are building areas. There is a wetland "brook" of sorts going through there, so whoever builds in that area needs to stay a certain distance away. The subsequent map he submitted to the City has a 75-foot setback from the wetlands. This provides a future architect the information needed to site a house foundation, a septic system, driveways, etc. Mr. Borden did apologize for not having the second map in to Staff in time prior to the packets being sent to the Board. He further stated that this is a nice area having been raised on the land. He concluded that this property is pretty remote from Hillside Village and he feels it will not have any negative impact on their residents.

Chair Gorman asked if Mr. Mess's inquiries are satisfied. Mr. Mess replied that he has further questions.

Mr. Hoppock stated that he heard Mr. Borden say earlier that the thatched area south of the proposed line is 6.1 acres. He asked if that is correct. Mr. Borden replied that the drawing submitted to the Board does not show a cross-hatched area of six acres. Mr. Hoppock replied that he has been taking notes during this meeting, and wrote down earlier that the thatched area south of the proposed line is 6.1 acres. He continued that however, what Mr. Borden stated earlier is that the "upland not delineated" area is 5.2 acres and that they are both considered buildable lots. Mr. Borden replied no, there is only six acres, total south of the proposed property line. Mr. Hoppock asked how many acres, then, are in the "upland not delineated" area. Mr. Borden replied that in the drawing submitted to the Board, there are 4.1 acres of upland shown. That is the delineated, cross-hatched area. He continued that south of the proposed line, the cross-hatched area down to the curved line where the cross-hatches stop, is 4.1 acres. The surveyor and wetlands scientist formed a triangular area right around the surveyor's earlier note and that added two more acres of upland, and it is shown exactly delineated. Mr. Borden stated that the reason he had this earlier map is from the surveyors providing only contiguous upland. He continued, that when he learned that non-contiguous areas could be counted as upland, the surveyor and the wetland scientist delineated that triangular area of two more acres. So what is shown on that drawing south of the proposed line is about 4.1 acres, and then there was an additional two acres found right where that note is. Mr. Hoppock thanked him and said that was what he was trying to get clarified.

Mr. Greenwald stated that the Board and Mr. Borden are here to discuss 173 Wyman Rd. and the creation of a three acre lot where five acres are necessary, not what is going to happen to the

remaining land. Ms. Taylor replied that may be true, but they still have to look at the entire lot as it currently exists, before they can make a decision about a portion of it.

Ms. Taylor asked if the "additional two acres" Mr. Borden just referenced is in the "upland not delineated" area, or the area that is near the southern boundary of the entire lot. Mr. Borden replied that it is where the "upland not delineated" note is. At the time the drawing was done, the surveyor knew that was upland but it was not delineated until later. The surveyor sketched it in a subsequent drawing.

Ms. Taylor stated that earlier, she thought Mr. Borden said there was additional upland at the southern end of the lot. Mr. Borden replied that there may be. He continued that he did not hire the soil scientist for that area. Once the six acres were found, and knowing five acres are required in the Rural District, they discontinued the survey. He continued stating that most of that southern area is swampland, which is great for the aquifer and animals and birds but definitely nothing to build on.

Chair Gorman stated that the public hearing is now closed for the Board to deliberate. He continued that if needed, he will re-open the public hearing to ask technical or procedural questions of Staff, the petitioner, or the public.

The Board went through the Findings of Fact.

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

Mr. Gaudio stated that he does not think that this application would be contrary to the public interest. He continued that he thinks it is in the public interest, because there are other three acre lots in the area, and because it is prime residential land that will be developed.

Mr. Greenwald replied that they are not talking about allowing a three acre lot to be developed on, they are talking about the creation of a three acre building lot. He asked for clarification on the distinction. Mr. Gaudio replied that his first reason is still true. Mr. Greenwald replied that his concern is of the confusion with the proposed lot as a building lot not the creation of a building lot.

Mr. Hoppock stated that it is consistent with the rural area where there are many lots that are three acres and developed with single-family homes, which is the purpose of this lot in the future, which he thinks they should consider as well. He does not think it is contrary to the public interest.

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

Ms. Taylor stated that she has some concerns with this criteria because of what Mr. Greenwald just referenced, which is that this is a conforming, historic lot, and they want to make it less

conforming by making it smaller, which is the opposite of the Spirit of the Ordinance. Mr. Greenwald stated that he agrees.

Mr. Gaudio stated that he does not think it would alter the essential character of the neighborhood. It is going to be a rural lot in a rural district and nothing he has seen is going to change that, and the correlate to that is there is nothing about the application that would threaten public health, safety, or welfare. There will not be any congestion issues, the septic is designed and approved, there is a well in front of the house, and he believes Mr. Borden testified about an approved plan, so he is satisfied that those criteria are met.

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

Mr. Gaudio stated that he believes it would do substantial justice because he does not see anything that would be an injustice, regarding the Zoning Ordinance. Chair Gorman stated that in other words, the fact that it is not creating a substantial injustice makes it justifiable. Mr. Hoppock replied that the other way to say that is there is no gain to the public that outweighs the loss to the individual.

Chair Gorman stated that he leans that way on this as well, especially given the size of the overall chunk of land, albeit mostly wet. It does not seem like it will have a severe impact on the general public.

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

Mr. Hoppock stated that there is no indication of any concern there. The values of the surrounding properties are not going to be hampered in any way. Chair Gorman stated that he does not imagine they would either.

5. *Unnecessary Hardship*

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

i. No fair and substantial relationship exists between the general public purposes of the Ordinance provision and the specific application of that provision to the property because:

and

ii. The proposed use is a reasonable one.

Mr. Greenwald stated that he disagrees with this. He continued that there is a house on a lot. It is a big lot. It can continue to be as such. The only hardship he hears is that the petitioner does not have an extra lot to sell. That is a financial hardship, and that is not a hardship.

Ms. Taylor stated that she agrees with Mr. Greenwald. She continued that if the Petitioner wanted to make this a five acre lot and then he could apply for a Variance for the southern larger lot because they did not have a full five acres of dry land. Ms. Taylor continued stating she had concerns with the Spirit of the Ordinance question as there is a lot that has plenty of acreage and the Petitioner wants to turn it into a substandard lot. She stated she does not see the hardship as it pertains to the request that is before the Board.

Mr. Hoppock stated that he sees it a little differently. He continued that the main purpose of the Ordinance is to maintain a rural setting, which means regulating congestion and density. He continued that what he sees is a large piece of land that is mostly wetland is proposed to be subdivided. He does take into account both parcels. He initially thought the Petitioner could move that proposed line two acres south, but he is persuaded that due to the condition of the lot and the degree of wetlands, what they are trying to do is get two lots that are similar to most of the other lots in the neighborhood. He thinks that because of the land makeup that is a special condition of the property and he does not think it changes the rural nature. Therefore, no fair and substantial relationship exists between the idea of preventing congestion and density and the application of that rule to this property. He thinks the standard is met.

Mr. Greenwald quested what happens to this property if the Board insists on five acres. Mr. Hoppock stated that the Applicant has nine acres total that are upland, three to the north of the line, four to the south, and two in the "upland not delineated" area. Mr. Greenwald stated that the result would be that another building lot cannot be created, if the Board insists on five acres. Mr. Hoppock stated that the Board should not have to insist on five acres. Mr. Greenwald replied that he understands, but is proposing what the result would be if the Board did insist on five acres. He continued that it would mean another building lot could not be created, which is a financial hardship. Mr. Hoppock replied that he does not see it that way stating it is a land-based hardship because on the amount of wetland available in relation to what the Petitioner is trying to do with this proposal along with the number of acres of wetland to the south.

Mr. Greenwald replied that they are talking about 173 Wyman Rd., not the southern larger lot. Mr. Hoppock stated that he is talking about and looking at the property as a whole. Mr. Greenwald question if the application ZBA 20-15 was withdrawn. Mr. Hoppock replied that is not the question they are asking. He continued that the question is there a Variance appropriate for the three acre piece to the north of the line that is marked "proposed." Mr. Hoppock continued that in evaluating the application, the Board should look at the special conditions of the land. He further stated that the Petitioner proposes boundary line for the proposed three acre lot by evaluating the surrounding properties. In seeing other three acre parcels, and keeping the line to the south is consistent with the line to the north because the Petitioner can. He thinks that all the Special Conditions are relevant, and that allows for an unnecessary hardship finding because the density rules are going to be less appropriate. Mr. Hoppock continued that there is no fair and substantial relationship where those rules apply to this property because it is not going to be densely populated. It is going to be one house on the northern lot, and they will get

no more than one house on the southern lot. He state that the southern larger lot cannot subdivide any further and is satisfied that those objectives are met.

Mr. Greenwald replied that for the purposes of this discussion, it is irrelevant to the Board what else can be created from granting the three acres. Mr. Hoppock replied that he disagreed. Mr. Greenwald clarified that it is irrelevant to the Board's decision of whether or not to say five acres is needed. He continued that he wants to ask the question of why it needs to be three acres, when it could be five. Mr. Hoppock replied that if this petition was five acres, then the other southern larger lot would not be five acres. Mr. Greenwald replied that about it is not the Board's concern of the other property for this discussion, the Board only cares about 173 Wyman Rd.

Ms. Taylor stated that she thinks the question before the Board is exactly as Mr. Greenwald phrased it; why can't the lot be five acres; what happens with the remainder is not before the Board. She continued that as Mr. Rogers said earlier, it is a matter of the size of the lot. Ms. Taylor continued that the question of whether it is upland or wetland is basically informational purposes. Therefore, if they have 4.1 acres and add two acres back to the north, they still have a buildable lot. But as Mr. Greenwald said, that question is not really in front of the Board.

Mr. Gaudio stated that he understands that the remainder of the whole lot is not before the Board, but they have to look at it, to see the whole picture. He continued stating the Board could say that the northern lot has to be five acres, which would mean the southern lot would be 4.1 acres. It would be two lots. They could grant the Variance for three acres, and the southern lot would have six acres, which is now conforming, so it does not have to return to the Board but will still have two lots. His opinion on the big picture, which helps him make a decision on the small picture here, is he thinks it is a viable answer to say a three acre lot fits, because it is in the same density. There is no fair and substantial relationship between the general purpose to keep the density for the two lots and the application of this Ordinance. Mr Gaudio believes the Board would come to the same conclusion. He would say that there is an unnecessary hardship.

Chair Gorman stated that for clarity, if the Board were to hear a Variance for two lots, it is regardless of what size either lot is in terms of upland.

Ms. Taylor replied that she does not think that is correct. She continued that what she understood from the earlier testimony is that the acreage of the upland was for the Board's information. It was not necessarily the required lot size.

Chair Gorman stated that he needs to interrupt Ms. Taylor to let Mr. Rogers speak to this issue. Mr. Rogers stated that for clarity, for the substandard three acre lot, the City asked for the delineations of upland and wetland to be given as informational. Overall, though, the amount of wetland does have a matter of calculation. Mr. Rogers continued stating that if the Board were to deny this Variance, the lot that currently has a house on it would actually have to be more than five acres since the .15 acres of wetlands would have to be removed to create a five acre lot, rendering the wetlands not useable with the calculation. The first lot would have to be 5.15 acres

to create the one lot as stated, and then the second lot would not have enough upland per the Zoning Code which removes the wetlands out of calculation. Mr. Rogers continued that the second lot, if it were to be subdivided, would have to return to the Board seeking a Variance for this section of the Ordinance since there would have a 20+ acre lot, but as Mr. Hoppock mentioned, they would only have a four acre abutment.

Mr. Greenwald questioned that if the Board did not approve this Variance, if it puts the creation of a second lot in jeopardy. Chair Gorman replied absolutely.

Ms. Taylor asked Mr. Rogers for clarification in saying that in the Rural District, five acres of dry/upland are needed for a house lot. Mr. Rogers replied yes. Ms. Taylor replied that her understanding was incorrect and she apologizes.

Chair Gorman stated that the Board would need to hear from the Applicant in either scenario to subdivide the property. He continued that what Mr. Borden did, he suspects, seek two Variances because he did not have enough upland on either portion, which is what the Board initially was presented with. When Mr. Borden found enough upland he eliminated the one Variance request because he was able to have enough upland for it to be a conforming lot. Chair Gorman stated that now the Applicant is before the Board for one Variance on a property that has pretty vast acreage, especially considering its location in Keene, and it is surrounded by properties that are primarily dissimilar, in that they are much smaller. He can see a hardship there for this property, in that there is a large amount of land that is restrictive in nature and he does not see it as adversely impacting the neighborhood in general, because he believes there are plenty of the other lots in the vicinity of three acres.

Ms. Taylor stated that she's struggling with the idea of creating a three acre lot, it not only does not have the five acres; it does not have five dry acres either. She asked if the Board considers either issues, or just the one that the Applicant requests a three acre lot instead of a five acre lot whether it is wet or dry. Chair Gorman replied that the Variance is to create a 3+/- acre lot where 2.85 acres is upland and .15 acres is wetland, which can be considered a 2.85-acre lot. He continued that .15 is about 6% of the cumulative acreage.

He asked if Mr. Rogers had any comment on this. Mr. Rogers stated that since the Applicant is seeking a Variance for a less than five acre lot to begin with, he does not think the section of the Zoning Ordinance that speaks to the wetlands not being allowed to be part of the calculation comes into play. Hence the request from Staff for the delineation of upland and wetland as informational for the Board. Staff's advice to the Applicant was that since they were seeking a Variance for a substandard size lot anyway, that section of the Zoning Ordinance did not apply. Chair Gorman clarified that the size of the upland and wetland is in front of the Board as relative in terms of being informational of what portion is, in fact, upland. Mr. Rogers replied yes, and to get the size of the upland and wetland on the record with the Board and with the Planning Board. Chair Gorman asked if that satisfies Ms. Taylor's inquiry. Ms. Taylor replied yes.

Chair Gorman asked if there is any more deliberation on criterion five or any of the others. Hearing none, he asked for a motion.

Mr. Hoppock made a motion to approve ZBA 20-14. Mr. Gaudio seconded the motion.

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. Ms. Taylor was opposed.

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

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

Unnecessary Hardship

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

i. No fair and substantial relationship exists between the general public purposes of the Ordinance provision and the specific application of that provision to the property because:

And

ii. The proposed use is a reasonable one.

Granted 3-2. Ms. Taylor and Mr. Greenwald were opposed.

With a vote of 3-2, the Zoning Board of Adjustment approved ZBA 20-14. Ms. Taylor and Mr. Greenwald were opposed.

V. New Business

Mr. Rogers stated that the next meeting is Tuesday, September 22, 2020 at 6:30 PM.

VI. Communications and Miscellaneous

Ms. Taylor stated that it would be very helpful if staff could get any updated agenda packet materials to the Board ahead of the meeting. Brief discussion ensued about the timing and logistics.

Ms. Zerba brought up difficulties she had with the hybrid Zoom/in-person meeting format they tried tonight. Brief discussion ensued about this and the format of the next meeting.

VII. Non-public Session (if required)

VIII. Adjournment

There being no further business, Chair Gorman adjourned the meeting at 9:28 PM.

Respectfully submitted by,
Britta Reida, Minute Taker

Edits done by Corinne Marcou, Zoning Clerk