

City of Keene
New Hampshire

ZONING BOARD OF ADJUSTMENT
MEETING MINUTES

Monday, February 7, 2022

6:30 PM

Council Chambers
City Hall

Members Present:

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

Staff Present:

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

Members Not Present:

All Present

I) Introduction of Board Members

Chair Gorman called the meeting to order at 6:30 PM and explained the procedures of the meeting. He welcomed new member Richard Clough. Roll call was conducted.

II) Voting Chair and Vice Chair for 2022

Ms. Taylor nominated Josh Gorman as Chair. Mr. Welsh seconded the motion, which passed by unanimous vote.

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

III) Minutes of the Previous Meeting December 6, 2021

Ms. Taylor stated that a notation at the bottom of the draft meeting minutes says "Reviewed and edited by Jane Taylor, Board Member." She continued that to be clear, she read the minutes only to look for typos so she would not take up meeting time by going line by line and saying, for instance, "It should say 'of' instead of 'or.'" She would not want anyone to think she actually edited the minutes. Chair Gorman thanked her for the clarification and for proofreading.

Mr. Hoppock made a motion to approve the meeting minutes of December 6, 2021. Chair Gorman seconded the motion, which passed with a vote of 4 to 0. Chair Gorman stated that Mr. Clough would not vote on this because he was not a Board member at the December 6 meeting.

IV) Unfinished Business

Chair Gorman asked staff if there is any unfinished business. John Rogers, Zoning Administrator, replied that the Rules of Procedure would be addressed later on in the agenda.

V) Hearings

A) ZBA 22-01: Petitioner, Jessica Aguirre, 164 Mountain Rd., Greenfield, NH, requests a Variance for property located at 127 Cross Street, Tax Map #554-034-000-000-000 that is in the High Density District. The Petitioner requests a Variance to permit the conversion of a multi-family dwelling with three units into a multi-family dwelling with four units on a lot size of 10,800 sq. ft. where 21,000 sq. ft. is required per Chapter 100, Article 3.6.2 of the Zoning Regulations.

Chair Gorman asked to hear from staff. Michael Hagan, Plans Examiner, stated that this is a pre-existing, non-conforming, 3-family unit, located in the High Density District. He continued that one needs 6,000 square feet for the first unit and 5,000 square feet for every additional unit. Currently, the applicant has 10,800 square feet. Right now it would require 16,000 for the three units that currently exist. It is a legally non-conforming lot.

Mr. Welsh asked if a Variance was applied for and approved for it to have the three dwelling units. Mr. Hagan replied that there was no Variance; it was a pre-existing nonconformity.

Mr. Hoppock asked about the parking. Mr. Hagan replied that he believes the applicant has a plan. He continued that [the City] has aerial views that show onsite parking for what is there now. There is a plan on file that they can ask questions about when the applicants are applying for four units. Chair Gorman asked Mr. Hagan what the required parking would be for four units. Mr. Hagan replied eight spaces.

Chair Gorman asked if Board members had more questions for Mr. Hagan. Hearing none, he asked to hear from the applicant.

Jessica Aguirre introduced her husband, Nicholas Roga, and stated that they live at 164 Mountain Rd., Greenfield, NH. She continued that they recently purchased 127 Cross St., Keene, and intend it to be their primary residence. The property currently has tenants who had a condominium lined up but that fell through at the last minute, and she and her husband did not want to kick them out, so they are waiting to move in.

Ms. Aguirre stated that she and her husband just closed on 127 Cross St. and they are submitting this request to the Board because the property is a large home with an attached barn and one of the three units is built on the second and third floor of the barn, with the first floor unused. They would like to convert that unused space into a small studio. It would be a good opportunity to provide different kinds of apartments and her parents or her husband's parents could eventually stay there.

Ms. Aguirre read her application aloud:

“I am applying for a variance to permit the conversion of a multi-family dwelling with three units into a multi-family dwelling with four units on a lot size of 10,800 sq. ft., where 21,000 sq. ft. is required per section 3.6.2 of the land development code.

I just purchased the property in mid-January, with the intention of renovating and upgrading it to meet the standards of the neighborhood. Mostly, I intend to use one of the units as my family residence, where I will live with my husband and our daughter. The building consists of a main house and an attached barn. Currently there are three units, each with two bedrooms. They are in the main house and on the 2nd floor of the barn. I would like to transform the first floor of the barn into a studio unit.

The LDC supports high density residential districts, and the '2010 Keene Comprehensive Master Plan' describes the purpose of such a district. It is to provide housing of various styles, various sizes and at different price points. Since the district is already fully developed, further development should be in accordance with the existing urban fabric; the usages should support each other and the intensity of use shouldn't inflict disturbance on the neighborhood. I believe that transforming the unused barn space into a small residential unit supports the idea of the LDC and the Master Plan in their true spirit. The restrictions defined in section 3.6.2 of the LDC, 'Dimensions & Siting,' are supposed to ensure the character of the neighborhood. Open spaces should be preserved, the urban tissue should remain permeable and the streetscape should remain open and 'airy.'

I believe the variance I'm applying for supports all of these criteria.

The shape and volume of the building will remain intact and the number of people living at the property won't increase beyond an acceptable measure. The impervious coverage will stay low, at around 50%, where 75% is permitted; this will allow for high quality open spaces that are comfortable to be in, that allow for natural seepage and that maintain local ecologies. The different apartment sizes I will be able to offer if the variance is granted will range from a studio to a three-bedroom apartment, providing housing for various needs. Furthermore, the variance is in line with the city's expressed desire for sustainable moderate densification within the center of the city. Currently underused spaces in the building that are already built up will be upgraded. Only a minimal amount of additional construction material will be needed. Moreover, the existing units will benefit because resources like water and heat will be used more efficiently with four instead of three units, and the insulation of the barn will help minimize emissions of the existing units.”

Ms. Aguirre continued that she would address each of the five criteria. She read:

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

The existing use and the proposed use are both residential uses. 127 Cross Street is composed of a six-bedroom, three-bathroom house that is connected to town gas, water and sewer. There is already ample parking for eight vehicles when they are parked behind each other, but it is easily possible to improve the lot so that each vehicle can easily drive in and out. The variance would not create a higher density of the built-up area, since the shape and volume of the existing building would remain the same. Granting the variance would allow use of the existing space in a more sustainable manner, without disturbing the integrity of the current urban fabric or the usages and character of the neighborhood. Additionally, since the variance would allow for the conversion and repurpose of the barn, it would facilitate its rehabilitation and support the preservation and viability of an historic structure.”

Ms. Aguirre added that the building is from 1854. She continued:

“2. If the variance were granted, the spirit of the ordinance would be observed because:

The ordinance intends to create a coherent residential neighborhood that includes single family, two-family and multi-family dwellings, along with the supporting uses. Therefore, the proposed variance creates a condition that is substantially compatible with the neighborhood as it currently exists. The LDC states: ‘The High Density (HD) District is intended to provide for high intensity residential development,’ and the ‘2010 Keene Comprehensive Master Plan’ points out the need to create housing options for various income groups and various household sizes. Furthermore, the ‘Master Plan’ stresses the importance of sustainable further development of the city. Moderate densification is suggested, especially in the central areas, and the conversion of bigger houses into smaller units is explicitly encouraged.

The property is located within the High Density District, and its location provides excellent connection to the city center and services. The proposed layout would provide a wider range in apartment size and would make use of currently unused spaces. Granting the variance would therefore support the spirit of the ordinance.

3. Granting the variance would do substantial justice because:

The benefit to the petitioner outweighs any potential loss caused by it to the general public. I believe the denial of the proposal has no likely benefit to the public; in fact I believe the neighborhood, as well as the city, would profit from the small expansion of this allowed use as it supports the intent of both the Land Development Code and the Comprehensive Master Plan. The attached list shows that several other nearby properties are also varying in a similar manner from the current ordinance. Out of the 30 abutting properties, 18 (on the list within the box) have duplex or multi-family dwellings, 16 (marked in blue and yellow on the list) are on lots smaller than permitted in the high density district and seven (marked in blue on the list) vary similarly or more dramatically than the property on 127 Cross Street (in green on the list) would if the variance was granted.

Granting of the variance would not cause an increase in impacts to the neighborhood or general public that doesn't already exist. Additionally, the benefit that would be granted to the petitioner is not greater than that permitted to other two-family and multi-family property owners in the neighborhood, yet it would significantly outweigh any negative impact to the general public. Granting the variance would allow the property on 127 Cross Street to be similarly used as other surrounding properties and would therefore do substantial justice.

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

Currently the barn is in slight disrepair. A renovation of the barn would upgrade the appearance of the building with a positive impact on its surrounding. The intensity of the usage, and the usage of the building, remain in a similar scope, and the volume of the building would not change. The changes are in accordance with the spirit of the surrounding apartment buildings and single-family houses, and the upgraded house would support the overall character of the neighborhood. Allowing the variance could therefore have a positive impact on the value of the surrounding houses and could even serve as model for future variances in the neighborhood. The value of the surrounding properties would therefore not diminish.

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:

The conditions and structures of this property are unique in various ways. First, the structures have existed for more than 150 years. They precede the modern ordinance. The property has a main building that dates back to 1854, which consists of about 2,600 square feet of living area and has a full basement; the two-story barn offers about 900 square feet and was built at a similar time. The upper floor of the barn was recently converted into living space but the first floor is unused. Furthermore, the physical state of this specific property is worse than many of the surrounding properties. The relevant part of the building, in particular, is in urgent need of renovation, which can only be reasonably financed if it comes with a benefit for the petitioner. Due to unique features in the floor plan, the first floor of the barn remains inaccessible from other parts of the building. It is behind the stairway and separated by the bathrooms of units two and three; therefore, the space cannot be added in a reasonable way to either of the existing units, which would be allowed by the ordinance and would not require a variance.

Denial of this variance would effectively disallow reasonable use of the first floor of the barn, thus creating a hardship. When the structure was built, a barn was an adequate use in the area, but today it lays empty and is consequently in disrepair. Although a variance is required to allow

for four units on a 0.25-acre lot, the ordinance provision already allows for the current use – multi-family housing - which would not change.

The main building - along with the 2nd floor of the barn, which is currently in use - has three units with two bedrooms each. I believe the restriction of units per lot set forth in the code is a means of preventing overcrowding within a building. This is not applicable to this specific property, as the additional unit would not affect any of the other units or change the footprint of the building.

In addition, the necessary amount of parking spaces can be provided on the lot without coming close to the allowed margin of impervious coverage. Seventy-five percent coverage is allowed, but with the proposed additional parking places only about 50% of the lot would have an impervious coverage.

and

ii. The proposed use is a reasonable one because:

The proposed use is a sensible expansion of an already existing and permitted use, and the expansion is well supported by the property and its existing infrastructure. The use is also supported by the intent of the Land Development Code as well as the Comprehensive Master Plan. The Master Plan specifically mentions conversion of larger buildings into smaller flats ‘... For example, in-law apartments or the conversion of a large home into condominiums can fit seamlessly into the built environment, without drastic change to the outward appearance...this type of residential infill allows for a change in density, not a change in intensity of residential use, which in turn supports the community's goal to create a compact, walkable community and provide choice in housing’

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.

If this variance is not granted, the first floor of the barn cannot be reasonably used for any purpose, which creates an unfair and unnecessary hardship. All other permitted uses in the zone would have a much more dramatic and negative impact on the neighborhood and would also require variances. Additionally, other permitted uses would have a negative impact on the current use of the property. Given that there is no other reasonable use that would be allowed for the existing structure within this zone, I am applying for the variance for an additional unit, as I believe it has the smallest impact while providing the greatest gain for the property, its abutters, and the community.”

Chair Gorman asked if the Board had questions for the Applicants.

Ms. Taylor asked about the square footage of the first floor of the barn and what they propose to have in it. Mr. Roga replied that it is about 500 square feet and they propose a small studio unit. He continued that it would have a kitchen and a separate sleeping area and bathroom.

Ms. Taylor asked what the area is being used for now. Mr. Roga replied that the use right now is non-existent. It is empty, with trash in it from the former owner. The windows are broken and it is in total disrepair.

Ms. Taylor asked if it could be used for storage. Mr. Roga replied not right now; it would also have to be changed for that. He continued that the building has a basement. He does not know what kind of storage would be usable there. Ms. Aguirre stated that there is a significant amount of space in the basement for storage, so there would be no additional benefit to using this first floor as storage space. Ms. Taylor replied that that was not her question; her question was whether this space could be used for storage. Mr. Roga replied yes, any space could be used for storage. He continued that it has to be changed in any case if it is to be used for something that has to stay dry.

Ms. Taylor stated that they mentioned that the upstairs was recently converted to a two-bedroom unit. Mr. Roga replied that the upstairs of the barn is one bedroom and the living room of a two-bedroom unit. The rest of the unit is in the main house. The former owner made some interesting changes to the overall structure that he and Ms. Aguirre have to review anyway. It is only the bedroom and living room in the top part of the barn. Ms. Taylor asked if he and Ms. Aguirre know whether the former owner received the proper approvals for the living unit. Mr. Roga replied that he and Ms. Aguirre bought it as a 3-unit, 2-bedroom. He continued that the former owner did not need to apply for a Variance because it was a three-unit before that. He only enlarged one of the three units; he did not change the amount of units. Mr. Roga stated that he assumes that the former owner got the permissions to change that.

Chair Gorman asked the Applicants if they checked City records before purchasing the property to see if those renovations were done under permit. Mr. Roga replied no, but the City record knows that it is a 3-unit, 2-bedroom. Chair Gorman replied that typically, the assessment is of what is there, but the Code Department says what is *permitted* to be there. He continued that sometimes reality and permissibility pass like strangers in the night. The Applicants may want to look into this and check City records, available on the 4th floor of City Hall.

Mr. Rogers stated that staff did a quick review of the files and determined, as Mr. Hagan said earlier, that it is in the files as a 3-unit building. He continued that he cannot speak to the number of bedrooms per unit, but the files recognize it as a non-conforming, 3-unit building. Chair Gorman asked Mr. Hagan about the minimum square footage requirements for the dwelling unit. Mr. Hagan replied that one room requires 120 square feet according to Building Code. There has to be a separate bathroom. Bathrooms can be a minimum of 25 square feet, depending on what you configure. There is more than enough. That is larger than some tiny

homes and meets the State Building Code under Appendix Q for the current Code requirements. You can build up to a 300 square foot tiny home and meet all the Code requirements.

Ms. Taylor asked about the chart of the abutting properties provided for in the agenda packet and asked if size refers to the size of the lot. Mr. Roga replied yes, the first size is the size of the lot, and the second is the amount of units on the lot, and the third is the size that would be needed if it were according to Code. The last number is how much it is over. His and Ms. Aguirre's property on 127 Cross St. would be at 193%, so it is significantly over size, which they know. However, there are other properties that are 254% over, and so on and so forth. Ms. Aguirre stated that again, the green is where her and Mr. Roga's property would be if the Variance were granted. She continued that currently, they are what is shown, in yellow.

Ms. Taylor asked if it is correct that this chart does not reflect the actual size of the structures that are on the property. Mr. Roga replied that is correct, because they are not applying to have a bigger structure. He continued that the section they are varying from does not say how big the units are; it only says how many units. Thus, the chart only says how many units are on the property, not how big they are. Ms. Taylor replied that one of the Board's jobs is to determine whether a request is reasonable. Thus, having four units in a 10,000 square foot structure, for example, is probably more reasonable than having, say, four units in a 4,000 square foot structure. Mr. Roga replied that he looked into that number, too, and it would be even more in his and Ms. Aguirre's favor. Their property would vary less than other properties in the area. However, he did not put it in the chart because they are not applying for that specific Variance. They would not have the smallest properties compared to abutting units, nor would they have the biggest units. Additionally, the attic has two rooms that are unused, which are not part of the current square footage of the house. They would also like to transform these rooms eventually into living space, for the same reason – the space is already there, and in their minds, it makes sense to use existing built space to house people. They want densification in the city center and in the High Density District. Therefore, they applied for this Variance and then the units would not be as small as they might appear now.

Chair Gorman asked about the eight parking spaces. He stated that Ms. Aguirre and Mr. Roga said they had a solution where the vehicles would not be stacked. He asked if they have a drawing of that. Mr. Roga replied that it is shown on the screen – the right side has eight vehicles. He continued that he wants to be clear that it is bigger than most parking spaces on the surrounding properties. It is not according to Code, that specific parking, but this is what they would suggest, because they would not cover as much ground. Even if they offered parking to Code, they would still only be at approximately 53% impervious coverage where 75% is permitted. It is easily doable. They think that the specific layout on the screen would make more sense, because it ends with a potential terrace and so on and so forth. The property currently has only 42% impervious coverage and 75% is permitted, which shows how much potential there is for additional parking if they wanted to do that.

Chair Gorman stated that Ms. Aguirre and Mr. Roga said they could not otherwise develop the barn and add it to another unit. His question is, if they already have dwelling space in the barn and dwelling space to one side of the barn, how is it possible that they could not continue an existing unit into that space to justify the improvements, without adding a unit? Mr. Roga replied that it would be difficult to do that to the side. He continued that the drawing shows that the barn is in the top of the building, toward the garden, and goes until the first line, and right at that line are the toilets and then staircases. Thus, you cannot go from the first floor into the barn. You would have to move either the toilets or the staircase, which is theoretically possible but would be a different kind of hardship. It would be very complicated and change the structure of the building. The second floor is the bedroom and living room. The bedroom would be too small to put staircases in there. The living room might be possible but extremely difficult. It is not a lot of space. There would have to be external staircases and it would change the volume of the building, which they do not want to do.

Chair Gorman asked if they are aware that if they add a fourth unit they would have to address fire safety code and add sprinklers to the entire building. Mr. Roga replied yes, they have talked with the Fire Department already. He continued that he and Ms. Aguirre would review with them what would be needed, if they receive this Variance.

Mr. Welsh stated that regarding the parking, what they are looking at now is a concept drawing. Mr. Roga replied yes. Mr. Welsh replied that the concept drawing would not necessarily satisfy Code. Mr. Roga replied that is correct. Mr. Welsh stated that there is space to expand on the lot in a way that brings it into Code. He continued that were the Board to consider approval of the Variance, and not want to get into the configuration of the parking and the various scenarios, he would like to know if it is possible for the Board to ask Code Enforcement to negotiate with the landowners to come up with a satisfactory configuration that the Board could approve as a concept tonight.

Mr. Rogers replied that if the Variance were granted tonight, this would require a building permit for some of the work occurring. He continued that at that time, since this would become a 4-unit building and more of a commercial-type structure, it would also trigger a possible Planning review. Planning would look to make sure parking, lot coverage, and so on and so forth, meet the Zoning Code and the parking standards within it.

Chair Gorman asked if the Board had any more questions for the Applicants. Hearing none, he asked for feedback from members of the public. Hearing none, he closed the public hearing and asked the Board to deliberate on the criteria.

1. *Granting the Variance would not be contrary to the public interest.*
2. *If the Variance were granted, the spirit of the Ordinance would be observed.*

Ms. Taylor stated that she has concerns that this may not be in the public interest, because of the intensity of the use for the lot and the structure, and the intensity of already residential uses in the neighborhood. She drove in this area looking at the number of single-family and multi-family

dwellings and their sizes, and thinks that one of the reasons the densities are put in the Code is to help control some of the intensity of use and overcrowding. She thinks this application does not jive with the spirit of the Ordinance.

Mr. Hoppock stated that he is not convinced that the application is not in the public interest. He continued that he thinks this *does* fit the character of the neighborhood. The intensification issue would be nominal, although it does eventually pile up. This would only be a studio unit and it sounds like only one person would be living there. Of the eight cars, they saw, one would be for this unit. He does not see a threat to public health, safety, or welfare from the information presented. Regarding the first two criteria, he has a difference of opinion from Ms. Taylor.

Mr. Welsh stated that he was the chair of the Master Plan Committee that this application cites numerous times. He continued that he specifically remembers the discussions around in-law additions and finding creative ways to utilize space in a way that increases intensity without density, and he thinks this is an example of that. He was concerned about the size of the proposed unit, but he is now convinced it is consistent with other small-sized units and has no problem there. He was also concerned about parking but is now convinced that it is fine. They may see this again if there is a question about parking, but they probably will not. He also thinks Mr. Hoppock is right that they will see seven cars at this location, not the eight that will be built into the parking lot. He is convinced that this is not contrary to the public interest.

Mr. Clough stated that all the questions he had have been addressed.

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

Mr. Hoppock stated that setting aside the ‘intensity versus densification’ problem, he thinks Mr. Welsh’s observation is right; there is an intensification without increasing density. Thus, he is hard pressed to find a benefit to the public if this were denied. He is looking for it but not seeing it. Right now, he thinks the loss to the individual is not outweighed by a gain to the public, and that suggests this criterion is satisfied.

Mr. Welsh stated that he agrees with Mr. Hoppock. He continued that in addition, he finds the comparison with other properties a compelling piece of evidence put forward by the Applicant. He does not know whether that piece of evidence fits into the third criterion or the fourth, regarding surrounding property values, but it is seemingly a practice of density and a practice of building that is consistent with other properties in the area.

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

Mr. Hoppock stated that to follow up on Mr. Welsh’s comments, it would seem to reason that the values of surrounding properties would not be diminished in light of the comparison laid out here. He continued that in fact, they could be enhanced.

Ms. Taylor stated that she does not know how to judge this one, because the Board has not been presented with any evidence on the value issue. She continued that they have statements that “the barn is in slight disrepair” so renovation might improve the value of this property, and if you improve the value of one property you are likely to improve, just by implication, at least the abutting property values. That probably weighs in favor of the application.

Chair Gorman stated that he could go either way on this criterion. He continued that on one hand, the improvements, if done nicely, probably add to the value. On the other hand, the addition of a unit and the creation of a commercial-type setting means increased activity, and all the things that could adversely impact a neighborhood and its values. He will have to decide, but he could go either way on this one. The Board was not given a lot of evidence regarding this. In addition, regarding some of the baseline for the existing properties and what is there today, he can look at that either way. He believes some of the buildings on the lower part of Cross St., on the Washington St. end, are overcrowded. He thinks those properties are a great case in point as to why they established Zoning Ordinances. In addition, although those properties are grandfathered in, he thinks that when a building is non-conforming, you need to be cautious when you make it more non-conforming. This already has a reasonable use. It has three units. Moving a toilet and staircase would probably be less invasive than re-creating an entire barn to add a unit. He thinks the space can be used, and the Applicants could find other ways to make use of their space in a wise manner. Adding a unit could mean having one person, or it could be three people, and there is no way to mandate that. If you end up with another unit, you are increasing the chances of overcrowding. The intent of the Ordinance, in his view, is to reduce overcrowding.

5. *Unnecessary Hardship*

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

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

and

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

Mr. Hoppock stated that he is not persuaded that there are special conditions to the property. He continued that he does not consider age of the building a unique feature, especially in that neighborhood where all the homes are old. The square footage could be a special condition, but there is no comparable evidence. He agrees with Chair Gorman. If the barn were inaccessible to other parts of the building, relocating a toilet and staircase would be easier than renovating the entire thing. He is troubled by the lack of that piece of information.

Ms. Taylor stated that she agrees with Mr. Hoppock. She continued that she is not persuaded that there is a special condition of the property that distinguishes it from any of the other properties. It already has reasonable use of the property, through three units. She agrees that there is potential to make use of that space, with another unit, or storage, or something else. “Reasonable use” goes to the property as a whole, not just to a 500 square foot area. She is at a loss to see the hardship here.

Mr. Welsh stated that he is not sure if “hardship” is the phrase he would use, but it feels kind of in that direction. He continued that he finds it compelling, if not convincing, that renovation of this space needs to be motivated by something. The renovation of the space for the purpose of developing storage does not seem like it is going to motivate the kind of investment that would bring the other benefits - improvement of the property, property values of the surrounding area, and so on and so forth. If he is thinking about the motivation of renovation that would allow the space to be used, this is the best purpose for that renovation, of all the choices that are available in the current Code. Everything else would require a variance and probably not be consistent with the neighborhood.

Ms. Taylor stated that running through the explanation the Applicant provided regarding hardship is the financial need, and as the Board has discussed previously on a number of Variance requests, financial need can be a consideration, but it cannot be the sole reason for the hardship. She continued that that is another concern she has with this application.

- 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 stated that he thinks the Board covered this.

Mr. Hoppock stated that he has the same problem with this one – there is not a special condition of the property identified. He continued that he is not sure how far they would get with that problem at the forefront.

Chair Gorman stated that in his view, the Applicants have the ability to renovate the space and find a way to add it to an existing unit, which could potentially save a substantial amount of resources and still perhaps get more revenue or more use out of the building. He continued that he does not think it is mandated that if you have unused space it automatically means you have to turn it into another unit. You can certainly develop it, but turning it into an entirely separate unit when you are already non-conforming; he does not see a hardship there.

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

Mr. Hoppock made a motion to approve ZBA 22-01, which was seconded by Ms. Taylor.

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

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

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

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

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

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

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

Met with a vote of 5-0.

5. *Unnecessary Hardship*

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

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

and

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

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

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

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

The motion to approve ZBA 22-01 failed with a vote of 1-4. Mr. Welsh voted in favor.

Mr. Hoppock made a motion to deny ZBA 22-01. Ms. Taylor seconded the motion, which passed with a vote of 4-1. Mr. Welsh was opposed.

B) ZBA 22-02: Petitioner, Alec Doyle, of the Colonial Theater, 95 Main St., requests a Variance for property located at 95 Main St., Tax Map #575-008-000-000-000 that is in the Downtown Core District. The Petitioner requests a Variance to permit an internally illuminated, electronically activated changeable copy sign where electronically activated changeable copy signs are a prohibited sign per Chapter 100, Article 10.3 of the Zoning Regulations.

Chair Gorman asked to hear from Staff. Mr. Hagan stated that there is an existing sign, although he does not know if it is conforming or non-conforming. He continued that it has been there for a long time. It is a changeable copy sign that is manually taken down and put up. The Applicants are seeking to put in an electronically activated, changeable copy sign.

Mr. Welsh asked why the Sign Ordinance does not permit electronically activated, changeable copy signs. Mr. Hagan replied that this is the way the Ordinance was written. He continued that there is a lot of history behind Ordinances, which they could go into, but his answer now is that the Ordinance as written does not permit these signs.

Ms. Taylor asked if Staff could explain something about this particular district the property is in. Mr. Rogers replied that it is in the Downtown Core, one of the newer districts that were created with the new Land Development Code. He continued that it is clear that electronically activated changeable copy signs are prohibited in any district in the city. Some districts allow certain kinds of signs. There are additional requirements for the Downtown Core that Staff would be looking at if this Variance were to be granted and a sign permit applied for, such as the requirements for specific colors to be adhered to in the Downtown Core, which is not necessarily a requirement in other districts. Another concern Staff would be looking at, if this were granted, is making sure this sign would not trigger an “animated sign,” which is a prohibited sign everywhere in the city. Some electronically activated, changeable copy signs come with elaborate functions.

Ms. Taylor stated that she was looking through the new Code, which will take her a long time to get used to, and noticed that the Downtown Core is just one small paragraph. She asked how they cross-reference to know what is allowed or not allowed. Mr. Rogers replied that a specific section under Article 10.3 has a list of prohibited signs. He continued that within the Code, there are different requirements for the different districts, but as he stated earlier, this is a case where this type of sign is prohibited throughout the whole city. That is covered under Article 10.3, Prohibited Signs. Ms. Taylor replied that she found that, but if the Board is supposed to be looking at things like the “spirit of the Ordinance,” she is not sure how they are supposed to figure out what the spirit of the Ordinance is when the Ordinance is described in one short paragraph that does not really say anything. Mr. Rogers replied that if the Board wants, Staff can go through the Code with them, but again, but there is a section within the Sign Code portion that speaks to the Downtown Core. He continued that it is the one that has more limitations and restrictions on signs, mostly about colors, but there are sections that speak to signs’ sizes as well. This is covered under Article 10.3, Prohibited Signs, regardless of the district.

Mr. Hoppock asked if the Downtown Core extends down to Cumberland Farms. Mr. Hagan replied that the Downtown Core has expanded a bit. It used to stop right at The Works. From that point, it was Central Business Limited, which was part of the Commerce Limited and so on and so forth. That is where you see more internally illuminated signs. Mr. Rogers stated that now the Downtown Core goes to Eagle Ct. and thus does not make it to Cumberland Farms.

Mr. Hoppock asked what the difference is between electronically activated changeable copy signs and internally illuminated signs. Mr. Rogers replied that illuminated signs do not have changeable copy. They see this in many other districts, where the sign face, typically plastic or Plexiglas, has lighting behind it but is not changeable. With an electronically activated, changeable copy sign, you can change the sign's copy electronically, as opposed to what the Colonial Theater currently has to do: have someone go up a ladder to slide the letters out. They would be able to change the sign's wording from inside, from a computer.

Mr. Hoppock stated that he sees that for internally illuminated signs there are a number of exceptions. He continued that none of them applies to tonight's application. Mr. Rogers replied that currently, the Colonial Theater's sign would probably be non-conforming, in that he believes it is already internally lit, with the sign copy over it. It sounds like that part is not going to change. He continued that most internally illuminated signs in the Downtown Core are restricted and are meant to only be inside the window. Mostly what it is trying to allow is the "open" signs, typically LED, internally lit.

Mr. Hoppock asked if he knows how many electronically activated, changeable copy signs the City has approved. Mr. Rogers replied that he knows there have been several before the Board over the past few years; the last that comes to mind is the one for Agway. Mr. Hoppock asked if it is correct that Burger King and Cumberland Farms were also on the list at some point. Mr. Rogers replied not that he was aware. Chair Gorman stated that he thinks Burger King was allowed to have an electronically activated, changeable copy sign but wanted two of them. He continued that he thinks Wendy's and McDonald's have applied for that as well. Mr. Rogers replied that many drive-thru businesses have come before the Board to ask for a second "menu board" sign. He continued that the Code was changed to allow those, because Staff was seeing that as a trend; many of the drive-thru businesses were trying to create two lanes to free up some stacking. That would be a different type of sign than what tonight's Applicant is asking for.

Mr. Welsh stated that he knows there is an illuminated sign on Spaulding Gym at Keene State College and it did not come before the Board or City review because it is Keene State, but that is an animated sign. He continued that he is not sure if Keene Middle School's sign is changeable copy or also an animated sign. Mr. Rogers replied that Mr. Welsh is correct. He continued that he is not sure about the sign at Keene State, but Keene State is not subject to the City's Zoning Code, which is where the Sign Code resides, and the same for the School District. The middle school's sign is an electronic copy sign that does have some animation available. The Board

would need to take into consideration, along that line, that the Applicant is not asking for a Variance from one of the other prohibited signs, which would be an animated sign.

Ms. Taylor asked if the Board could get in their agenda packets next month an 11"x17" version of the map that is on the screen now. She continued that she could look at it on her computer at home, but she loses reference. Mr. Rogers replied that the map in front of them should be in their books, toward the front, under "Zoning Maps." One page shows the previous zones and the next page shows the current zones, such as Downtown Core. He continued that they could get members a bigger copy if necessary.

Brian Warner of 34 California St., Swanzey, stated that he believes Kapiloff Insurance on Rt. 10, just past the roundabout, has an electric, changeable copy sign. He continued that he is not sure if that qualifies for the zoning.

Chair Gorman asked to hear from the Applicants.

Alec Doyle of 56 Elm St. stated that he is the Executive Director of the Colonial Theater, joined by Brian Warner, Colonial Theater staff; and representatives from Sousa Signs and Watchfire, the manufacturer of the sign in question. He continued that he would assume the Board is familiar with his written application and will not go through the five criteria point by point, unless they need him to. He will add to the summary that has already been provided. He does not think it is necessary to talk a lot about the place The Colonial holds in the community, as the last remaining historic theater. The sign in question is also a historic landmark. It was added mid-century; it is not the original sign. It has been in operation since then, with all the good and bad that goes with that, including the maintenance requirements and inability to find replacement parts.

Mr. Doyle continued that the The Colonial's sign has three illuminated parts: the top portion, the neon "Colonial" sign, which they continually maintain; the chase lights, which are little flashing lights that run around two edges of the actual signage area; and the signboard itself. All they are talking about is the signboard itself. The signboard itself already has rear illumination. The fluorescent bulbs sit behind a quasi-opaque plastic material. The actual lettering is a variety of aluminum, plastic, and other materials; it is very difficult to find these in this day and age. The letters are hand-placed on the sign. Every time there is a change it requires a staff member to climb onto a ladder and make that change, and many of those changes occur during the bad weather months because most of their programming is between October and May. There is a life safety issue with that, for the employees and the public. The changes often have to occur twice in one day, because of the nature of the programming, which occurs at night. It is prepped for the evening show and then prepped again after the show for the next morning, and so on and so forth.

Mr. Doyle continued that the technology that has been described is automatically changeable, which means no one has to go outside; it is all changed from within the building, electronically.

This is a great advantage, not only for life safety but also for The Colonial's ability to be current and to provide messaging and signage not just for The Colonial Theater, but also for community members and supporting businesses. In addition, there is a 23-letter limit per line on the sign. That essentially turns them into a telegraph operator. When there is a business there or corporate and a show title as well, they have to be very creative with abbreviations and try to get messages across. With a digital sign, they could manipulate that in ways to increase or decrease font size and the problem of the 23-letter limit will go away automatically.

Mr. Doyle continued that as part of The Colonial's big project, major renovations of the entire theater, this sign is one of the key pieces. The overall sign itself will be undergoing a lot of internal work, because the wiring is mid-century and there are always problems with it. They are hoping to address many of those problems. They decided early on that neon is not easy to maintain, but they made a commitment that they feel as though the most iconic piece of the marquee is the neon "Colonial," as well as the chaser lights. However, it is called a "sign" for a reason: it is supposed to provide information to people. The proposed, electronic, changeable, lit sign is going to allow The Colonial to increase their ability to message, and to be responsive in messaging. They have community messages up on their sign. The ability to change the message at a moment's notice, from inside, because of their location on Main St., could also be used for messaging for general public good as well. If there were an emergency downtown, say, The Colonial could plug a message into their sign very quickly. It is amazing how many people notice the sign. For instance, when they put signs up there during COVID-19, trying to build community spirit, many people responded to that.

Mr. Doyle continued that is the major rationale behind The Colonial wanting to make this improvement to the sign. It already is an illuminated sign. They are simply asking that the illuminated, central message portion be changed to an easily changeable, contemporary technology. The illumination of a center message will not change. It will not be brighter than the fluorescent tubes that are lighting that center section now. They like to leave their animation and entertainment for inside the theater, so they do not contemplate having a big animated content out on the sign as well.

Chair Gorman stated that he is thrilled to hear they are keeping the cool, old parts of the sign, because he has been seeing that sign since he was a little kid, and it is certainly part of the history. He asked if the section they are discussing would be streaming or static words. Mr. Doyle replied that it would be static lettering, a still image, not unlike what they see now. He continued that they would have the capability to replicate the font of the existing sign.

Chair Gorman asked if it would be black and white like it is now. Mr. Doyle replied that they can do black and white, but they might want to have a little color. They put colors up on the marquee as it is; during the holidays, they put colored bulbs in all of the chaser lights. Perhaps they would do something along those lines. Again, the sign will not be drawing more attention to itself than it does already.

Ms. Taylor asked if this has to go before the Historic District Commission as well. Mr. Doyle replied that The Colonial's understanding is that it does not. All of the rest of the renovation, of the façade and the back of the house, went before the Historic District Commission.

Chair Gorman asked if the Board had any further questions. Hearing none, he asked to hear from the public. Hearing no public input, he closed the public hearing and asked the Board to deliberate on the criteria.

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

Mr. Hoppock stated that the application says the only change will be the technology utilized to light and create the signage area. He continued that, to him, says that the only difference between what this sign will do and what the sign presently there does is save the employee the trouble of going up a ladder between October and May. He hopes and assumes no one will be losing a job over this. His main point is that if that is the only issue, there is no harm to the public interest if the Variance is granted. There is a nostalgic harm, but for the Board's purposes, that is irrelevant. It will look the same, from what he can see; The Colonial will just have an easier way to change the letters and promote their programs. Technology being the only change, he cannot imagine that the Board cannot accommodate that. He does not see any harm to the general public. If that is the only change, it will not alter the character of the neighborhood. It will be the same. The lighting will not be any brighter or darker and certainly will not be noisy.

Mr. Welsh stated that this gets to the nature of the question he had at the very beginning about why these signs might be prohibited. He continued that he was imagining a distracting, animated sign with things running across, and imagining something bright, which might be a detriment to the experience of walking downtown. He understands now that it will not have animation. However, what about the brightness? Will it be set into the sign itself? How does the Board know it will not be brighter than now?

Mr. Doyle replied that a representative from Sousa or the sign manufacturer could address that question. Erik King from Watchfire Signs stated that the company is based in Danville, IL, and he is from Manchester, NH. He continued that Watchfire signs are equipped with a photocell, so they adjust to the ambient light. When the mid-day sun is directly on the sign, the sign runs at 100% brightness, which allows you to see the image and not have the image look dim or dull. When it is twilight or night, the sign automatically dims, down to 10% of its maximum brightness. The brightness level is not offensive, and is a benefit, in the sense that the brightness of internally illuminated signs is static and cannot be changed. This Watchfire sign will automatically adjust to ambient light and be more pleasing for the downtown area.

Mr. Welsh thanked Mr. King and stated that that helps convince him that this would not be contrary to the public interest in the ways that he had imagined.

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

Mr. Hoppock stated that this sign will not alter the essential character of the neighborhood and will not be a threat to public health, safety, or welfare. He continued that he couldn't imagine any set of facts that would support any of those conclusions, from what they have seen tonight and what they have read in the application. He supports the second criterion being satisfied.

Ms. Taylor stated that she agrees with Mr. Hoppock. She continued that she is surprised by how the Ordinance is written, because it seems to not allow technology to be upgraded.

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

Mr. Hoppock stated that maybe this case illustrates how all of the criteria are interlinked. He continued that seeing that there are no issues with the first two criteria, he is hard pressed to find a gain to the public by denying this application, whereas the loss to the individual would be higher costs to maintain outdated and antique systems and safety issues that Mr. Doyle mentioned. He finds this criterion satisfied. There would be no gain to the public by denying it, but there would be a loss to the property owner.

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

Chair Gorman stated that he is thrilled about The Colonial's efforts to maintain the historical integrity of the sign by keeping the neon "Colonial" and the chaser lights. He continued that when he first saw this application, like Mr. Welsh, he had visions of something like a Jumbotron sign, but now he thinks this will be tastefully done and will not adversely impact anything. The renovations are looking great and inarguably add value.

Mr. Hoppock stated that he agrees with Chair Gorman.

5. *Unnecessary Hardship*

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

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

and

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

Mr. Hoppock stated that special conditions of the property are that it is a downtown theater, and it has been operating for about 100 years. Coupled with those two unique features is the technology piece, which is all this is going to amount too. With that unique property, with the

non-unique changes that technology goes through, he thinks this ought to be permitted to evolve naturally in the way that anyone would use technology today. The impact on the entire area will be almost nominal. Those are at least two special conditions they can utilize to support an unnecessary hardship.

Ms. Taylor stated that she agrees. She continued that also, regarding the special conditions and the way that this is going to be developed, there does not seem to be a relationship between how they want to renovate and upgrade the sign with the way the Ordinance was written. She thinks this fits quite well with that, and she thinks it is a reasonable request.

Chair Gorman stated that he, too, thinks it is reasonable.

Mr. Hoppock made a motion to approve ZBA 22-02. Mr. Clough seconded the motion.

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

Met with a vote of 5-0.

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

Met with a vote of 5-0.

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

Met with a vote of 5-0.

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

Met with a vote of 5-0.

5. *Unnecessary Hardship*

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

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

and

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

Met with a vote of 5-0.

The motion to approve ZBA 22-02 passed unanimously.

VI) New Business
A. Rules of Procedure

Chair Gorman asked to hear from Staff.

Corinne Marcou, Zoning Clerk, stated that the draft Rules of Procedure in the agenda packet has one line that Staff would like to strike. She continued that this would be to have the Board's Rules of Procedure more in line with the Land Use Code and the requirements for Zoning applications. The line they propose striking states that the 200 feet shall not include the width of any street or streams. They would like that removed since it is not noticed in any of the requirements for abutter submittals for all of the applications.

Mr. Hoppock stated that the definition of "abutter" in the State statutes includes streams and streets. Ms. Marcou replied that the City has the same definitions in its Land Use Code as the State RSA.

Mr. Rogers stated that yes; a "direct abutter" would still be somebody directly across a street or a stream. He continued that what they are trying to eliminate is the problem created by the way it was worded. The 200 feet that is there is minus streets and streams, so many times you end up pulling in people to the notice calculation unnecessarily. For example, the Main St./Rt. 101 intersection is a very wide right-of-way, so if you were to use that, you would be going to the other side of the street and then going another 200 feet even further. For example, if an application came in from 15 King Ct., obviously they would have to notify businesses directly across the highway, like Andy's and Agway, but also they would be required to go another 200 feet even further beyond that, which is not what the RSA says. It is also not the requirements the City has in place for other boards that require abutter notification. Staff are trying to align these requirements so they are the same. Especially when development professionals come in, sometimes applying for Variances or to the Planning Board, they get confused because each board has a different abutter notification requirement. They are just trying to line them up, and it does line up with what the State RSA requires for direct abutters and abutter notification.

Mr. Hoppock stated that he agrees, and is looking at NH RSA 672:3. He asked if Staff wants the Board to vote on this tonight. Mr. Rogers replied that he leaves that up to the Board. If they are comfortable voting on the change tonight, that is fine, or this can be put off until the next agenda.

Ms. Taylor stated that this was before the Board originally in December, and because no one had looked at it, they put it off. She continued that she is comfortable voting on it tonight. Chair Gorman stated that he sees the others nodding.

Ms. Taylor made a motion to adopt the change to the Rules of Procedure for applications, on page 5. Mr. Hoppock seconded the motion, which passed by unanimous vote.

There being no further business, Chair Gorman adjourned the meeting at 8:38 PM.

Respectfully submitted by,
Britta Reida, Minute Taker

Reviewed and edited by,
Corinne Marcou, Zoning Clerk

Proofread by,
Jane Taylor, Board Member