City of Keene
New Hampshire

ZONING BOARD OF ADJUSTMENT MEETING MINUTES

Monday, April 3, 2023 **6:30 PM** **Council Chambers, City Hall**

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

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

Members Not Present:
Joshua Gorman

I) Introduction of Board Members

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

II) Minutes of the Previous Meeting: November 7, 2022 and March 6, 2023

Chair Hoppock stated that the (draft) November 7, 2022, meeting minutes are incomplete to a degree. He asked if anyone had comments. Mr. Welsh stated that he was not present at the November 7 meeting and thus cannot vote.

Mr. Welsh made a motion to approve the meeting minutes of November 7, 2022. Chair Hoppock seconded the motion.

Ms. Taylor stated that she was not at the meeting, either, and will have to abstain. Chair Hoppock stated that he and Mr. Clough are (of no help); he does not know what any of the text marked "[inaudible]" should say. He continued that he looked at it a couple times.

John Rogers, Zoning Administrator, stated that since two Board members here cannot vote because they were not present at the meeting, he recommends tabling this until the next meeting, when a third Board member will be present, and they will have a quorum voting. Chair Hoppock replied it is correct that they need three votes. He asked Corinne Marcou, Zoning Clerk, if the City Clerk's Office would have a hard time with this. He continued that the consensus is to table the November 7, 2022, minutes, so that is what they will do, and move on to the next set of minutes.

Ms. Taylor gave three corrections to the draft minutes of March 6, 2023:

Line 382: The sentence beginning with "Vice Chair Taylor stated…" should say "eminently reasonable" instead of "imminently."
Line 889: "T&T" should be "TnT."
Line 926: In the sentence, "MFS's mission is to take care of people on a given month," the word "on" should be "in."

Mr. Welsh made a motion to approve the March 6, 2023, meeting minutes as amended. Chair Hoppock seconded the motion, which passed by unanimous vote.

III) Unfinished Business

Chair Hoppock asked if there is any unfinished business. Mr. Rogers replied no.

IV) Hearings

A) Continued ZBA 23-03: Petitioner, Samson Associates, LLC, and represented by Jim Phippard, of Brickstone Land Use Consultants, LLC, requests a Variance for property located at 32 Optical Ave., Tax Map #113-006-000-000-000 and is in the Industrial Park District. The Petitioner requests to permit self-storage units on a lot in the Industrial Park District where self-storage units are not listed as a permitted use per Chapter 100, Article 6.3.5 of the Zoning Regulations.

Jim Phippard stated that he is here on behalf of Samson Associates, LLC, and they are requesting that ZBA 23-03 be continued to the ZBA's May meeting.

Ms. Taylor made a motion to continue ZBA 23-03, request for Variance property at 32 Optical Ave., to the May 1, 2023, meeting. Chair Hoppock seconded the motion, which passed by unanimous vote.

B) Continued ZBA 23-04: Petitioner, Samson Associates, LLC, and represented by Jim Phippard, of Brickstone Land Use Consultants, LLC, requests a Variance for property located at 32 Optical Ave., Tax Map #113-006-000-000-000 and is in the Industrial Park District. The Petitioner requests to permit a vehicle fueling station on a lot in the Industrial District where vehicle fueling station is not a permitted use per Chapter 100, Article 6.3.5 of the Zoning Regulations.

Mr. Phippard stated that he requests that ZBA 23-04 be continued until the May meeting.

Ms. Taylor made a motion to continue ZBA 23-04, petition from Samson Associates for a Variance for property located at 32 Optical Ave., to the May 1, 2023, meeting. Chair Hoppock seconded the motion, which passed by unanimous vote.

C) ZBA-23-11: Petitioner, Keene Meadow Solar Station, LLC, of Boston MA, represented by A. Eli Leino of Bernstein, Shur, Sawyer & Nelson of Manchester NH, requests a Variance for property located at 0 Old Gilsum Rd., Tax Map #214-001-000-000-000, is in the Rural District and is owned by D-L-C Spofford, LLC of Stuart, FL. The Petitioner requests to permit a 30 acre large scale ground mounted solar energy system where 20 acres is allowed per Chapter 100, Article 8.3.7.C.2.b of the Zoning Regulations.

Chair Hoppock asked to hear from a representative for ZBA 23-11.

Eli Leino, of Bernstein and Shur in Manchester, stated that he is here on behalf of the applicant. He continued that he requests to continue the applicant's Variance, ZBA 23-11, to the next scheduled meeting.

Ms. Taylor stated that she needs to recuse herself on ZBA 23-11 and ZBA 23-12.

Mr. Welsh made a motion to continue ZBA 23-11 to the May 1, 2023, meeting. Chair Hoppock seconded the motion, which passed with a vote of 3-0.

Mr. Leino stated that he has one comment, which is that he thanks Mr. Rogers and the Community Development Department for bringing to his attention that he had a scrivener's error in the application, a reference to the property (for ZBA 23-11) as "0 Old Gilsum Rd." The other parcel in the Assessor's maps is 0 Old Gilsum Rd., but this is 0 Gilsum Rd. Due to that mistake on his part, they did notice correctly, but they will re-notice with the correct name, to make sure that no one was served incorrectly.

D) ZBA 23-12: Petitioner, Keene Meadow Solar Station, LLC, of Boston MA, represented by A. Eli Leino of Bernstein, Shur, Sawyer & Nelson of Manchester NH, requests a Variance for property located at 0 Old Gilsum Rd., Tax Map #213-006-000-000-000, is in the Rural District and is owned by Platts Lot, LLC of West Swanzey, NH. The Petitioner requests to permit a 135 acre large scale ground mounted solar energy system where 20 acres is allowed per Chapter 100, Article 8.3.7.C.2.b of the Zoning Regulations.

Chair Hoppock asked Mr. Leino to address ZBA 23-12.

Mr. Leino stated that he requests this be continued to the May 1 meeting.

Mr. Welsh made a motion to continue ZBA 23-12 to the May 1, 2023, meeting. Chair Hoppock seconded the motion, which passed with a vote of 3-0.

Ms. Taylor rejoined the meeting.

E) ZBA 23-09: Petitioners, Jeffrey William Tighe-Conway and Matthew Conway and represented by Jim Phippard, of Brickstone Land Use Consultants, LLC, requests a Variance for property located at 8 Page St., Tax Map #553-018-000-000-000, is in the Medium Density District. The Petitioner requests a building with two dwelling units to have three parking spaces where four parking spaces (2 spaces per dwelling unit) are required per Chapter 100, Article 9.2, Table 9-1, Minimum On-site Parking Requirements of the Zoning Regulations.

Chair Hoppock asked to hear from staff.

Michael Hagan, Plans Examiner, stated that 8 Page St. is zoned Medium Density and sits on a 0.7-acre lot was built in 1923 with a total livable square footage is 1,926. This is a request for an Accessory Dwelling Unit (ADU), which would add up to 800 square feet of living space. There were no Variances on file for this (property).

Mr. Rogers stated that for clarification, as an ADU, State RSA dictates that the City cannot use the density calculation they would in most cases. He continued that there are some limitations and Mr. Hagan mentioned the ADU's 800 square feet, that would be the maximum size ADU they want to construct in the basement of this property. If this were a regular true two-bedroom dwelling unit, this lot would not meet the dimensional requirements, but because of the State RSA for ADUs, they are not allowed to use that calculation for an ADU. The City's Zoning Code does not differentiate the difference between an ADU and a regular dwelling unit when it comes to the parking calculation. That is why the applicant is before the Board tonight for the reduction by one space.

Ms. Taylor stated that Mr. Hagan said the floor space is 1,926 square feet and the ADU can be up to 800 square feet. She asked if the square footage of the ADU gets subtracted from the overall square footage, or if it is included in it, or how it gets calculated. Mr. Hagan replied that the up to 800 square feet would be in addition to the 1,926 square feet that exists. He continued that the basement now is 1,290 square feet on the Assessing records. They can only go up to 800 square feet; it could be 400 or 500 square feet, but they will hear from the applicant on the details. Ms. Taylor asked if it is correct that the number, whatever it comes out to be, will be in addition to the existing square footage. Mr. Hagan replied yes.

Ms. Taylor asked if on street parking is permitted on Page St. She continued that she tried looking that information up but could not find it. Mr. Rogers replied that he can look into the Ordinances while the meeting is going on. He continued that he knows a lot of on street parking occurs on this street. It is a tight street, as you can see in the photo included in the application.

Chair Hoppock asked if the Board had further questions for staff. Hearing none, he invited the Petitioner to speak.

Jim Phippard of Brickstone Land Use Consultants, LLC, stated that he is here on behalf of the owners of the property at 8 Page St., Jeffrey Conway, Benjamin Conway, and Matthew Tighe-Conway. He continued that they are requesting a Variance to allow three parking spaces on this property where four parking spaces would be required in the event that an ADU is added to the basement of the building. Previously, a local podiatrist owned and occupied the building and operated a home business with an office in the basement. They would convert that space to an ADU. It already has a second entrance, is approximately 700 square feet of living area and would be a one-bedroom unit. Benjamin Conway, who is part owner of the property, would occupy the ADU as it is a requirement that an owner occupy the premises when an ADU is added. This would meet those requirements and the space requirements. However, it cannot meet the legal requirement of two additional parking spaces for the ADU. The houses on Page St. are all very old with most of them constructed prior to 1900. The buildings occupy most of the lots; as you go down the street, that pattern repeats. On Page St., almost every residential dwelling has people parking in front of the building, because there is not room to park behind the buildings or have more than one or two cars along the side of the building due to the size of the lots. This is an existing, non-conforming lot in the Medium Density District, which requires a minimum lot size of 8,000 square feet. This lot is just over 3,000 square feet in size, less than half the size of a regular lot in the Medium Density District.

Mr. Phippard continued that there is an existing paved driveway along this southerly property line exclusively for the use of 8 Page St. He measured the length of that paved driveway, all the way to the rear property line where there is a wire fence and it is about 73 feet to the sidewalk. They can fit four cars stacking in that paved driveway, but it does not comply with the parking location requirements of the new Land Development Code (LDC). The LDC requires that people not park a car in the front yard of a property. They do not want cars extending beyond the front line of the building into the front yard of the property. He thought about applying for a Variance for that location, discussed it briefly with Mr. Rogers, and decided to just go with the Variance for three parking spaces instead of four. If you look up and down the street, you will see that everyone parks in front of the buildings. That is because they have to. There is not enough room behind or beside the buildings without blocking someone else in the driveway. That is what they would be doing here, stacking in their driveway. They can fit three spaces legally in the space that they have and meet the location requirements. He decided to pursue the Variance to allow just three spaces instead of four because this would be a single bedroom ADU. The occupant will be a single resident, Benjamin Conway, and he has one car. It meets his purposes. It would allow him to enjoy this property that he is part owner of.

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

Mr. Phippard stated that he believes this is true, because ADUs are actually encouraged, to try to help address the severe housing shortage. He continued that in addition, it is a permitted use

under the current land development regulations. All residential zones permit it outright, but they still must comply with the parking requirements. This will be a single bedroom unit in the basement, with a single occupant with a single car. It meets his needs on the property. Any visitor he or the other residents have will park in front of the building just as they do today, as is the case up and down the street. He did not see any posted "no parking" signs on this street. If there are no signs, then on street parking is permitted, which is how it works in the City of Keene. It has to be posted as restricted, otherwise it is allowed. This would be no different from any of their neighbors, visitors would probably park in the front area. There is no grass because people have been parking there repeatedly. Given the housing shortage in the city, he feels that an ADU in this location is appropriate, and it is in the public interest to allow it. He does not see any benefit to the public in not allowing an ADU in that existing basement space, especially where so little work has to be done to convert this to an ADU. It is on City water and sewer and those services are adequate to support this use of this building.

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

Mr. Phippard stated that the spirit is to allow ADUs where it is feasible, anywhere in the residential zones in the city and he thinks this fits. There is room in the building. It used to be an office space, and they would convert it to the ADU. It has its own separate entrance. No changes will be made to the exterior of the building. It will be an invisible change on the street. The only issue to deal with is this parking issue, which is why he is before the Board tonight. It will be an ADU with one bedroom, one occupant, and one vehicle, and it meets the intent of the lot.

3. Granting the Variance would do substantial justice.

Mr. Phippard stated that this building has a large living area, over 1,900 square feet. He continued that there are two stories above the basement level, which was previously a home office for a podiatrist and existed there for many years. He does not see any benefit to the public in denying the Variance. They will not change the appearance of the building or of the property. They will use the existing driveway where it is located today. He feels that granting this Variance does substantial justice for this property.

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

Mr. Phippard stated that as he described the character of the neighborhood, it is primarily single-family homes on very small lots. He continued that that is the character of this area – most of the lots are undersized, well under the 8,000 square feet that is required in the Medium Density District. They will not change that nor will they change the appearance of the building. They do not need to change anything as there is already an existing separate entrance to this space. It will meet all of the other requirements for ADUs other than the four parking spaces. He feels this will have no negative effects on surrounding property values. It will be more of the same.

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.

Mr. Phippard stated that the special condition of this property is obviously the size of the lot. He continued that this is existing, a very old lot that existed prior to 1900 when the house was built. Back then, there were no cars, so no one was worried about parking. This situation was created as zoning was created, well after the house was built and occupied in this location. Regarding the requirement for two parking spaces for an ADU, he feels the existing Ordinance does not recognize a situation where an ADU might have a single occupant and only need one parking space. The LDC does not require that but also does not recognize it, and thus, he feels that in this case the LDC is inadequate and contributes to the hardship that would be created if this Variance were not permitted.

and
ii. The proposed use is a reasonable one.

Mr. Phippard stated that ADUs are permitted outright in residential zones. He continued that this is a permitted use. They feel that it does fit the property because they do not have to alter the building or add anything on. The alterations will be interior only and they are not expanding the driveway or changing the outside features. It is a reasonable use and fits in this neighborhood and gives the property owner the enjoyment of his property, which he is entitled to.

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. Phippard stated that he will not repeat it all, but it is the same argument. It is a pre-existing, non-conforming property that became non-conforming due to changes in the Zoning regulations. The current Zoning does not recognize that an ADU could have a single occupant with a single vehicle and therefore this should be allowed, and it should not be held against the owner. That helps to create hardship.

Mr. Welsh stated that he is trying to orient himself, regarding the photo that came with the packet. He continued that the black car looks just about flush with the front of the building. He asked if what Mr. Phippard is describing is a situation in which the driveway goes back far enough that three cars could fit, or four if the end of the car is flush with the building.

Mr. Phippard replied yes. He continued that in the photo, the black car located to the left of the house is in the existing driveway. In the exhibit he submitted with the application, he measured the length of the paved driveway from the rear of the property to the front of the house as 59 feet, which is adequate to stack three cars. The Zoning Code requires a minimum of 18-foot length for each parking space.

Mr. Welsh stated that the same photo shows two cars in front of the building. He continued that from the description Mr. Phippard gave, he gathers that those cars are parked illegally and could potentially be issued tickets. Mr. Phippard replied that the cars shown parking in front of the house is something that has gone on for a very long time, and he thinks it predates the changes in the Zoning regulations that prohibit cars parking in the front yard. He parks in front of his house. He has to, as it is where his driveway leads up to his garage. His house was built in 1896 and he is not going to build a parking space to the side or rear of his house. When he looks around Keene, he sees thousands of single-family homes in the same situation. The regulation that requires parking to the side and to the rear came about not too long ago and was primarily for new construction in commercial offices and it was not applied to residential. It was not until the City updated the LDC that this became a regulation that everyone is faced with. Thus, Keene has thousands of properties that were made non-conforming by that change in the regulations. He does not consider that illegal parking; he considers it non-conforming parking.

Mr. Welsh stated that if they were in compliance with the plan Mr. Phippard promoted, they would probably do away with the non-conforming parking in front of the building, except when they had visitors or if someone did not know to park on the side.

Ms. Taylor stated that regarding the section of the Code that does not permit parking in your front yard, as opposed to on the street in front of your house, she became familiar with that in the 1990s. She continued that it is not a new regulation. There were quite a few enforcement issues regarding Keene State College (KSC). The regulation has been in place for a long time. When she drove to look at the area where the property is, she saw a car parked in the street, and it basically made the street one lane. You could not get two cars passing the car that was parked on the street. If there was enforcement, and you were not allowed to park on what was left of the front lawn, that would seem to create a problem in the neighborhood requiring parking in the street for the fourth car.

Mr. Phippard replied that he agrees with Ms. Taylor, having driven up and down the street several times to see how it operates. He continued that two pickup trucks were parked on one side of the road and only one lane was open, but he (drove) it, and it works. This is an existing situation, and this (Variance) would not be creating a new situation. In his discussion with the property owners, he told them they should not park in the area that used to be grass and should park on the paved driveway. Even though the fourth car would extend beyond the front of the building, it would be on the paved driveway, not blocking the sidewalk. They have 79 feet from the end of the driveway to the edge of the sidewalk, so there is adequate room to stack four cars. That is why he almost went in this direction and pursued that Variance rather than this one, but

from his discussion with staff, he thinks they are considering reducing the parking requirement for ADUs. There may be a future Zoning change, but the Petitioners did not want to wait that long. They are hoping to occupy the unit this summer. He cannot speak to the future and whether that will happen. They can safely park three cars and a fourth if they have to. The fourth car would be non-conforming, but it would be on the existing paved driveway.

Mr. Rogers stated that he has some clarity regarding Chapter 4 of the City's Ordinances – Page St. is not on the list of "no parking" streets. He continued that there might be other rules that the Police would enforce as far as maintaining travel lanes, though. To clarify, the way the Ordinance is written for parking is that no parking can be created either in the front setback or in front of the house, whichever is less. In this situation, he assumes it does not meet the front setback anymore, which would be 15 feet in this district. If the house were, say, only 10 feet from the street, they could actually park, as long as it is behind the front of the building, since that is a lesser number. Also, the other issue with going after the other Variance for being able to park in front is that the City Ordinance does speak to the need for parking spaces to be 18 feet long. With this property, they are talking about less than a foot and there is not enough distance there to create four legal parking spaces per the Ordinance; is the conversation he had with Mr. Phippard. The diagram he showed is just under 70 feet, and about 71 feet would be needed. That was the reasoning for going for this Variance as opposed to being able to park in front.

Mr. Rogers continued that regarding the on-street parking, Keene has the winter parking overnight ban, so someone would not be able to park in the street overnight during the winter. Secondly, the problem they have on this side of the street is that where the car to the right (in the photo) is parked is actually the sidewalk and that is a concern. The street design did not include curbing, which lends itself to people parking like that, which happens in many neighborhoods.

Ms. Taylor stated that the Variance runs with the land, so ostensibly, if the property were to change hands, there could be more than a single person living in the ADU. She continued that she is thus concerned about Mr. Phippard's emphasis on how there will just be one person living there and the Board has to think about the future, too. Mr. Phippard replied that they are going to construct a one-bedroom ADU, so it is possible that a couple could live there and maybe they would have two cars, and yes, they would have a parking issue. Maybe they could get away with parking on the street, because right now it is not restricted. How can they single this one property out when all the properties on the street are in the same situation?

Ms. Taylor stated that that goes to her last question, which is hardship. She continued that Mr. Phippard says the property's small size is the special condition, but it has to be something that distinguishes it from all other properties. All the properties here are small-sized, so she does not see how that is a special condition. Mr. Phippard replied that he and Ms. Taylor have always disagreed on this hardship criterion. He continued that she feels that it has to be single and unique, whereas he feels there could be 100 properties that are like this, suffering from this special condition. A condition was created when the City of Keene created Zoning laws and changed the lot sizes and changed all these requirements. As he said, when this property was

first built, there were no cars, so none of this was an issue. All of that came about as society progressed and these regulations were developed. He thinks an undersized lot is a special condition and it is not the only undersized lot in the City. If the City would just change the Zoning to High Density instead of Medium Density, that would help. It would still be undersized, but it would not be more than 50% undersized.

Ms. Taylor replied that that is exactly what the case law says – if the problem is that all of the properties are undersized, they should change the Zoning, and not just give Variances to each property as it comes along. That is where she is coming from.

Chair Hoppock asked what Mr. Phippard's thoughts would be about having a condition imposed that restricted the occupancy of the ADU to one person. He continued that his second question is what Mr. Phippard thinks about a condition restricting the property to no more than three cars at any one time. Mr. Phippard replied that he thinks it is fair. He continued that he discussed with the owners their need to realize what they are asking, because the Board does not want to set a precedent and may want to impose conditions. He suggested limiting the occupancy of the ADU to one person and limiting the cars in the driveway to three. Chair Hoppock replied that he meant the cars on the property. Mr. Phippard replied that that would be hard to enforce. He continued that if a fourth car comes into the driveway, he does not think Code Enforcement will come along and write them up. Chair Hoppock replied that Mr. Rogers would probably give them a warning. Mr. Phippard replied that he thinks that is fair and continued that he understands the position they are putting the Board in by asking for this Variance; it creates difficulties. Unless the City can change the Zone, as Ms. Taylor suggested, or change the requirements for ADUs, which may happen, he thinks it is fair to restrict it.

Chair Hoppock asked if there were any further questions from the Board. Hearing none, he asked for public input, beginning with anyone in opposition. Hearing none, he continued that the Board received an email from Karen and Tom Chabot, which he will read into the record. It was addressed to the Community Development Department, dated April 2, 2023.

"I have a concern about the parking in front of the house at 8 Page St. as well as the house at 12 Page St. I have already seen two cars parked on the front lawn here, often partially blocking the sidewalk. This can be dangerous for sidewalk users, especially for Franklin School students. It is even more dangerous as this house is near the corner with Beaver St. and cars turning onto Page St. often don't stay in their lane. I don't know how this can be safely addressed. Thank you."

Chair Hoppock asked for public input in favor of the application. Hearing none, he closed the public hearing and asked the Board to deliberate.

Chair Hoppock stated that he does not disagree with Mr. Phippard's comments that ADUs are generally in the public interest because of the housing shortage. He continued that generally, he thinks there is support for the application being in the public interest. However, this is a parking

Variance, not an ADU Variance request. He also does not see that the parking application would negatively affect the character of the neighborhood or raise any significant safety problems. In addition, it may well do substantial justice to the owner versus the gain to the public. However, he has an issue with the hardship criterion. He thinks Ms. Taylor is correct regarding the debate between Mr. Phippard and Ms. Taylor about what the law requires. “Unnecessary hardship” means that owing to a special condition of the property that distinguishes it from other properties in the area. It is not a one-size-fits-all problem; it has to distinguish it from other properties in the area. If other properties in the area are similar, then there is no distinction, and they are all suffering from the special condition. That does not make it an unnecessary hardship. The correct remedy is a change in Zoning, not a Variance.

Mr. Welsh stated that he shares that opinion. He continued that he thinks the correct long-term remedy is the change in Zoning as opposed to the Variance. He has not heard any evidence as to how the other properties which are subject to the same constraints are getting along, what their parking situations are, whether they are in compliance, and so on and so forth. He is satisfied that if they address this one with the parking Variance it would be a just solution. He sees the desirability of the ADU and more housing as in the public interest. His linkage of that plus the parking is that minus the parking Variance, the ADU becomes a non-viable option. They would have to supply two extra parking spaces and there is no practical way to do that. At least, that argument has been made, and he finds it compelling. He is satisfied with the first and fifth criteria.

Ms. Taylor stated that she disagrees. She continued that she does not think this is in the public interest, because of the existing congestion in the area. As Chair Hoppock said, it is a parking question. Yes, it is related to the ADU, but not every property is appropriate for an ADU. She is also concerned because they can say now that only one person will be living in the ADU, but once the Variance is there, there could be (more). There could be three cars belonging to the upstairs tenant, and maybe a couple with two cars in the ADU, and then there would be five cars, possibly parking on the front lawn. She thinks this is a poor area for this and does not think it will do substantial justice, because having additional parking that would be in the street really is a negative. There is already a bad situation with parking on this street, and this would only exacerbate it. As she mentioned earlier, they do not have any testimony regarding the value. And again, she does not see that this property is distinguished from any other property in the immediate area.

Chair Hoppock asked if there was further discussion. Hearing none, he asked for a motion.

Mr. Welsh made a motion to approve the application for a Variance to 8 Page St., ZBA 23-09, with the added conditions that the ADU be occupied by one tenant and that the total number of cars on the property cannot exceed three.

Ms. Taylor stated that she is not comfortable with a condition limiting occupancy stating she does not think they can do that on a Variance. Mr. Welsh replied that he will withdraw that condition from the motion.

Ms. Taylor stated that Mr. Welsh's motion is to limit the number of cars to three, but the applicants are asking for four. Chair Hoppock replied that four spaces are required, two spaces per dwelling unit. He continued that they want a building with two dwellings to have three parking spaces where four parking spaces are required.

Chair Hoppock stated that for the record, they have a motion to approve, without a condition on occupancy limits, but conditioned on limiting it to three cars on the property.

Mr. Clough seconded the motion.

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

Not met with a vote of 2-2. Ms. Taylor and Chair Hoppock were opposed.

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

Not met with a vote of 2-2. Ms. Taylor and Chair Hoppock were opposed.

3. Granting the Variance would do substantial justice.

Not met with a vote of 2-2. Ms. Taylor and Chair Hoppock were opposed.

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

Met with a vote of 3-1. 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 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.

Not met with a vote of 2-2. Ms. Taylor and Chair Hoppock were opposed.

and
ii. The proposed use is a reasonable one.

Not met with a vote of 2-2. Ms. Taylor and Chair Hoppock were opposed.

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

Chair Hoppock stated that he does not think B. applies at all. He asked other Board members. Ms. Taylor replied that she agrees that it does not apply, because they still can have reasonable use of the property.

The motion to approve ZBA 23-09 had a vote of 2-2. Ms. Taylor and Chair Hoppock were opposed. Chair Hoppock stated that the motion fails. Mr. Welsh asked if they need to make a motion to deny ZBA 23-09. Chair Hoppock replied that they do not have three votes in favor. Mr. Rogers stated that the Board could make a motion to deny and vote on it without going through all the criteria again.

Ms. Taylor made a motion to deny ZBA 23-09 for a Variance at 8 Page St. Chair Hoppock seconded the motion, which had a vote of 2-2. Mr. Clough and Mr. Welsh were opposed.

Mr. Rogers stated that with a 2-2 vote, the Board has taken no action. Ms. Taylor replied that she believes the motion fails. Mr. Rogers replied that he will review, but he believes that the RSAs changed and that a tie means no action. Staff will let the Board know, and let the applicant know. The applicant could come back before the Board next month if Mr. Gorman is back then, so there is a five-member Board and no tie vote. He will confirm, but he believes the RSA changed a few years ago to require that the majority of a Board vote in order for an action to be taken. Ms. Taylor asked him to ask the City Attorney to rule on that. Mr. Rogers replied that he will, and in fact, the City Attorney is the one who had the RSA changed to reflect that. Chair Hoppock stated that the statute says they need at least three affirmative votes in order to pass anything. Mr. Rogers replied that he thinks it was further changed to say that to take any action it has to be three votes, the majority of the Board. Ms. Taylor stated that one reason she disagrees is that you could not bring the same application back under the Fisher rule. Mr. Rogers replied that he will confirm with the City Attorney. He just wanted the Board to be aware that with that tie vote, an additional step might need to happen. Staff will follow up with the applicant and the Board regarding what the City Attorney says.

F) <u>ZBA-23-10:</u> Petitioner, Lehnen Industries of Keene, represented by Jim Phippard of Brickstone Land Use Consultants, LLC., requests a Special Exception for property located at 809 Court St., Tax Map #219-005-000-000-000, is in the Commerce District and is owned by Hillsborough Capital, LLC of Keene, NH. The Petitioner requests to permit light industrial use in the Commerce District per Chapter 100, Article 5.1.5 of the Zoning Regulations.

Chair Hoppock asked to hear from staff.

Mr. Hagan stated that 809 Court St. is zoned Commerce. He continued that it sits on 1.81 acres and was built in 1986. The building's square footage is 19,800 square feet. It received one Variance in 2016 and was approved 5-0 for an 8-foot rear setback where a 20-foot setback is required. They were required to move the shed off the back side.

Ms. Taylor asked for more detail, because she did not understand the description of what the applicants were asking for and where. Mr. Rogers replied that this is a Special Exception request to allow for an industrial use.

Chair Hoppock asked to hear from the applicant.

Jim Phippard of Brickstone Land Use Consultants, LLC, stated that he is here on behalf of the property owner, Hillsborough Capital, LLC, and the applicant, Lehnen Industrial Services. He continued that this is a request to allow a light industrial use on a property in the Commerce District since this is something new under the new LDC. He has never done one of these in the 46 years he has been doing this work. Lehnen Industrial Services is an existing high-tech company currently located at 22 Production Ave. in a building of about 6,000 square feet and they manufacture specialty machines. This is not a mass manufacturing of parts for the auto industry or anything like that. The specialty machines are manufactured for individual uses, and they do many different things. The owner, Peter Lehnen, is present tonight and can answer specific questions. He (Mr. Phippard) was given the privilege of a tour on Production Ave. so he could see and better understand what it is they do, and one of the machines Mr. Lehnen showed him was for Badger Balm in Gilsum. Lehnen Industrial Services created the machine that fills the little tubes of lip balm. It is interesting that we have facilities like this in Keene and this is a clean industry, a high-tech industry. They create the parts, the machine itself, and the software that operates it. They installed the machine in the new facility. This is a wonderful company to have in the area, and this is the type of plan that the Comprehensive Master Plan encourages. They want to encourage companies like this to stay here and grow, and to come here if they are not already located here. He is happy to work on this application.

A. *The nature of the proposed application is consistent with the spirit and intent of the Zoning Regulations, this LDC and the City's Comprehensive Master Plan, and complies with all applicable standards in this LDC for the particular use.*

Mr. Phippard stated that this is an existing building, built in 1986. He continued that he actually did the site plan for this building back in 1986. There have been several different uses in the building, most currently, as an athletic facility. There may be 50-70 youth participating in athletic activities and training within the facility today. Thus, light industrial is a big change, and he thinks it is a very positive change, as the use is less intense with less traffic. It is clean, high tech, and what we want in the community. Access to the property is from Court St. and there are 73 parking spaces on the property today, which is far more than what Lehnen Industrial Services needs, but adequate for the proposed use. They would be moving from a 6,000 square foot

building to a nearly 20,000 square foot building. It would give Lehnen Industrial Services much more room for warehousing their products, the products they need to manufacture their specialized machines, and to conduct their activities, giving them room to grow as well. They currently have 21 full-time employees working at Production Ave., all of whom will come to this facility if the company is approved to relocate here. They operate Monday through Friday from 7:00 AM to 6:00 PM. Employees usually arrive between 7:00 and 9:00 AM and leave between 4:00 and 6:00 PM. They do not have regular hours on evenings or weekends, although on an as-needed basis they may be there into the evening or on a Saturday if the business needs require that.

Mr. Phippard continued that the manufacturing activities that they conduct would be wholly inside the building. There are no activities outside of the building, nor any storage of products or machines outside the building. Everything would be inside the building, which is important.

B. *The proposed use will be established, maintained and operated so as not to endanger the public health, safety, or welfare.*

Mr. Phippard stated that there are 21 full-time employees and 73 existing parking spaces, so parking is not an issue. He continued that they will not be parking in the streets or driveways as there is no need for that. The company operates regular business hours, Monday to Friday. The building has plenty of size for them to grow into and to store their products and machines inside. He does not believe there would be any excessive noise, fumes, or vibrations, stating he did not feel it when he was on the premises on Production Ave. He could see drilling machines operating, but nothing was loud and there were no fumes. It is a nice, clean operation. He believes staff are familiar with the facility as well and agrees that this meets the criteria as a light industrial use.

Mr. Phippard continued that most of the deliveries to this facility would be by UPS or Fed-Ex, with very few large trucks. The larger, flatbed trucks come once or twice a week, delivering metal products. There is plenty of room for them to drive in to load and unload at the rear of the building. He thinks this low intensity use will not endanger public health, safety, or welfare. It does not generate excessive traffic or create excessive noise or fumes.

C. *The proposed use will be established, maintained, and operated so as to be harmonious with the surrounding area and will not impede the development, use, and enjoyment of adjacent property.*

Mr. Phippard stated that just to the north is a commercial building with multiple tenants, a pizza restaurant, an outlet, and a healthcare facility. He continued that the American Legion is located to the south and has its own parking lot. These properties all share a common service road that runs parallel to Court St. and can be accessed from the curb cut or the other access shared with Walpole Savings bank and the dental offices. Their parking lot is separate and does not interfere with the service road operation. Everything is contained in the building, so people will not see activities that are disturbing, will not feel vibrations and they will not have fumes or disturb the abutting properties. Again, the company has normal business hours, 7:00 AM to 6:00 PM,

Monday through Friday, with very few exceptions. He does not think it will have any effect on the abutters.

D. *The proposed use will be of a character that does not produce noise, odors, glare, and/or vibration that adversely affects the surrounding area.*

Mr. Phippard stated that once the company is in and operating, you will not even know they are there. He continued that they do not generate enough noise doing their machining and operations within the building to be a nuisance to anyone in the surrounding properties.

E. *The proposed use will not place an excessive burden on public improvements, facilities, services, or utilities.*

Mr. Phippard stated that Court St. is a busy road. He continued that having Lehnen Industrial Services here would reduce the number of people using this property on a regular basis, by eliminating the athletic activities that are ongoing today. They only have 21 full-time employees, although hopefully they will grow into this facility. Even if they doubled in size, the traffic they would be generating between 7:00 to 9:00 AM and 4:00 to 6:00 PM is not such that it would affect the safety or capacity at Court St. He thinks it would be a good, positive change if this were allowed to proceed. This building is serviced by City water and City sewer and the company would not be using it to excess; they do not use a lot of water or generate a lot of wastewater and there is certainly adequate parking on this site.

F. *The proposed use will not result in the destruction, loss, or damage of any feature determined to be of significant natural, scenic, or historic importance.*

Mr. Phippard stated that this is an existing, developed lot. He continued that there are no natural features that will be disturbed. Lehnen Industrial Services wants to paint the building a different color and may add an overhead door at the rear, but other than that, there will be no changes to the site and no threat to historic features that he is aware of.

G. *The proposed use will not create a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity of the use.*

Mr. Phippard stated that as he said previously, the company has 21 employees. He continued that even if they doubled in size, it would still be less traffic than what is being generated on a regular basis today. The athletic activities occur on evenings and weekends as well (as during weekday business hours), so having Lehnen Industrial Services here would diminish the traffic in this area if this use were permitted. He hopes the Board agrees and will allow this use as a light industrial use in the Commerce District.

Ms. Taylor stated that she agrees that if there are only 21 employees, mostly there at the same time, it is not a huge amount of traffic, but she is curious about how the delivery trucks would work.

Mr. Phippard replied that deliveries to the facility today utilize primarily the curb cut from Court St. that is directly opposite the curb cut into the Court St. condominiums. He continued that they drive straight to the back of the facility, back up, and then drive out. If it is a flatbed or tractor-trailer, they drive into the front parking area and back into the other end of the property. They do not use a loading dock, so they would use a forklift if they were loading something off a flatbed truck, which could drive in and out of the building through the overhead door. When he designs a site plan, he looks at things like delivery vehicles and how a tractor-trailer would get in and out. If this were a busy retail operation, or even the athletic facility, tractor-trailers making deliveries would concern him, regarding how they would get in. With the athletic facility that has been there, he has witnessed youth getting in and out of cars and running into the building carrying various athletic gear. That is not an activity you want to see when a truck is backing up. Thus, this will be a vast improvement in what is there today, to allow for safe deliveries into and out of the property.

Ms. Taylor asked if this will be going to the Planning Board (PB) because of the change of use, or if it will be handled administratively since there is not much external change. Mr. Rogers replied that the Community Development Director would have to look at it. He continued that with the change of use, he doubts it would be just a straight up administrative approval. Most likely, at a minimum, it would have to go before the Minor Project Review Committee (MPRC). This property also has a current, existing site plan that is about to expire. The sports complex originally had anticipated doing additions and other things. At a minimum, this will go the MPRC, and possibly the PB because of the change of use.

Chair Hoppock replied that the site plan that is about to expire has nothing to do with what Lehnen Industrial Services proposes here. Mr. Rogers replied that it was a weird approval process they went through, because the sports facility had to develop their business for a certain amount of time before they could get the financing, they needed for the expansion they were anticipating, so no work had been done toward that site plan, and it would most likely revert back. He is not sure what the date is on this site plan, but it would revert back to whatever the previous approved site plan was. However, the use itself would trigger at least a MPRC or possibly PB approval.

Chair Hoppock asked Mr. Phippard what the growth capacity of the building is, in terms of the maximum number of employees that could work there. Mr. Phippard replied that going from 6,000 to 20,000 square feet obviously gives plenty of additional capacity. He continued that they have 73 parking spaces, so he anticipates that Mr. Lehnen could double his workforce. After that, he would probably want to look at adding a second shift or multiple shifts. There is not room on the site to add onto the building; it is maxed out, as far as lot coverage is concerned. It is reasonable to expect that he could as much as double his workforce utilizing the existing parking spaces on site today.

Chair Hoppock asked if there were any further questions from the Board. Hearing none, he asked for public input, beginning with anyone in opposition. Hearing none, he asked if anyone wanted to speak in favor.

Peter Lehnen, of Lehnen Industrial Services, 22 Production Ave., stated that he has a correction – the name on the application was "Lehnen Industries," but the owner of the building will be Lehnen Holdings, LLC. He continued that that is his company as well, and it will be just for the purpose of owning the building, which will be used by Lehnen Industrial Services. He would be happy to answer the Board's questions about what Lehnen Industrial Services plans to do. He invited Mr. Rogers to the existing facility to show him what they actually do. It is primarily an engineering firm, but they also design what they build, so they employ mechanical engineers, electrical engineers, software engineers, and skilled labor to construct the machines they design.

Mr. Clough asked what percentage of the existing plant is devoted to manufacturing and what percentage is storage or warehouse. Mr. Lehnen replied that about a third of the employees are overhead sales, marketing, and so on and so forth; about a third are engineering; and about a third are manufacturing. He continued that in terms of space usage, in the current facility, about a third is manufacturing space. Inside the building, they have added some additional vertical space, so they actually have a little more than 6,000 square feet that they utilize. In the new building, manufacturing will be about one fourth of the 20,000 square feet, engineering will be about a third, and ancillary functions will be the rest. They are looking to put in a robotic demonstration center; that might consume a nice chunk of the space, also.

Ms. Taylor stated that the application says, "There will be no outside noises, fumes, vibrations, or disturbances to the abutting properties." She continued that her concern is, it may not disturb the abutting properties, but what kind exhaust or emissions does the manufacturing have? Mr. Lehnen replied that there is none at all.

Chair Hoppock asked, if a person was standing outside of Lehnen Industrial Services' building at about 11:30 AM and the manufacturing is fully revved up, what would that person hear outside? Mr. Lehnen replied probably nothing. He continued that most of what they do is engineering and design, and then assembly. All the manufacturing of the components, the actual machining, welding, and fabricating, they farm out to other companies, then those materials come into Lehnen Industrial Serviecs and they assemble them. What they do on site is about 90% assembly. They do have a small model shop, which is a machine shop with lathes, mills, and so on and so forth. They use for prototyping and fixing things that need to be changed. Their machining is quiet. They do not create any waste.

Mr. Welsh asked, suppose it is delivery day for one of the machines to be sent off to a client. He asked if a UPS truck would come. Mr. Lehnen replied no, typically it would be a flatbed truck, and typically they would bring their own heavy equipment, their own forklifts. They take the equipment from Lehnen Industrial Services' floor and put it on their truck. He continued that that is very infrequent as they probably do about 15 to 20 projects a year, and most of those

projects are small enough to go in, say, a 6’x6’ crate that would go onto a truck. Some equipment they build is larger than that, and the riggers manipulate that and put it on a trailer. Typically, it would be a single trailer taking away the finished product.

Chair Hoppock thanked Mr. Phippard and Mr. Lehnen, closed the public hearing, and asked the Board to deliberate.

A. *The nature of the proposed application is consistent with the spirit and intent of the Zoning Regulations, this LDC and the City's Comprehensive Master Plan, and complies with all applicable standards in this LDC for the particular use.*

Mr. Welsh stated that he could speak to the criteria one by one, but generally speaking, he is satisfied as he visualizes this facility in place that none of the negative scenarios described in the Special Exception criteria are likely to come about. It seems like a fairly good candidate for the Special Exception they are looking for. He tried to imagine the noise, fumes, and so on and so forth, and he does not see those things.

Chair Hoppock stated that he was doing the same thing, and he agrees completely. He continued that a Special Exception, by definition, is a permitted use if you meet the extra criteria. In his mind, that in and of itself satisfies the first criterion.

B. *The proposed use will be established, maintained and operated so as not to endanger the public health, safety, or welfare.*

Chair Hoppock stated that he thinks the nature of the proposed application is consistent with the spirit and intent of the Zoning Regulations. He continued that he also thinks the use will be maintained and operated such that it will not endanger public health, safety, or welfare, for all the reasons the Board heard. It will be a quiet operation, a clean operation, and low-density.

C. *The proposed use will be established, maintained, and operated so as to be harmonious with the surrounding area and will not impede the development, use, and enjoyment of adjacent property.*

Chair Hoppock stated that the proposed use will be consistent with what is there. He continued that there is a bank, a bread place, and some apartments across the street, and this (light industrial use) will not be offensive to anyone there. This will fit right in with the other commercial activities.

D. *The proposed use will be of a character that does not produce noise, odors, glare, and/or vibration that adversely affects the surrounding area.*

Chair Hoppock stated that the Board heard a lot of information about the (lack of) noise, odors, glare, and vibrations. He continued that that satisfies this criterion.

E. *The proposed use will not place an excessive burden on public improvements, facilities, services, or utilities.*

Chair Hoppock stated that he did not hear any information that the use would place an excessive burden on public improvements, services, or utilities. He continued that water and sewer are the only two, and it is a large building that has been housing an athletic facility used by many adolescents.

F. *The proposed use will not result in the destruction, loss, or damage of any feature determined to be of significant natural, scenic, or historic importance.*

Chair Hoppock stated that the proposed use will not result in the destruction, loss, or damage of any feature of natural, scenic, or historic importance.

G. *The proposed use will not create a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity of the use.*

Chair Hoppock stated that he has not seen any information that would lead him to believe that a traffic safety hazard would be created on this area of Court St.

Chair Hoppock stated that he is satisfied the criteria are met.

Ms. Taylor stated that her two real concerns about this were traffic, particularly trucks, and whether there would be any kind of emissions or external effect. She continued that however, from what the Board heard tonight, it appears that if anything there will be less traffic, and (activity) would be internal to the building. Thus, her concerns were addressed.

Mr. Welsh made a motion to approve ZBA 23-10, 809 Court St. Mr. Clough seconded the motion.

A. *The nature of the proposed application is consistent with the spirit and intent of the Zoning Regulations, this LDC and the City's Comprehensive Master Plan, and complies with all applicable standards in this LDC for the particular use.*

Met with a vote of 4-0.

B. *The proposed use will be established, maintained and operated so as not to endanger the public health, safety, or welfare.*

Met with a vote of 4-0.

C. *The proposed use will be established, maintained, and operated so as to be harmonious with the surrounding area and will not impede the development, use, and enjoyment of adjacent property.*

Met with a vote of 4-0.

D. *The proposed use will be of a character that does not produce noise, odors, glare, and/or vibration that adversely affects the surrounding area.*

Met with a vote of 4-0.

E. *The proposed use will not place an excessive burden on public improvements, facilities, services, or utilities.*

Met with a vote of 4-0.

F. *The proposed use will not result in the destruction, loss, or damage of any feature determined to be of significant natural, scenic, or historic importance.*

Met with a vote of 4-0.

G. *The proposed use will not create a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity of the use.*

Met with a vote of 4-0.

The motion to approve ZBA 23-10 passed 4-0.

G) ZBA 23-13: Petitioner, Carlisle Park Avenue, LLC, of Keene, represented by A. Eli Leino of Bernstein, Shur, Sawyer & Nelson of Manchester NH, requests a Variance for property located at 800 Park Ave., Tax Map #227-002-000-000-000, is in the Commerce District. The Petitioner requests a parking area within eight feet and ten feet of the proposed property line per Chapter 100, Article 9.4, Table 9-2 of the Zoning Regulations.

Chair Hoppock introduced the application and asked to hear from staff.

Mr. Hagan stated that 800 Park Ave. is located in the Cowmmerce Zone on 5.76 acres. He continued that there are two buildings on this property. Building #1 was built in 1980. He is only giving (the figures for the) workable square footage, but there are some ancillary areas like basements and mechanical areas. Building #1 has 17,892 square feet. Building #2 was built in 1957 and has 19,035 [sic] square feet. There are some additions to that, decks, and ramps, but only the livable square footage is given.

Mr. Hagan continued that previously, there was a Special Exception and a Variance. The Special Exception was granted on October 6, 1969, to permit Cashway Sales Lumber Storage and Keene Ice Creamy, a light industrial use. The Board granted a Variance on March 28, 1977, to allow for light assembly operation.

Ms. Taylor asked for clarification on which building is which. Mr. Hagan replied that if you are looking south or southeast of the property, which is the larger L shaped building and has Pizza Down Under in it, and the one to the northwest according to the screen is what was the ice cream

shop, and that is building #2. The smaller building is the older one from 1957, and the bigger building is the newer one from 1986. Ms. Taylor stated that she asks because if building #2 was the one that started out as an office – and she first knew it as a chiropractor's office – she is surprised that it has more square footage than the other.

Mr. Leino stated that Mr. Hagan (mistakenly) added a zero to the square footage. Mr. Hagan replied that is correct; it is 1,935 square feet, not 19,035.

Ms. Taylor stated that she thinks there was a Variance a couple years ago for the smaller building. Mr. Hagan replied that is correct; there was a Variance for setback on the front for an awning canopy, about three years ago. Chair Hoppock replied that he believes that was related to rough or uneven terrain on the lot. Mr. Hagan replied that is correct, and some covering for parking.

Ms. Taylor asked if her understanding is correct that this is basically anticipating a subdivision. Mr. Hagan replied yes. Ms. Taylor asked if he could show where the lines are anticipated to be, or if that is for the applicant. Mr. Hagan replied that they do have that information. Chair Hoppock replied that it is in the packet. Mr. Rogers stated that the dark line in the image shows the non-conforming setback. He continued that the wording in the narrative of what the requirements are is that the applicant is seeking a "zero setback" for the pavements, since this is an existing condition and the pavement is already there. They are looking to subdivide this property. If this Variance were to be granted, if the subdivision goes through, there would be a Variance granted for both properties, because they both are going to have pavement right up to property lines. It is currently an existing condition, minus the setback question, the applicant can speak further to that and it will apply to two properties. There is no tax map number yet to associate unless they subdivide that.

Chair Hoppock asked to hear from the Petitioner.

Eli Leino of Bernstein and Shur in Manchester stated that as noted, the shaded portion of the image highlights the lot line. He continued that if you have parking with less than two acres of blacktop you are required to have a 10-foot side setback, and then 30,000 square feet or less requires an 8-foot setback, which is shown. The parking lot terminates, and the lot line continues. They are left with two compliant lots, except for the existing pavement, if they do it this way. The Piazza is still in the smaller building, along with a bakery. The larger building has a mix of commercial uses. It is a unique property; in that they have dissimilar size buildings with dissimilar uses. They are all allowed uses, but it would make sense if the uses were grouped together. Having two disparate uses on the same lot reduces the flexibility of the owner, especially if a tenant were to want to buy one of these at the end of the lease. It does not necessarily make sense that if you have an office use in one place you are also willing to buy into an ice cream shop location. They are trying to simplify this. The existing parking lot works well, and the goal would be to change nothing about that on the ground, but to use certain legal and engineering mechanisms such that they could divide this and probably do a reciprocal

parking easement. That way, if someone parked in the lot for building #1 wanted to get an ice cream, they would not need to drive out and come back around, if they were forced to tear up pavement, or were not parking in the "wrong place" for so the second use.

Mr. Leino stated that the north side of the property is all green area. He continued that no changes are expected to that, because there is a slope and wet areas down there as mentioned, there was a previous Variance due to the slopes. There are some topographic concerns on the site but he does not know that those are relevant, because this lot is already paved and no new paving is anticipated, requested, or expected.

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

Mr. Leino continued that this would not be contrary to the public interest. It is an existing lot. They do not expect that the average user of this parcel would notice any of these changes. There are changes to be done on paper, between this request and then the subdivision. They are looking to maintain safe vehicle and pedestrian circulation on the site, and again, the parking lot works, and was vetted when it was laid out, and time bears that out. There is no expectation of any negative changes to the public health, safety, or welfare here.

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

Mr. Leino stated that both lots are compliant with the spirit of the Ordinance, in every dimension but for this requested 8' and 10' setback on each side of the proposed new lot line. There will not be a visible impact and the character of the neighborhood will not be changed.

3. Granting the Variance would do substantial justice.

Mr. Leino stated that the third criterion is the balancing test, and again, this (change) will go largely unnoticed by anybody except that it will create a benefit to the owner and the applicant, who will have the opportunity to potentially sell one of these. There is nothing necessarily considered right now, but they would have general flexibility on the fact that "this is a 5-acre-plus lot in a zone where 15-acre lots are required" [Minute-taker note: I believe he misspoke, and meant "where 15,000-square-foot lots are required."]. They are trying to set this up so that it can be used as is deemed fit, eventually, if one or both should be sold.

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

Mr. Leino stated that regarding the value of surrounding properties, again, they are not discussing changing uses or adding paving or bringing in more cars, or anything of that sort. He continued that the only impact on other lots would be that if one of these were to sell it would provide favorable comparable in the area, although there are a number of different uses in this

area, including apartments, which are not one-to-one comps. There would be no negative effect on neighboring lots.

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.

Mr. Leino stated that he believes he mentioned some of the distinguishing conditions, but it is a very large parcel in a zone where they are not necessarily required to be. [They are required to be] 1,500 square feet [Minute taker note: I believe he meant 15,000], a third of an acre, and that is small. This is 5.5 acres. There are two principal structures that are not necessarily similar. It is not unusual to have two commercial buildings look at each other, such as one being Target and one being Dick's Sporting Goods, but this is a little different, where one is 18,000 square feet and the other is less than 2,000 square feet. Thus, they make more sense sited on their own lots neighboring each other than they do as one parcel.

and
ii. The proposed use is a reasonable one.

Mr. Leino stated that the proposed uses are all allowed, existing, permitted uses. Therefore, under the Malachy Glen case, those are inherently viewed as reasonable.

Mr. Leino concluded that he would be happy to answer questions about the property or the criteria. He continued that the property owner, Don Carlisle, is also present and can answer questions.

Ms. Taylor asked for a rough estimate on how much of the 5+ acres is actually usable, because of the wetlands, the brook, and so on and so forth. Jim Phippard replied that he is background support staff on this application and continued that approximately half of the property is encumbered by floodplain, with Black Brook passing through the area. He showed it on the drawing.

Chair Hoppock asked if there were any further questions. Hearing none, he stated that he thought the application was very thorough. He asked if Mr. Carlisle wanted to add anything.

Don Carlisle stated that he was looking to have the property subdivided in case there comes a point when they want to sell the ice cream shop or the office space. He continued that he has no intentions of doing that, but at least they would have that flexibility. He does not have anything else to add but could answer questions.

Chair Hoppock replied that he does not think the Board has any further questions, which speaks to the thoroughness of the application. He asked if there was any public comment in opposition to or in favor of the application. Hearing none, he closed the public hearing and asked the Board to deliberate.

Mr. Welsh stated that speaking to the criteria in general, this is a fairly straightforward purpose in the applicant's wish to subdivide, and the necessity of doing this, and he thinks they adequately explained how it meets all the criteria. He continued that regarding the fifth criteria, if the Variance is not granted, the potential of hardship is also stated, in that they would have disparate kinds of uses and kinds of buildings for sale in one package, if it were to be for sale. That makes it a more difficult task than it needs to be, especially if someone is just looking to have an ice cream shop.

Ms. Taylor stated that she thinks the Board had struggled with this parcel a couple of years ago, regarding the setback issue. She continued that she does not think any of them, at the time, realized that it was all one parcel, because they kept looking for another map and lot number, but it was all one parcel. She thinks that one of the issues here, and the reason she asked about how much of the property is usable, is that if you subdivided it and had to meet the setback, and put parking in different places, you would be rather constrained, due to the wetlands and floodplain. That creates its own unique issues within the parcel itself, let alone compared to other parcels in the "strange universe" out in that area. She certainly thinks that of all the applications the Board has recently had, this one meets the substantial justice requirement. She does not see that there would be any negative impact on the public, and certainly, the benefit to the property owner, in trying to make some sense out of this mess, is probably a very good idea.

Mr. Clough stated that he agrees. He continued that looking at this and at how the subdivision would be proposed, he sees that it is an extremely reasonable way to subdivide this property, and certainly, no one is going to notice where the property line is when they are buying ice cream or anything like that. Trying to impose a setback in something like that would create a big snarl. It would be extremely difficult to subdivide this property without doing it in this manner.

Chair Hoppock stated that he agrees with all the comments. He continued that he thinks that trying to take two principal structures on one property and, as they say in the application, remedy that through a Variance request and a subdivision makes a lot of sense. It is in the public interest to allow a property owner to preserve the property in a sensible way that does not make it worse and does not really change it, either. That is the beauty of the application. He thinks the public interest criterion is satisfied, he does not think there is any alteration to the character of the neighborhood and there is no danger to public health, safety, or welfare. He agrees with Ms. Taylor on the substantial justice test because there would be no gain to the public in denying this; there is no impact to the public. All the gain is to the individual, so the balance strikes in favor of the individual. As they learned once again about this property, there are special conditions of the property that distinguish it from the other properties in the area, and denying the Variance would result in an unnecessary hardship, because the reasons for the setback on a pre-existing lot

do not apply. Those provisions of the Ordinance really do not apply to this lot. You cannot make the definition of "undue hardship" any clearer and he thinks it is satisfied. He continued that nothing in the application would diminish property values as he does not see, from the information presented, anything that would have any impact on any property values in the area.

Ms. Taylor stated that regarding the spirit of the Ordinance, this is a commercial pocket surrounded by residential areas, but it is certainly not distinguishable in the nature of the businesses there from what is on the island that is created between Summit Rd. and Park Ave. She continued that it is not doing anything untoward in that regard. Regarding the fifth criterion, this is a reasonable request. Chair Hoppock replied that he agrees that it is a reasonable use.

Chair Hoppock asked if there were any further comments. Hearing none, he asked for a motion.

Mr. Welsh made a motion to approve ZBA 23-13, 800 Park Ave. Mr. Clough seconded the motion.

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

Met with a vote of 4-0.

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

Met with a vote of 4-0.

3. Granting the Variance would do substantial justice.

Met with a vote of 4-0.

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

Met with a vote of 4-0.

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

Met with a vote of 4-0.

The motion to approve ZBA 23-13 passed with a vote of 4-0.

V) New Business

Chair Hoppock asked staff if there was any new business. Mr. Rogers replied no.

VI) Communications and Miscellaneous

VII) Non-Public Session: (if required)

VIII) Adjournment

There being no further business, Chair Hoppock adjourned the meeting at 8:22 PM.

Respectfully submitted by,
Britta Reida, Minute Taker

Reviewed and edited by,
Corinne Marcou, Zoning Clerk