

**CITY OF CONCORD, NH  
ZONING BOARD OF ADJUSTMENT  
JULY 6, 2022 MEETING  
DRAFT MINUTES**

Attendees: Chairman Christopher Carley, Tedd Evans, Nicholas Wallner, James Monahan and Laura Scott.

Absent: Andrew Winters

Staff: Ernest Cartier-Creveling, Zoning Administrator

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Meeting commenced at 7:00 pm.

**36-22 32 Manchester Street; GWP-Gateway Performance District; Property Owner-ROI IRREV TRUST-WINDLER CHRISTINE M TTEE, C/O CRONIN BISSON & ZALINSKY PC:** Applicant wishes to establish a commercial Kennel (Use M8 in the Table of Principal Uses) in the GWP District and is seeking the following variances:

1. 28-2-4(j) to allow a commercial kennel in the GW-Gateway Performance District, where such use is not allowed.

**37-22 270 Loudon Rd–Steeplegate Mall; GWP-Gateway Performance District; Property Owner-STEEPLEGATE MALL REALTY LLC & STEEPLEGATE CH LLC & STEEPLEGATE NASSIM LLC:** Applicant wishes to utilize a +/- 2 acres of the parking lot on the easterly side of the overall property, which is currently part of the Steeplegate Mall site plan, to allow its use for truck and automobile maneuvers as part of a Commercial Driving School, which is not an allowed use in the GWP District. The applicant seeks the following variance:

1. 28-2-4(j) to allow a commercial driving school (Use B3) in the GW-Gateway Performance District, where such use is not allowed.

A motion to continue case #36-22 and Case #37-22 to the August 3, 2022 meeting was made by Wallner, seconded by Scott and passed by a unanimous vote.

**[Vote to Continue Cases 36-22 and 37-22 took Place Prior to Public Hearings](#)**

**31-22 42 Julie Drive; RO-Open Space Residential District; Sean Bussiere:**

Applicant seeks a variance to establish a Contractor Yard (Use L7 in the Table of Principal Uses) and is requesting variances to:

1. Article 28-2-4(j), Table of Principal Uses, to allow a Contractor Yard in the RO-Open Space Residential District, where the Zoning Ordinance only permits Contractor Yards in the IN-Industrial District.
2. Article 28-5-37(b) Screening Requirements, to allow use of the existing natural vegetation, where the Zoning Ordinance requires the use to be screened from adjacent streets and properties by the installation of solid and opaque fences, walls, or enclosures.
3. 28-4-7(d)(2) Uses Accessory to a Principal Residential Use to allow the development of a Contractor Yard (Use L7) within a cluster development, where it currently is not a permitted accessory use.

Testified: Attorney Brett Allard and property owner Sean Bussiere. Attorney Allard described the property and that it was located in a cluster development within the RO Zone. It is a 5.06 acre lot with a single family home. It has 265 feet of frontage on Graham Road but is accessed through an easement at 38 Julie Drive. He described the property as a densely wooded lot. His client owns Sbus Excavation. All of the work for the excavation company remains off-site. His client purchased the property in 2017. He has occasionally stored vehicles and equipment at his home overnight which includes 4 pick up trucks, 2 trailers, 2 dump trucks and 2 excavators. There are no materials stored on the lot. The only thing kept there is his own personal wood pile. He showed on the maps where Mr. Bussiere would store his vehicles and equipment on the lot. It is a parking area about 170 to 200 feet from the front line, which is 38 Julie Drive and about 100 to 120 feet from the rear lot line which is Conservation land deeded to the City of Concord. There are about 3 or 4 acres to the west of the parking area and it is a substantial distance to Graham Road. The equipment spends most of its time

at job sites or being transported between job sites. They are, by no means, coming and going out of 42 Julie Drive every day. Sometimes his client will drive one back if the job site was closed. He is his only employee. He describes the daily traffic as him leaving at 7 am and returning home around 6 pm. His client thought this use was incidental and that nothing required approval. Attorney Allard went over the 3 variances his client is requesting. He went over the criteria. Granting the variance will not be contrary to the public interest. The basic zoning objectives are not violated. It will not alter the essential character of the area as there is no materials stored on site and there is no increase in traffic to and from the site. He has no employees. There is no parade of trucks coming in and out every day. It is a very private back lot that is densely wooded which shields the site lines into the property. They propose to maintain the wooded buffer in its natural state in lieu of building an artificial enclosure or fence. There will not be any threat to public health or safety. The second variance request, which states that granting the variance will alter the essential character of the area or threaten public, health and safety, they do not think there will be any alteration of the essential character of the area. Again, there is no material increase on site or traffic increase. Granting the variance will be consistent with the spirit of the Ordinance. Contractor yards are technically only permitted in the industrial district. They fall within that contractor yard designation, but variances are designed to make exceptions when the uniqueness of the property doesn't compromise the spirit of the Ordinance. They do not believe it does. Contractor yards, in a sense, lend to work being done on site or customers coming and going and buying things. This is really a storage thing that was initially thought of as incidental to the residential use. It is sort of a passive use on a densely wooded back lot with substantial screening. For those reasons they do not think that what they are proposing is so drastically different that it would be inconsistent with the spirit of the Ordinance. Substantial justice, is the balancing test between public and private rights. They do not believe there would be any injury to the public if the variances are granted. They do not believe there would be any gain to the public if the variances are denied. It would represent loss only to the applicant because this property is uniquely situated for this type of passive storage use, despite its location in a neighborhood. When balancing public and private rights, they think substantial justice would be done. The values of surrounding properties will not be diminished, as the property remains consistent with the residential neighborhood. There is room between the parking area and the property lines as shown on the diagram provided. They are not seeking to build structures with setbacks close to the neighbors.

**Hardship** This lot is larger than all the other lots on Julie Drive, so it can uniquely support this type of storage use. There is no increase in traffic as it has a densely wooded buffer. They provided a letter from Cindy Anderson, who is a licensed real estate agent with CB Realty. Ms. Anderson looked at the property, couldn't see equipment from the road and therefore felt it would not devalue surrounding properties.

He received letters from individuals in the neighborhood prior to the meeting and hadn't had a chance to submit them to the Board. He read them into the record. One was from Caitlin and Andrew Cullen of 38 Julie Drive. They had no issues with Sean Bussiere driving his trucks and equipment past their house. They are related to him, but feel they are the only ones directly affected by this request as Mr. Bussiere's driveway has an easement on their property. They have three dogs and Sean is always sure to drive slowly and respectfully. It is rare that they see him drive by and there have been no incidents or issues over the year. He has their support to continue keeping his equipment on his property. A letter from Michael Courchaine of 10 Julie Drive was submitted. He and his family have no issue with Sean Bussiere driving his dump truck by his residence. Sean is a great neighbor who is always willing to help and very respectful to his family. The last letter was submitted by Ryan and Heather Hildum of 30 Julie Drive. They are neighbors and are aware of Sean Bussiere's business. He has not been a nuisance or disturbed them since they have been in the neighborhood. They bought there November of 2019. He has their support to continue to utilize his property in any way he sees fit to continue to make a living. For all of those reasons they propose that the values of surrounding properties will not be diminished if the variances are granted.

They believe that this property does have several special conditions that distinguish it from other properties in the area. It is a back lot, essentially with a driveway easement. It is a very densely wooded area. It has different characteristics than the other properties on Julie Drive, which consists of nine other house lots. This lot is 5.06 acres which is substantially larger than the other lots in the subdivision. They believe that the lot size is a special condition that's particularly relevant in situation as this lot is larger and has a longer driveway. It has natural screening which distinguishes it and makes the property suitable for this use.

To summarize, he has no employees, there is no traffic increase and there is substantial distance between the property lines in that parking area. He noted a 2003 Supreme Court Case; *Rancourt vs City of Manchester*. The Supreme Court held that the subject property had satisfied the hardship criteria and affirmed the variances that were issued, because the lot was larger than most of the other surrounding lots in the area, was uniquely configured, the rear portion of the lot was considerably larger than the front and there was a thick wooded buffer around the subject area. They thought that

those characteristics sounded remarkably like this case and thought it would be helpful for the Board to have that knowledge. For all of those reasons, they believe that the proposed use is reasonable, and are asking the Board to grant the variances.

Chairman Carley asked how long he had been there with his equipment. Mr. Bussiere thought 2017 or 2018. He explained that it was as soon as he bought the house. He did all of the site work himself.

Nicholas Wallner asked for clarification which lots are owned by the neighbors who provided letters of support. Scott Bussiere explained they were the first three houses on the right as you enter the subdivision. (10 Julie Drive, 30 Julie Drive and 38 Julie Drive).

Tedd Evans asked if he intended to convey that there will never be employees? Sean Bussiere answered he had no employees working from this property. Attorney Allard wanted the Board to know that they are open to conditions of approval that limit it the use to not have any employees or any additional vehicles, other than those described in the application, which he read tonight. They understand that the Board can attach reasonable conditions. His client is also willing to build a 6' fence along the side of the driveway where the previous accidental encroachment took place that they have now remedied.

Chairman Carley asked if the Board had any further questions. There were none.

Attorney Allard stated that he is aware of letter the Board received in opposition. He has some rebuttal comments, but will wait until after they have commented.

In Opposition:

Attorney Jacob Rhodes and his client, Linda Couser, who own property directly abutting the Conservation Easement and who resides at 34 Graham Road, which is directly across the road from her property abutting the easement. Julie drive is the development which has access to Graham Road. The whole area is rural in nature. It is heavily wooded. It's an idyllic neighborhood for living in a natural setting. Essentially, it's sparsely populated, and the road is lightly trafficked. There are mainly passenger vehicles and it's heavily used for recreation by a lot of runners and walkers. It's a rural neighborhood. There are no sidewalks and there are minimal shoulders along the road. Having these construction vehicles would potentially present a problem with runners and walkers going along the road. It's a relatively narrow road with quite a bit of hills and curves, which presents a safety concern. They submitted a letter and for the sake of everyone's time, I will not be addressing everything in detail. He started with unnecessary hardship. The literal enforcement of the ordinance would not result in an unnecessary hardship under the uniqueness prong. There are no special conditions which distinguish this lot from others in the area. This lot is a wooded area. It is a larger lot, but so are many of the other lots along Graham Road, Hoit Road and Snow Pond Road areas. These lots are essentially very similar to Mr. Bussiere's property and also many of the lots have the houses to the rear of their property, similar to the applicant's property. There is also no fair and substantial relationship between the public purposes of the ordinance and the application of the ordinance to this property. The ordinance exists to prevent growth in this rural area. Although, the applicant has said that the use is limited right now to him driving occasionally along the road. There is nothing preventing that use from expanding in the future. If another owner purchased the property, there's nothing to prevent the owner from having employees, more traffic along the road and there is also no restriction to material storage. Although the applicants stated there was no material stored there currently, if the variance was granted, there could be an expansion by the applicant or a future owner of the property to include storage of materials. Essentially, the relationship between the ordinance and the applications of the ordinance to this property are to protect this rural natural area of land. The use is not reasonable because of all these harms. It would change the character of the neighborhood from a rural area to one that has trucks going along a road that's not meant for trucks. Additionally, Graham Road is subject to the nine-ton weight limit in the spring and there's nothing to prevent the continued degradation of the road. The road is in poor shape right now, mainly because it's not heavily used. It is only used by the residents. There's a significant amount of frost heaves and the use of the vehicles over this would contribute to the frost heaves becoming bigger and damaging vehicles. Although the applicant is not storing the materials there he hasn't said anything about work on trucks and potential runoff of oil or other types of work on the trucks that would go down to the brook, which runs along Graham Road. Turning to the public interest, the spirit of the ordinance, the New Hampshire Supreme Court has held that the public interest prong is related to the spirit of the ordinance prong, and I address both here. So again, just because Mr. Bussiere does not use the property frequently, does not use his trucks frequently along this road, doesn't mean he wouldn't expand his business. In fact, he acknowledged that the use has

increased from a few trucks initially to four pickup trucks, two dump trucks and a couple of trailers. So, as we can see, the use of the property has increased substantially from the initial use and this use would alter the essential character of the neighborhood. If it was expanded, it would further alter that character of the neighborhood from the rural idyllic nature. This would also threaten the public safety and health and welfare of the neighborhood. As I said before, there would be trucks where there's not customarily trucks and large construction vehicles. The weight limits would damage the road, and this would cause a significant increase to city expenses and could prevent people from driving safely along the road. For these reasons, substantial justice is not done by granting the variance as the previous legal counsel stated. This is the balancing test here. There is minimal gain to the applicant, but as I discussed previously there are harms to the neighborhood which are significant. Again, this use is not consistent with the residential use for which this subdivision is intended. Finally, granting the variance will diminish the value of Mrs. Couser's property. New Hampshire Supreme Court precedent allows owners to opine as to the value of their property. Essentially, Mrs. Couser would pay less for the property if there was a contractor yard just up the road, especially considering that a subsequent owner could somewhat expand that use. For these reasons we would request that the Board deny the variance.

Nicholas Wallner asked Attorney Rhodes to point out his client's property on the map shown on the overhead screen, which he did, along with the City of Concord easement. There was discussion about the easement and Attorney Rhodes stated that Mr. Bussiere's deed states that his land (appellant's land) was subject to the terms of the easement.

Chairman Carley asked what the terms of the easement are, to which Attorney Rhodes responded that they were to protect the rural character of the area so there would not be any huge development along Graham Road and that there could be no industrial development.

Jim Monahan asked if he was suggesting that by granting this, it would violate the terms of the easement? Attorney Rhodes wasn't sure, but that was the City's call to make, since the City owns the easement.

Laura Scott asked if the ownership of the property could be checked utilizing the City of Concord GIS. The ownership of the easement was confirmed as the City of Concord and the ownership of 42 Julie was confirmed to be Sean Bussiere, with no indication that the provisions of the easement were applicable to Mr. Bussiere's property. Laura Scott explained that the terms of the easement customarily are not imposed on the residential lots, only the easement itself. Attorney Rhodes stated that he believed Scott Bussiere owns the underlying land in fee for tax purposes.

Nicole & Brian Athearn, 39 Julie Drive. Chairman Carley asked the Athearn's to point out their property on the map, which they did. They reside at Lot 6 aka 39 Julie Drive, the property that directly abuts the driveway that Mr. Bussiere is using for his excavation business. They bought their home in 2017 with the knowledge that there would be an excavation business being operated right next door. They have two young girls; a two-year-old and a four-year-old that love to play outside. The driveway is very close to their property. They are the property that was encroached upon by Mr. Bussiere's driveway, which three weeks ago was moved to be five feet from their property line, per zoning requirements. It is still open, and very close. There is no privacy. It's very close to where the girls play outside. Mr. Bussiere has two dump trucks that he does operate. Any place within their home they can hear him start the dump trucks up and you can feel the dump trucks. Their children's bedrooms are on the side of the house that the driveway is on. Their eldest daughter has complained that she has a hard time sleeping because of the dump trucks. There are times that he leaves at 5:30 in the morning. He's driven home at 9:30 pm and at 1:30 in the morning, he honked his horn. We have that on video. It is very disruptive. There are times that he will park his dump truck outside his sister's house and leave it running to go visit with his sister and then come back to his truck and then drive home. Last year he took his mini excavator and dug up part of our property and destroyed some of our irrigation lines, but that's a different story. We did fill out a police report for that. They are trying to give a fuller picture as they talked about the vegetation offering a buffer. In the summertime there is vegetation, but even when they are on their deck, they still have a sight line to his house. In the wintertime, you can see everything. They talked about it not devaluing our property. You can see his dump trucks, you can see everything, so there isn't privacy in the wintertime.

Mr. Bussiere stated that he only occasionally stores his vehicles there, but that's only been recently because of the complaint that they filed with the City. Before that it was frequent, daily, and there are times that he drives multiple times in and out of his driveway. Their daughter and he were walking to a birthday party down the street on Saturday and Mr. Bussiere left with his dump truck. They moved to the opposite side of the road because they weren't comfortable being on the same side as his truck. Granting these variances would impair the health and safety of the folks that enjoy recreational use on Graham Road. Also, they live at the back of the cul-de-sac, so Mr. Bussiere has to drive out all the way down that property line around the cul-de-sac circle to go down. It's not like he lives at the beginning of the cul-de-sac, which is just a quick

entry in and out. Their girls love to walk around the circle, play in the grass and in the circle, we do chalk. Having dump trucks going in out of there does put their children at risk and there are other children in the cul-de-sac. They kept talking about the large property size and, yes, his property extends all the way down to Graham Road, but he only uses that back corner. He doesn't use the rest of it, so the proximity to our home is close. They purchased this house to start a family. They bought the house at the end of the cul-de-sac to avoid traffic on Graham Road. They are strongly against him receiving this variance for the safety of their children. They heard an offer of building a fence along the property line. That would be fine to protect the driveway, but if their girls are riding their bikes and learning to ride their bikes around the cul-de-sac, they still have to worry about dump trucks coming in and out with large trailers.

In favor:

Caitlin Cohen, formerly Caitlin Bussiere. She addressed some of the comments made by the Athearns. She is an avid runner who runs four or five times a week. Possibly one or two times has she seen Mr. Bussiere go past her. She has never felt unsafe. She has had zero issues with feeling unsafe. She also stated that the irrigation system that was torn up was hers, not the Ahearn's'. She further stated that she is the closest to Mr. Bussiere and she has worked at home for the past two and a half years and has never felt the house shake.

James Strong, 134 Hoit Road toward the rear of the Bussiere property. He testified that he sometimes see's Mr. Bussiere's vehicles go by in the morning, but that's because he goes to work early. He always sees him at night and that it's usually only once or twice a day. Mr. Strong said that he has absolutely no problem with the noise and pointed out that he is about 200 yards away through the trees. He further stated that Sean using the road is no different that logging trucks or even City trucks. He reiterated that he has no problem with Sean.

Comments from Code Administration: none.

Rebuttal: Attorney Allard and his client clarified a couple of points. Regarding runners and walkers on Graham Road, as well as the degradation of the road. Those comments are not site specific. No matter what the Board decides here, there is nothing to prevent trucks from driving on Graham Road. There's really no way that granting these variances could devalue property. We heard that there is nothing to prevent subsequent owners from having employees or from storing materials on the site. The ZBA can attach reasonable conditions of approval to prevent those things from occurring. We have also cleared up that my client's land is not subject to the same restrictions to which the Conservation Easement is subject to. We are not downplaying the direct abutters comments regarding the safety of their children playing in the street. He stated that the Board can reach a middle ground to protect against these harms. One condition could be the construction of a fence between the driveway and the abutters' property and certain hours of operation, or when the trucks come and go. We know there is trash pick-up in the neighborhood, albeit once a week, but there are other heavy trucks that utilize Julie Drive. He pointed out that there are good site lines at the cul-de-sac, and further stressed that any conditions restricting hours of operation, etc., would run with the land, providing future protections to the residents. He respectfully asked that the Board grant the variances.

Laura Scott asked if his personal pick-up truck was included in the listed four pick-up trucks, two commercial trailers, two dump trucks and two excavators listed. Mr. Bussiere responded that they are all his personal vehicles and further clarified that the trucks in question are over 13,000 pounds GVW (gross vehicle weight).

Nicholas Wallner asked about the weight of the excavators. Mr. Bussiere stated that the excavator(s) are up to 30,000 lbs GVW, or 15 tons. They would hardly ever be coming back to the yard. There would be a limited time in the spring that the roads are posted for that weight.

#### DECISION:

Chairman Carley closed the public testimony portion of the meeting. Mr. Carley summarized the testimony the Board heard concerning a use that is not permitted in the area, which it is taking place for the storage and operation of heavy equipment in and out of the property. The Board heard testimony that the lot is obscured by trees and remote from other properties and therefore the consequences of granting the variance would not have an impact on the neighbors.

Laura Scott: This is concerning a use that is not permitted in the area in which it is taking place. These are always hard situations because you have people that are trying to conduct local business and support themselves and they thought they were doing the right thing. There are no employees and no signage, and the neighbors bought a house thinking that they were in a nice residential neighborhood and weren't going to have to deal with a commercial use. She appreciates the

applicant stating that limits can be placed on the number of vehicles, requiring fencing, not allowing employees and limiting the hours of operation and as someone who used to enforce these kinds of conditions, it gets difficult to do at times. It's hard to enforce how many vehicles are on a site or when someone starts up a vehicle. It creates a lot of problems. It can be done, but it does become difficult. She would like to see the business succeed, but having to limit employees and equipment - those types of conditions becomes really tough on all sides and no one is usually happy. I didn't really answer any questions, I just gave my opinion.

Mr. Carley responded that it sounds as though she was leaning toward no approval.

Laura Scott stated that it becomes a logistical nightmare and as much as she understands his personal hardship, she didn't hear a variance zoning hardship. She heard, "I have the property and I do everything on my own and it's a big property," but she didn't hear why the zoning doesn't fit the property.

Jim Monahan agrees with what Laura said. He would have led with the hardship issue because he thinks it's one of the tests that they must have. There's also the need for consistency when they can do it as a Board, and there have been similar issues in residential neighborhoods in recent months that have come before them and we have denied those variances.

Nick Wallner agrees. There is still potential for reasonable use without the commercial aspect.

Tedd Evans is enthused by the applicant's zealous grasp of business and all those kinds of things but agrees with Laura Scott that putting restrictions on an approval would be hard to enforce. There is no one that is going to be watching out there and counting the number of times or how many people come in and out of there with vehicles. I can't help but feel that the argument that the abutters made about it being detrimental to enjoying the residential use is valid and to the value of their property. They probably wouldn't have bought that house for that price if they knew that was going to be going on. I think that's unfair, so in weighing the interests I go towards the abutters, and I would vote to decline.

Chris Carley agreed with his colleagues and asked for a motion.

A motion to deny the variances requested based on the reasons stated was made by Laura Scott, seconded by James Monahan and passed by a unanimous vote.

**32-22 132 Warren Street; RN Neighborhood Residential District; Christopher Higman:** Applicant wishes to expand the driveway width serving a two-family dwelling and is requesting variances to:

1. Article 28-7-7(f), Driveway Width, to permit a driveway with a maximum width of 40 feet, where a maximum width of 28 feet is allowed;
2. Article 28-7-8(b), Separation of Driveways in Residential Districts, to allow the driveway to be widened to the extent that the westerly side of the widened driveway has 25 feet of separation from the easterly edge of the driveway entrance serving 136 Warren Street, where a distance of 40 feet of separation is required.
3. Article 28-7-8(b), Separation of Driveways in Residential Districts, to allow the driveway to be widened to the extent that the easterly side of the widened driveway has less than 20'-4" of separation from the westerly edge of the driveway entrance serving 130 Warren Street, where 40 feet of separation is required.

Testified: Christopher Higman. His driveway is on the west side of Washington Street, which is a one-way street. Three years ago, the structure burned down. He had to rebuild. He referred to a diagram in his packet. He stated that he needs to widen the driveway by approximately 8' in either direction in order to provide two parking spaces per unit (total of 4 spaces). He wants to pave the driveway. He has spoken with his neighbors, who are both supportive.

James Monahan asked if there were two driveways now and can the cars all fit in there now? Christopher Higman explained that there has never been two driveways. It was deeper, though. And yes, the cars can all pull in and back out.

In Favor: none.

Opposed: none.

Comments from Code Administration: none.

**DECISION:**

Chairman Carley closed the public portion of the hearing and summarized the testimony.

Tedd Evans sees this property as being sufficiently unique to support the request as a hardship.

Nicholas Wallner thinks it's unique and believes they saw in the evidence that you're allowed to back out of a residential use and you can back out from the configuration here. He thinks it makes reasonable sense, particularly due to the uniqueness of the property and circumstances that made them rebuild under different conditions from the original footprint.

James Monahan also thinks that it will help facilitate making sure there's no on street parking because they can't get out of the driveway. He agrees.

Laura Scott agrees.

Christopher Carley also agrees.

A motion to approve the variances requested was made by James Monahan for all the reasons stated, seconded by Tedd Evans and passed by a unanimous vote.

**33-22 220 Loudon Road; CG-General Commercial District; SV Property SS LLC:**

Applicant wishes to add an additional warehouse of 4,000 square feet in size and seeks the following:

1. A Special Exception from Article 28-8-4(c)(2), Nonconforming Uses of Land;
2. A Variance to Article 28-8-4(c)(1), Expansion of a Non-conforming Use, to allow an increase in lot coverage in the amount of 9.9 percent by adding an additional warehouse of 4,000 square feet in size (Use K7, Warehousing, in the Table of Principal Uses), which is not an allowable use in the GC-General Commercial District); and
3. A Variance to Article 28-7-1(a), Applicability, which requires that whenever a building is constructed or enlarged, off-street parking and loading spaces shall be provided for the entire use or combination of uses; the applicant is proposing to provide a net decrease in nonconformity by proposing 7 standard parking spaces and one van accessible space, where 34 standard spaces and two accessible spaces are required.

Request was Withdrawn and Resubmitted for August 3<sup>rd</sup> ZBA Meeting

**34-22 72 Washington Street; CN-Neighborhood Commercial District; 45 Centre St Frnt:** Applicant proposes to locate a restaurant with a gross floor area less than 5,000 sf with no drive-through service (Use I1 in the Table of Principal Uses) and is seeking variances for this proposed change of use to:

1. Article 28-7-1(a), which requires when a use of any land is changed, that off-street parking and loading spaces shall be provided for the entire use or combination of uses, where in this case the existing parking lot has no capacity for additional parking.
2. Article 28-7-2, Sections:
  - (a) Computation of Number of Spaces Required, to allow no off-street spaces to be located within the existing parking lot, which has no capacity for additional parking (44 spaces are required for this proposed change in use);
  - (c) Requirements Where There are Multiple Uses or Buildings on a Lot, to allow no parking spaces to be provided within the existing parking lot for this proposed change of use, where the sum of required parking spaces of both principal uses exceeds the capacity of the existing parking lot.
  - (e) Table of Off-Street Parking Requirements, where the zoning ordinance requires 1 parking space for every 75 square feet of gross floor area (3,328 sf of GFA ÷ 75 parking spaces per sf = 44) spaces required.
4. Article 28-7-3, Location of Required Parking, which requires that off-street parking shall be provided on the same lot as the use or uses that they are intended to serve;
5. Article 28-7-5, Requirements for Handicapped Accessible Parking Spaces, to allow no off-street accessible

- parking spaces, where two spaces are required;
6. Article 28-7-7, Parking Area Design Standards, to allow no application generally of the provisions of this article, as there is no on-site parking available to be allocated for this change of use;
  7. Article 28-7-8, Access and Driveway Standards, to allow no application generally of the provisions of this article, as there is no on-site parking allocated for this change of use;
  8. Article 28-7-9, Pedestrian Circulation, to allow no application generally of the provisions of this article, as there is no on-site parking allocated for this change of use;
  9. Article 28-7-10, Parking Area Landscaping Standards, to allow no landscaping to be performed as a result of no ability to expand the existing parking lot to accommodate additional parking for any secondary principal use related to this structure;
  10. Article 28-7-13, Off-Street Loading Requirements, to allow no loading spaces to be provided for this change of use;
  11. Article 28-7-14, Off-Street Loading Area for Refuse Containers, to allow for no provision of off-street loading area for refuse containers, where there is no area available on the existing site to provide it;
  12. Article 28-8-4(a)(1), Continuation of a Nonconforming Use or Nonconforming Characteristics of a Use; and
  13. Article 28-8-4(5)a, which allows an existing use to be replaced by a use permitted in the RN District if there is no net increase in the need for off-street parking spaces.

The Board for this case consisted of Chair Christopher Carley, Laura Scott, James Monahan, and Nicholas Wallner. Tedd Evans recused himself.

Attorney Moeckel testified. He represented the President of Keystone Management Company and the owner of 72 Washington Street. He stated they were willing to move forward with only 4 members available to sit on the case, understanding that not having a full board cannot constitute the basis of any appeal.

Chairman Carley read through the variance requests. Upon completion, he stated that essentially what they are talking about is a restaurant in a building where parking would normally be required which you do not have the ability to provide.

Attorney Moeckel stated that he understood it completely. As best as he has been able to figure out, the long rectangular building that you see in the southwest corner of the lot was built in 1955. The building was always a market. The people that he's spoken to states it goes back to the 60s and 70s when people recognized this as a store. It was one of the community stores that peppered the city before the big supermarkets came. He's been inside the building and one of the remarkable things about the commercial building is that there's still refrigeration and freezing equipment circa 1950s and apparently was still going before the last tenant left in October of 2021. It may matter to the Board that when the building was built in the 50s, it was all entirely permissible. The ordinances going back to 1930 and '41 permitted this building to be built. It didn't need off-street parking and it was 5 feet from the street line. The building today is non-conforming. Parking didn't really creep up into a zoning issue until the 60s when Concord, like many municipalities, started to make parking a part of zoning. One of the provisions in your zoning ordinance is that if you change the use, the whole property must comply with current parking requirements. There is a safety valve and that's 28-8-4(a)(5). Their problem is that because the commercial building never had any parking, as soon as the property owner changes, the use, whatever use goes in there, will automatically disqualify the building from being able to switch from one non-conforming use to a permitted use. No matter what happens, and this really goes to the argument on unnecessary hardship, whatever change in use occurs, parking under the present requirements, has to be met and we just can't do it with this property.

There is one hour parking on either side of the street Washington Street from Spring Street going southwest toward the law school. As you approach the law school, he believes that both sides of Washington there is unlimited parking but again it's on street parking. The same is true for Linden Street on what he will call the north easterly side of Linden, there is on street parking that is not time limited. This unique little area of what he will call the intersection of Spring, Linden and Washington, as it runs toward the law school, was one of the first unique zoning districts in Concord going all the way back to the 30s. We have four commercial businesses. We have the market with take-out food, which is tonight's issue, you have Checkmate Pizza across the street, you have the laundromat, and the fourth commercial business would be Washington Street Café. What is unique about 72 Washington, as compared to the rest of the properties in the zoning district. (1) It's the first one, and the only one, that has its own separate commercial building, unlike any other property in this district or this neighborhood it has its own commercial building and a residence; (2) It's the biggest lot in this neighborhood, except for the property that the law school owns. It's almost six tenths of an acre, so it's a big lot and it also has the most square footage of usable space, almost 14 000 square feet, so it's a unique lot in those respects. (3) It's unique historically because this lot was able to support a commercial enterprise and a residential use with no off-street

parking for the commercial use. (4) The building is uniquely configured with this historical refrigeration equipment and the interior is laid out for different types of refrigeration; deep freeze produce, freezers beverage, freezers; you name it so they have these unique aspects. He also wanted to point out the tension between the Table of Permitted Uses, the use of a restaurant without drive-through, and with no entertainment, is permitted by conditional use. There's a companion application filed with the Planning Board subject to the board's decision tonight on this. This little zoning district has been around since the 30s and as Concord has re-codified its zoning ordinance, it has always allowed for this restaurant in this zoning district. But, when the parking requirements became came around in the 60s, there existed this tension that on the one hand there's this permitted use for a restaurant, but you also must comply with the parking. When he looked at each one of these properties, none of them can accommodate the restaurant and the parking. Any one of the lots in the CN District would have to come to the Board for a variance. This property is the only one that can support this restaurant in a 3,200 square foot area.

They recognize that the law school owns the biggest lot in this zoning district. He contacted the law school and spoke to Ellen Muzinski looking for parking and, unfortunately for his client, those parking spaces are committed, by contract with the City of Concord, not to be used for anything but the law school. So, the option for off-site parking to accommodate this restaurant is not available. The property owner is up against the clock. The absence of any historical parking that meets the zoning ordinance requirements is a grandfathered aspect of the use. The last tenant left in October, so the property owner's back is against the wall with respect to the abandonment or termination of the non-conforming use. Mr. Tarbell will talk about the efforts to find a tenant to replace the one that left who will essentially take over the market with takeout food that's grandfathered. He hasn't been able to find any such individual or individuals so without the relief tonight, the concern is that the grandfathered use will lapse, and the building will be vacant. Nothing will ever be able to be done with this building without relief from the parking requirements.

Hardship. He's described the unique characteristics of this property that distinguish it from all the other ones. Is the proposed use reasonable? Your zoning ordinance contemplates a restaurant less than 5 000 square feet with no drive-through and no entertainment, which is exactly what the applicant wants to do in this approximately 3200 square foot building. They meet that. What is the public purpose of parking? They cannot do it here.

For this property, both elements of hardship are met. Without a variance, once the grandfathered use lapses, nothing will be able to be done with the building without a variance. Spirit & Intent and public interest prongs. They will not be altering the character of the neighborhood.

One abutter raises traffic concerns. He represents to the Board that in the companion application to the Planning Board, one of the items that they addressed was the traffic. This use to be more of a convenient store. This property should have in excess of 2000 trips per day. Trips will be a 20 maximum trips average daily trips. Washington Street is a heavily traveled street. It has been able to accommodate and support these four retails uses over the years, without incident.

Substantial justice: Without the variances, the building is going to sit vacant. That will reduce this property value which will affect surrounding property values negatively. Miles Tarbell is going to talk about the surrounding property values but this is more whether substantial justice is done. This building has been a commercial enterprise since 1955 and will cease to be used as such. No other use can go in there without relief from the zoning board.

Miles Tarbell testified. He was born and raised in Concord. He went to Concord High School. He was actually married in the Council Chambers about 10 years ago. After college, he went to Boston.

Carley asked him to move forward with the case vs. his background.

Mr. Tarbell stated that for the last 15 years he has been a Vice President at Keystone Management and worked with acquisitions financing and redevelopment. The area in the property values; the immediate neighborhood of 72 Washington Street, Keystone owns and manages seven properties including 33 units all within six lots of where the Washington Street Food Basket is located. We would not do anything that would hurt the property values of this neighborhood. The proposal to allow indoor seating with a family-owned neighborhood eatery would increase property values. From a property management perspective, having a neighborhood eatery would make the surrounding area a more attractive place to live. Another way of saying this is that demand to live near this area should increase, but supply of housing in this area is fixed because of the already developed homes and apartments in the area. There is virtually no new space to build new housing when demand increases, and supply is fixed. Rents in the area should also increase with higher rent values of the

surrounding properties. The current building is vacant and this is hurting property values. There has been public support on Facebook and many of those people are here in the room tonight. Carley suggested they submit those for the Record. In June 2021 they were notified that the Washington Street Food Basket closed. In July 2021 they signed an agreement with Jay Lee who is a commercial broker with Berkshire Hathaway out of the Londonderry Office. He was chosen because he knew the owners of the Food Basket and he would try to help sell their business and find a new tenant. He was unsuccessful in helping to sell the business and the Food Basket closed its doors in October 2021. After six months Jay was only able to find one interested prospect for the space. Kamal Shepard who owns K Sherpa Diner in Montpelier Vermont. This would be a second location in Concord subject to the variance decision tonight. K Sherpa Diner is ready to move forward with the lease and approve the space for the new neighborhood eatery. Interesting note, 72 Washington Street is Jay Lee's only commercial listing in Concord New Hampshire. If the zoning request is denied K Sherpa will move on to Plan B in Hookset or Manchester and this opportunity for Concord and the nearby neighborhood will be lost. I believe we should try hard to attract and keep businesses here in Concord. It would be a shame to lose the case for a dinner to another city. This also a great opportunity to help bring in and keep diversity here in Concord.

Attorney Moeckel has the Planning application and analogized the existing use to an average among these three; variety stores, supermarket and liquor store, because if we had used the convenience store it would have been 2441 trips a day and he doesn't think that the prior use reflects the number of trips for an eatery. Quality restaurant and high turnover sit down restaurant was 83.84 and 112 18 average daily trips per thousand. When he averaged those based on 3200 s.f. they get a low high of the prior use of 203 to 342 average daily trips and the proposed use a low of 268 to 359. We are within that window and that's either plus 65 or plus 17 but well below the 200 that would trigger Major Site Plan Review. He also reached out to the abutters because he knows that the parking is a concern. No property owner can control where the public is going to park. The historical use of this commercial building also shared the on-street parking with all the other commercial businesses there.

Carley does have a couple of questions. How many seats in the restaurant? Mr. Tarbell stated that they are looking for up to 40 seats. Attorney Moeckel said that Washington Street Café has 25 indoor seats and 9 outdoor seats. Checkmate Pizza has zero seats indoor. Outside he thinks there may be a picnic table. The prior business at 72 Washington had no seating.

Carley asked roughly how many employees do they think they will have? Mr. Tarbell is not sure. Attorney Moeckel answered the parking calculations questions Carley had. Attorney Moeckel also wanted to disclose that the latest version of the ITE manual is around \$1500. You can only do it electronically. He found it online publicly and he used the 10th edition.

Monahan stated that he thinks he was trying to argue there would be less traffic than the convenience store. Attorney Moeckel said that was correct.

Monahan said the intensity was less. Monahan asked if there was metered parking on Washington Street. Attorney Moeckel stated that there was not but there is a signed one hour though. During his discussions with Code, they raised the 1998 special exceptions that were granted by this Board in conjunction with the proposed use of the big building and in 1998 there was a proposal to change it from a single family home to a therapeutic counseling office building and this Board granted myriad types of relief on parking to allow that and then an abutter at 6 Linden Street took that to Superior Court and got those approvals reversed. Code's concern was, is this an identical application and I said it's not. It's for a different part. It's for one of the other principal uses on this property that related to special exceptions for parking for the multi-family use this relates to parking for the commercial building and so I don't think it is. It is altogether a materially different application and I wanted to disclose that because I don't know what code's going to say. But under the law this Board in the first instance gets to decide if this is a new application that's materially different from that which it has either approved or denied in the past.

Monahan asked him to talk to them about how they are going to resolve the dumpster issue. You are asking for relief, and he didn't hear from you what your solution would be. Attorney Moeckel stated that the Lyndon Street side of the building there is an old loading dock area that he believes with some yankee ingenuity could be used to accommodate some type of enclosed trash area. Also, in the rear of the building as it approaches 6 Lyndon Street, but it's over 50 feet away from the other property and he believes that the back of the building could accommodate some trash facility and keep it inside. It's vented but that would be a solution that he thinks would not be an unreasonable solution. It may require a little bit more labor on trash day, but at least it wouldn't be sitting out on the sidewalk. Monahan asked if about handicapped parking. He didn't hear a solution regarding that. Attorney Moeckel stated that there is a crosswalk that exists nearby that is a nice spot to stop and let out because it slopes down nicely there. He has no space for any parking and if he did, the first one would probably be for an accessible spot. You can park in front of the building, but that's on street parking. They can't designate that for an accessible spot.

Laura Scott asked if the building is ADA accessible. Attorney Moeckel said it is. You can come right off the street up to the door. The door is at sidewalk level. There are no steps or anything like that.

Monahan noted that they made a reference to something that the Planning Board had to look at.

Attorney Moeckel stated that because the restaurant is less than 5,000 square feet with no drive through and no entertainment it is permitted by Conditional Use permit if it doesn't effectively create a risk to the public health public health safety or welfare. Planning wanted them to come to the ZBA first.

Monahan asked if Planning would have any oversight or input on the trash issue? Attorney Moeckel said absolutely.

In favor: Megan Divorcey, 6 Cambridge Street and walks this area regularly. She was excited to see the poster go up about K. Sherpa. She shared it with the West Side Concord Connects group on Facebook and there was a lot of excitement to have a healthy restaurant walkable in their community. They were sad to see the little store leave were sad because now they have an empty building in the neighborhood. It's the excitement of knowing that we could get Nepalis Indian food and be able to walk to it. She used to live in Atlanta, George and there were pockets of restaurants surrounded by residential areas. This is a mini example of that. They have the laundromat, Checkmate Pizza and the Washington Street Deli and we also have residences, residential neighborhood and the neighbors are able to walk to it. She understands there will be takeout food which will be a large part of it.

Karen Shields, 2 Rowell right behind the law school. She walks extensively throughout this whole area. She thinks a Nepalis restaurant would be fabulous and is in support. She doesn't think that parking would be an undue burden whatsoever.

Frederick Schaefer who owns 74 Washington Street, right across Lindon Street. This property has been vacant for 9 months or so and is detrimental to the neighborhood. A restaurant, one especially that caters to the neighborhood, would in enhance the vitality of the neighborhood, give it some security, and also help maintain property values. He hopes it is approved.

Jonathan Smith, 81 Washington Street. He concurs with the last 3 people who spoke. He feels it would be great for the neighborhood. He doesn't want to see the building stay vacant. He's not concerned with parking.

Alan Hassler, 6 Montgomery Street, walking distance from the property. He concurs with the previous comments. He believes a restaurant will add significantly to the diversity of the area as well as addressing the vacancy that has been there for some time. It is a highly walkable, dense residential area so the lack of on-site parking is nothing new.

In opposition:

Paul Savage, 6 Lyndon Street, right in the back of the store. He submitted written opposition. He wanted to outline their position. Additional parking in that area will be burdensome, especially to his property. The impact to their property is significant. There will be parking at night. In the snow Lyndon Street is not plowed well. Carley asked if he had a driveway. He said yes. How does parking have an influence on you directly. Mr. Savage said it would be an impact as there will be more people parking on the street and it will be difficult to navigate that street. This will diminish his property values. Unnecessary hardship is that this property is overburdened. He named the commercial uses in the area. There is no parking for this new restaurant, which is added there. Carley said the restaurant is allowed by right. Mr. Savage stated but under the Ordinance they needed 43 or 44 parking spaces. They have had concerns and problems with the trash. The concern would be if you don't have adequate disposal area for the food and restaurant waste. They literally live right behind that building. He believes it won't do substantial justice due to the impact on his property.

Jason Thibodeau, who owns 47 Washington Street which contains the six family dwelling as well as the laundromat.

Laura asked where his building was and he showed her the location on the map.

Mr. Thibodeau has empathy for the property owner. The parking issue is the crux of the matter. There are 13 variances required for what they would like to do. That raised a red flag. The main concern is the parking for the existing businesses and the neighbors. For him specifically, his tenants need on-street parking. He has no parking at his building at all other than one little strip between the building for himself and Checkmate Pizza. The other 5 units need the on-street parking. Two or three of the cars parked on Lydon Street on the right-hand side. So, they will be directly affected by the restaurant's need for that parking spot for the duration of the year while it's in use. It is a hardship for his tenants. They will have to spread out. Regarding his laundromat, it's mostly used when people come drop laundry off, then they either wait in their car because there is no parking lot, or they leave and come back for it. If there's a restaurant in place and people are parked there for an hour or more, it's going

to basically lock up that intersection and then my customers will have to park further away from the laundromat. They'll eventually not be my customers anymore because they won't be able to lug their two or three loads of laundry from a block down the street to my laundromat. That is his largest issue. Everything else has been repeated and I don't want to repeat what their concern is. His other concern is the dumpster as well. Lyndon Street is extremely narrow. It is parking on one side. It is a two-way street. It is impossible to move anything around in there, getting a dump truck or garbage truck to maneuver there to pick up a dumpster is impossible. It would have to be hand loaded into a truck. That is the basic outline of his concerns regarding the parking variances. It's a hardship on those in the immediate proximity of the property.

Monahan asked if there would be any parking restrictions in the area? Is it 1 hour parking out there? Mr. Thibodeau answered that from Rumford Street where the Washington Street Café is going down the hill towards Main Street, at least past Lyndon Street, maybe it's Merrimack Street, that entire stretch is posted one hour parking.

Laura Scott asked if there is no meters? He said no meters there. But parking for one hour.

Monahan asked if his tenants could park after 7 o'clock. Mr. Thibodeau said that his tenants, out of respect for him, do not park in front of the laundromat. He can't enforce that, but they just do that as a kindness for me.

Monahan asked but on Lyndon and Cambridge Streets, they do not have time limits. Mr. Thibodeau said that was correct, there is no time limit on those streets as well as North Spring Street.

Tracy Boisvert. She and her husband live at 8 Lyndon Street, which is 2 lots past this lot in question. They appreciate the applicant's desire to rent this space. They would like to see it rented too. They also think the idea of restaurant would be great if it didn't have this lengthy list of required variances. They are particularly concerned with the trash on Lyndon Street. By allowing this variance for trash to continue to be used on that side of the street. There is a little bunker, on the City sidewalk, which historically been used for storing trash. It has always been an enormous mess. During the time that the Food Basket was in that location trash was spilling out of it onto the street. We would hate for a new business to go in there that is producing more food waste and for it to be out on this side of Lyndon Street. We would ask that this particular concern about that particular variance being approved would be looked at and ask that if this proposal or some variation of it were to go through that trash be contained within the site as opposed to on the street. They have lived there for 27 years, and Lyndon Street is two-way traffic. There's parking on one side. She never pulls out onto Washington Street from Lyndon Street because that intersection is dangerous. This will cause additional traffic pressure on Lyndon Street.

Rebuttal by Attorney Moeckel. Spring Street is no parking on the south side. The ordinance has specific requirements and they do not meet the safety valve because of a building that was built in 1955 on a lot that was created before the civil war. The house is one of the oldest houses in Concord. They are stuck with the size and location of this property. The applicant meets the hardship requirements.

#### DECISION:

Carley reviewed the testimony as given.

Laura Scott: She appreciates the time constraint that Mr. Tarbell's is under. The loss of the grandfathering shouldn't make the Zoning Board have to grant anything. She wanted to make sure that everyone knows that is not one of our criteria nor is the fact that Nepalese food is delicious, and we'd love to have it because it's not a variance for the specific owner and user it's a restaurant so it could be a pizza place. So as much as the neighborhood may want the specific restaurant that isn't in front of us. It's the use, not the type of food that's going to be provided. She wanted to put that out there. It is tough because it is an existing building in a fully developed neighborhood that has uses that are allowed. If it wasn't going to be sit down and it was going to be the continuation of the existing use, the neighborhood they wouldn't be here before us. She thinks there's going to be less traffic but it's going to be there longer. People are going to view that differently. She has concerns about the handicap parking as well as the trash. Those are two issues that she's probably not willing to grant a variance for. She thinks the applicant may have to come up with some sort of solution. She has concerns about restaurant trash, which is a little different than convenience store trash. It is an opportunity to be creative and figure out a way to make it work on the site. Those are her thoughts.

Jim Monahan: He will echo much of what Laura said. He thinks that the fact that they'll lose their grandfathering is a unique and colorful hardship, but he's not sure that's something they want to rush to. Hearing from the neighbors and it's a walkable inviting neighborhood but it must be inviting for everyone. He doesn't think they can just be dismissive of the handicap requirements. In the past, for other applicants, they have found a way to get to 'yes we don't have to be completely rigid' but they can't just simply say they are going to ignore those requirements and make it a less welcoming community. He's comfortable with the other provisions, not number five. He will be voting against that. The trash he doesn't disagree with Laura but he's hoping that

Planning Board can come up with a solution there. Alternatively, they could just deny that as well and invite the applicant to come back and be creative with them.

Nick Wallner: Agrees with most things said so far. The characteristic of the neighborhood is it's basically a limited parking situation that's been there for a long time. The commercial properties have managed to survive without the parking based on what's available, so he doesn't think this is any different. He's persuaded this could be less traffic, 40 capacity probably translates to no more than 20 cars, if people come in as couples. If it's a foursome probably less than 15 cars. He is a little concerned about the trash. In terms of the handicapped parking, he thinks that's a characteristic of all the commercial businesses on Washington Street. He doesn't know if there are a mobility challenged parking spaces on Washington Street for any of those commercial businesses, so he's not as compelled to deal with item number five as two of our members are.

Carley: It seems to me that in terms of the Master Plan notion, and he thinks it is of the Master Plan now of the city being a collection of little villages, this is one of them and there is a small amount of commercial activity that goes on in a residential scale neighborhood and that he thinks is a desirable thing. He suspects that people live in that neighborhood partly because they like to be near that sort of thing. So, he doesn't see it as inconsistent with the character of the neighborhood. On the hardship side you can certainly argue that this building, being what it is and where it is, has no parking so there's going to be a hardship somewhere for some use so it's a question of is this parking issue a do sufficient damage to other people so that we should discourage it? He's not persuaded that it does. As Nick pointed out it's not a huge number of automobiles as it is for a limited amount of time during the day. I'm not dismissing the neighboring property owners concerns about their businesses and parking but they're taking advantage of exactly the sort of forgiveness that we're being asked to grant the restaurant. Which is normally any businesses would be required to have some kind of parking. He asked the Zoning Administrator if that was correct, and Ernie said yes. He's getting religion on trash. He totally missed that item about refuse containers. He does think that's important because trash from either convenience store or a restaurant can be an attractive nuisance and it's not something that you want rattling around the neighborhood. He would be inclined to support pulling that item out of any approval that we chose to grant with the idea that it really needs more scrutiny, and it may have to come back to the Board at some point. They need a proposal not just a suggestion that it's possible to deal with the trash in an acceptable way. Handicap parking, he's a little bit more ambivalent. Obviously, you want to provide handicap parking. On the other hand, when you're talking about street parking that's not dedicated to any business the practice around the city has been to put handicap parking spaces in from time to time and place to place on the street and maybe that's something that the city ought to consider doing. He doesn't know that they can lay that at the feet of the applicant. In this case he thinks it's something that ought to happen but he's thinking of the parking spaces downtown, for example, that are dedicated to handicap in front of the library, that are dedicated to handicapped but they're public spaces. They're just on the street, so that's how he sees it which he thinks is a long-winded version of pretty much what everybody else said with a couple of variations.

Monahan: When applicants come forward for change of use it gives them the opportunity to make that change and correct it. We're not walking up and down the streets of Concord insisting that things become more accessible immediately, but this is our opportunity to correct it. So, he's uncomfortable not taking that opportunity, particularly when the applicant just didn't come forward with any sort of a solution. He thinks that's more important than finding a solution on trash. He doesn't disagree that if you're on Main Street where there are dedicated handicap places it provides for that type of accommodation. He doesn't know how the city and the applicant could work something out. There's a lot of activity whether it be the law school, these other businesses, or commercial properties, the lack of handicap parking is something that should be addressed rather than just dismissed.

Carley felt that it was a point well made. If they single this item out, as with the trash, and ask the appellant to make a little bit more effort to deal with it, they could still come back to us and say here's what we came up with we've got a partial solution or no solution, but we tried everything we could think of.

Monahan noted that they've done that before.

Carley: The areas where the Board has reservations are the trash, which was item 11 and the handicapped requirement item 11.

A motion to approve all but those two. Carley noted that would be items 1 to 4; 6 to 10 and 12 and 13. There is no #3. Wallner seconded that. Motion carries by a unanimous (4-1) vote.

Carley went on to Items #5 and 11. The Board has a couple of options. They can simply deny or they could Table those.

Monahan moved to Table items 5 and 11.

Carley noted that would mean they are essentially dismissed without prejudice. They're not granted which means they have not yet fulfilled the requirement.

Scott second the motion to Table them until the August meeting. If they do the August meeting they don't have to re-notice. If it's a date certain.

Monahan will not be at the August meeting.

Scott won't be at the August meeting either.

Carley thought they should do it for the August meeting and if they want to request a continuance at that point they can do so. That way if they feel they can sort this out by August then they don't lose another month.

Monahan asked if it would be our expectation that the Board would receive, if they do come forward with an alternative solution, they would see it ahead of time. Then when he comes back from vacation, he can endorse it.

Scott said they would have to submit it so it would be on the agenda.

Carley asked if they had yet had a motion. A motion to Table 5 and 11 was made by Monahan. Scott said it was made to continue the requests. Monahan said it was a motion to a date certain, which is next month, the August meeting. Seconded by Scott. Unanimous vote.

**35-22 19 Ridge Road; RS-Single Family Residential District; Property Owner-WRAIGHT SIMON C REVOCABLE TRUST:** Applicant wishes to add an addition of +/- 70 square feet to expand a kitchen by extending the existing single family dwelling, which presently encroaches into the side setback by +/- one foot. The applicant seeks the following variance:

1. Article 28-4-1(h), Table of Dimensional Regulations to allow the addition to be constructed 14 feet from the northwesterly property line, where 15 feet are required.

Simon Wright testified as well as his wife Anna Krasinski. They would like to have a small addition to their property located at the dog leg on Ridge Road. They would like to expand and upgrade. Ms. Krasinski said there wasn't a time for them to have discussions with their neighbors. They have now reached out to all of our neighbors that we share property line with. They spoke with the Mertz's gave them a letter in support of this renovation. She submitted the letter to the Board. Their neighbor on the other side BJ is on board with their plan. They spoke with Ardinger's and the Nelson's. The Ardinger's biggest concern was with whether the Mertz's had any issue with it. The Nelson's came over and looked at the plans and didn't have any issues with it.

Carley asked if the house itself is now in violation of the setback. Mr. Wright said that was correct.

Carley: The addition that you're proposing go all the way out to the edge of the existing house or does it stop short of that it.

Mr. Wright said it goes to the edge of the existing house but it doesn't encroach further. They are just trying to square that corner off.

In favor: none.

In opposition: none.

Comments from Code Administration: none.

DECISION: Carley closed the public testimony portion of the hearing and reviewed testimony heard.

A motion to approve the request was made by Wallner, seconded by Evans and passed by a unanimous vote.

**38-22 149 & 175 East Side Drive-Havenwood Heritage Heights (retirement community); RM-Medium Density Residential District; Property Owner-UNITED CHURCH OF CHRIST RET COMM INC DBA**

**HAVENWOOD HERITAGE HEIGHTS C/O T JUDD:** Applicant proposes to redevelop portions of the retirement community, as represented in the submitted preliminary planning documents, which involves demolition, then constructing new buildings in a different configuration than the original layout and seeks the following variances:

1. Article 28-4-5(d)(3) Building Dimensions and Separation, to allow building separation of no less than 30 feet, where 40 feet are required;
2. Article 28-4-1(h) Table of Dimensional Regulations, to allow lot coverage of 65%, where 20% is allowed.

The Board could not locate the case material and went onto the last case.

**34-20 Michael Chapman for an extension of Case 34-20. 27 Fayette Street.** The board reviewed the material.

A motion to approve the request was made by Wallner, seconded by Evans and passed by a unanimous vote.

**38-22 149 & 175 East Side Drive-Havenwood Heritage Heights (retirement community); RM-Medium Density Residential District; Property Owner-UNITED CHURCH OF CHRIST RET COMM INC DBA HAVENWOOD HERITAGE HEIGHTS C/O T JUDD:** Applicant proposes to redevelop portions of the retirement community, as represented in the submitted preliminary planning documents, which involves demolition, then constructing new buildings in a different configuration than the original layout and seeks the following variances:

3. Article 28-4-5(d)(3) Building Dimensions and Separation, to allow building separation of no less than 30 feet, where 40 feet are required;
4. Article 28-4-1(h) Table of Dimensional Regulations, to allow lot coverage of 65%, where 20% is allowed.

Carley read the request into the record.

Testified: Attorney Jeremy Eggleton with Orr and Reno. He represents Havenwood Heritage Heights. Also available is Mike Palmeri who is the CEO of the complex and Erin Lamber who is the engineer of the project. Also, Marcia Camp is in the audience to offer an opinion that is part of your packet. He described the packet he submitted that you do not have. He also submitted materials from the file related to a 2013 variance granted for the same relief regarding building separation and substantially the same relief regarding lot coverage. Back in 2013 Heritage Heights approached this Board and wanted to do the same thing but on the north end of this very large property. In order to do that, if you look at the portion of the property that we're talking about is mostly beneath the sinuous driveway that you can see at the bottom part of the lot. The variance from 2013 was regarding another portion of the lot. They want to make this portion of the lot the same as the relief received from the 2013 variance. The opinion from Marcia's report was that there would be no detrimental impact on property values.

Erin Lambert showed the proposed layout. They will basically have one through road which you see in gray. They are going to keep that but the buildings are oriented around a parking lot. While it makes it easy for them to have parking spaces it's not easy for snow plowing or emergency vehicles. It creates dead end stubs. They broke it out into phases 1 through 6 which is how Havenwood can accomplish this while also accommodating their residents who live there. Phase 1 was constructed in 2021. That's already done. They are here to discuss Phase 2 through 6. They would like to put a new through road. They want to build the houses fronting on that road. Phase 2 would be first then phase 3. Then they would build the stub and bring the road and the utilities through. This will be better flow for the residents, emergency vehicles, and pedestrian connectivity. Each of these houses, like the north end, will have a garage and a basement. That is one of the reasons they are here.

Attorney Eggleton spoke regarding the 40-foot restriction on houses on the proximity of buildings that exists under the ordinance that's also what existed on the north side same zone same configuration. They obtained a 30 foot separation from the Board before. Of the 18 buildings that we are proposing to accomplish in this south redevelopment 13 of those spaces will require that variance the other five will not. Erin Lambert spoke with Paul Sirois of Concord Fire. The Fire codes do not require 40 foot separation. All buildings will be sprinklered.

Attorney Eggleton: The addition of the new drive is coming through the middle is a substantial component that will allow all of the buildings to essentially have street facing access. Life safety vehicles will be able to access buildings from the street side.

Hardship: The hardship criteria that justified the granting of the variance request in 2013 are precisely the same. In 2013 what Havenwood argued was that the tract itself which, comprises not just the portion we're seeing, but the large totality that includes the north section is transected by three zoning districts. On the west side as, you have a bluff overlooking the Merrimack River. It is a uniquely sized property. It is a very large lot. A lot of the lot is open space right now. The RO district on the top end and

side of the lot adds a substantial amount of open space. They are not invading that space. Since 1967 this lot has a continuing living on it. The concerns regarding to allow houses to maintain some separation and some privacy and then to allow life safety access. The lot is separated from all houses around it. The total number of buildings will increase by two. From 16 to 18 on the plan that we've submitted. The number of units will actually be decreasing. Erin Lambert testified there are currently 81 and there will be 74.

Carley asked what the current lot coverage was. Erin Lambert answered it is currently 48 percent. They are going for 65 percent. They've asked for a little bit of leniency because we came to the board before the plans the buildings are fully designed and whatnot but yes it will be in that range.

Attorney Eggleton pointed out the breakdown on the plan. It reads 50%. It reflects the fact that these are the conceptual plans. In 2013 they were allowed to and did count a portion of the RO zone into the calculation of lot coverage.

Carley asked how far the buildings were apart. Ms. Lambert said 29 to 30 feet. Some are more.

Monahan asked if the new units are larger than the existing units. Ms. Lambert said they are. They are a mix, one, two or three bedrooms. Each has a garage and basement. Monahan asked about square footage. Ms. Lambert said 1200 to 2000. Mr. Monahan asked if they are all single level? Ms. Lambert said everything throughout the campus is single story.

Monahan asked about a vacancy rate now. Mr. Palmeri stated it was about 85 to 90%. They should be much better to be a viable business. These are these units are outdated. They are 30 years old. They're not handicapped accessible, some of them have bathtubs. What they did on the north end and the new south end last year is really remarkable. They are award-winning units.

Ms. Lambert: Lot coverage, they are all are looking to reduce our impervious cover and so one of the reasons for that is storm water runoff. They significantly decreased the runoff to the city system. They will have an increase in impervious but a decrease in runoff. The landscaping will be beautiful.

Attorney Eggleton: With respect to the reasonableness of the proposed use, given the size of the property, given the fact that there is an existing use which has in some cases building separations that are smaller than what we're actually requesting and planning to build the enhancement that we're proposing is reasonable in that it actually brings in some cases the development closer into conformity with the ordinance than it presently exists. With respect to the value of surrounding properties, he submitted Marcia Campanella's report. She is available and can give a brief presentation if you want to hear it, but she's a certified general appraiser here in New Hampshire. She testifies in court on a regular basis on these issues and has done extensive modeling of the impact of developments of all kinds around the state on property values and what she has concluded in this case is that there won't be any detrimental impact on the related property values and our submission on that point is part of the record already.

Substantial justice is done in this case because there's going to really be no substantial noticeable change from the perspective of the rest of the neighborhood except for the fact that it's going to look nicer and be more like the newly redeveloped north end.

The benefit to the applicant is overwhelming in terms of the ability of the applicant to offer modern units to seniors who are looking for independent living here in Concord.

Spirit of the Ordinance being observed. One of the purposes of article 28-4-5(d) is to ensure the compatibility of this development with other existing adjacent developments and that is exactly what this request is seeking to do. In fact, there might even be an argument to be made that we already have a variance to build buildings that are separated by 30 feet but we're here you know for purposes of completeness and transparency and to ensure that what we're proposing now remains compliant subject to the variance with what the board has allowed us to do in the past. The lot coverage portion also has the purposes of preserving open space. What this project will allow us to do is enhance the exterior environment of all these units by allowing walkways that allow owners to visit each other. There's no general public access.

Contrary to the Public Interest: The Attorney who spoke regarding 72 Washington Street recited the standard which is whether the variance unduly or in a market degree conflicts with the ordinance such that it violates the ordinance's basic zoning objectives. That simply can't be said about this project. They are replicating a variance that's already been granted with incredible success and they are just asking that it be granted as well for this southern portion of the lot.

In favor: Thomas and Linda Brochu. They have lived on that property for many years. He can tell you that the one that was done a few years ago we did not realize the whole building shimmered from the ground. All wanted to say was the ground, the septic tanks, the boiler in the basement, all those things can be impacted. The whole house shimmered and shook. They are

asking to go to 65%. Is this due to a financial windfall.

Carley asked where his house was. Mr. Brochu said 17 South Curtisville Road right across the street. Carley asked if the tremors in the ground stopped when the construction stopped. The Brochu's said yes. Carley explained that things happening during construction the Board doesn't have a say in. Mr. Brochu said his property is negatively impacted. Carley explained the storm water run off and septic tanks, etc. and how they worked as explained by the engineer.

In opposition: none.

Comments from Code: none.

Rebuttal: Attorney Eggleton is not sure they can tie the redevelopment of the northern section of the Heritage Heights campus to ongoing tremors that they're experiencing. The lot coverage parameter is 40% for this district. They were given a variance for 48% for the northern section.

#### DECISION:

Carley reviewed the testimony as given.

Evans: The duplication of effort. Agreed

Wallner: agreed.

Monahan: They checked all the boxes.

Scott: She think that the lot coverage issues being mitigated by the fact that they're going to retain the storm water on site so even though they're increasing their lot coverage, it'll be better than probably what's happening there now where it's going into the city system. For the building separation she knows it's a little antiquated because you know zoning doesn't meet fire code doesn't mean building code requirements, but she think that's a reasonable request that you know 30 feet. She's in favor.

Carley thinks that what he's hearing is that the existing configuration and the section that we're talking about tonight is obsolete and what they want to do is bring it into contemporary standards so they can continue to do what they want to do and (a) in existing configuration being obsolete and not usable we have considered to be a hardship in the past. They also heard concerning the pavement being required for mobility for people with disabilities and the ordinance specifically permits variances for that so he'd be inclined to vote yes.

A motion to grant the variances was made by Monahan, seconded by Scott and passed by a unanimous vote.

May Minutes: A motion to approve was made by Wallner, seconded by Scott and passed by a 4-0 vote with Evans abstaining.

Motion to adjourn meeting Scott, seconded by Carley.

*Respectfully submitted by  
Rose M. Fife, Clerk*