

City of Keene
New Hampshire

ZONING BOARD OF ADJUSTMENT
MEETING MINUTES

Monday, June 5, 2023

6:30 PM

**Council Chambers,
City Hall**

Members Present:

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

Staff Present:

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

Members Not Present:

All Present

I) Call to Order

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

II) Minutes of the Previous Meeting – May 1, 2023

Chair Hoppock asked Ms. Taylor to go through her proposed changes to the meeting minutes.

Ms. Taylor stated that line 60 of the May 1 minutes state, “*Mr. Phippard continued that he was contacted through his attorney,*” and she is not sure whom that refers to, but it does not refer to Mr. Phippard. She continued that it is possible that it refers to Mr. Hanna, but they need to clarify that. Mr. Gorman stated that he thinks it is the Putnams’ attorney. Ms. Marcou stated that she and the minute taker can listen to the audio recording, make the correction, and the Board can adopt the minutes at the next meeting. Chair Hoppock agreed.

Ms. Taylor stated that she believes “*Mr. Ryan*” on line 564 should be “*Mr. Owens.*” His name is Ryan Owens. She continued that line 683 currently reads, “*Mr. Jackson stated that he will try to respond to the individual points,*” and she thought he said he was *not* going to respond to the individual points, but to respond generally, as the rest of the minutes seem to indicate.

Chair Hoppock asked if anyone else had comments on the minutes. Hearing none, he continued that if there are no objections, they will table the vote until next time.

Chair Hoppock stated that the Board also has draft minutes from the special meeting held on May 16, 2023.

Ms. Taylor stated that she has three suggested edits:

Line 166: the minutes currently state “*Mr. Chartier replied that they are looking to make this lot more appeasing,*” and she thinks it should be “*more appealing.*”

Line 193: “*Mary Jane Doody of 185 South Lincoln St. stated she abuts one of the abutters.*” She actually abuts the property, and said that, not that she abuts an abutter. Mr. Gorman replied that he thinks Ms. Doody had stated that she is one of the abutters. He continued that she is, in fact, an abutter. Chair Hoppock agreed that the minutes should reflect that Ms. Doody is an abutter.

Line 225: “*Because the property in question has right-of-way to his driveway*” should read “*...has a right-of-way to his driveway.*”

Mr. Gorman made a motion to approve the meeting minutes of May 16, 2023 with the amendments. Chair Hoppock seconded the motion, which passed with a vote of 3-0. Mr. Clough and Mr. Welsh abstained, having not been present at the meeting.

III) Unfinished Business

Chair Hoppock asked if there was 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 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.

Chair Hoppock asked staff to give background information.

Mr. Hagan stated that 32 Optical Ave. is located in the Industrial Park District. He continued that the Industrial Park District is “*intended to provide for relatively low intensity manufacturing and research and development firms that are employee intensive, clean in nature, and promote an attractive industrial park environment. Service operations and sales activities are excluded from this district, except for minor sales that may be accessory to the primary use. All uses in this district shall have City water and sewer services.*” He continued that this is a 10.84-acre lot, which currently has a 52,000 square foot manufacturing building and a 168,000 square foot area paved. There are no ZBA applications on file.

Chair Hoppock asked if the Board had questions for staff. Hearing none, he asked to hear from Jim Phippard.

Mr. Phippard stated that he is here on behalf of Samson Associates, LLC, the owners of the property at 32 Optical Ave. He showed the plan and oriented the Board as to the location of the property. He continued that the existing manufacturing facility, Samson Manufacturing, is a gun manufacturer with 124 parking spaces on site. They have an additional land area that is currently undeveloped that is mostly an open field, flat, with sandy soils and has been that way for many years. The total property is 10.84 acres. Samson Associates proposes doing something on the southerly portion of land, having talked about creating a 4-acre lot, subdividing a separate parcel from the main parcel. That would leave the main parcel 6.75 acres, which meets all the zone dimensional requirements for the Industrial Park District. Samson Associates would like to create an electric vehicle (EV) charging station at the frontage of the property along Optical Ave and leave a placeholder area for storm water detention, and at the rear of the property, they propose self-storage units.

Mr. Phippard continued that (Mr. Samson) has been looking since approximately 2018 to create some additional use on this property to best utilize his land; it has been quite a challenge. Once or twice a week, he (Mr. Phippard) is contacted by realtors, developers, and companies who are interested in locating in Keene, asking about available sites and about zoning. Half a dozen (people/companies) have been interested in the area along Optical Ave. that used to be a drive-in, which there is a proposal now coming forward for this lot. He has made them aware that there is an area of roughly four acres available. The problem has been that the Industrial Park zoning is quite restrictive and not like the Industrial Zone or the Commerce Zone. The Zoning regulations only list four or five permitted uses. As time has gone on during the 40+ years he has been doing this work, land uses have changed, and companies' needs and requirements have changed. When the Industrial Park was created in the 1950's, there was a need to create large, flat lots for big buildings where companies could move in and have many employees and a lot of parking, and access to the highway to accommodate their employees and deliveries. It was successful as Markem, MPB, American Optical, and other corporations existed there. Today, some of those companies are gone, and many of those companies are changing. The former American Optical space is office space for ES3, a division of C&S. He worked on that property and came before the ZBA to get a Special Exception to allow that office use. That is an example of the changes that have occurred.

Mr. Phippard continued that they are at that point again, where he is not able to bring these companies to Keene because Keene's zoning does not accommodate them without a Variance. Most of these companies are large. One is an international company, one of the largest companies in the world. When he tells them they need a Variance for their use to locate in this area in Keene, they are not interested, and are off to other towns. They do not want to bother with (a Variance). Keene's restrictive zoning is affecting Keene's marketability for companies looking at the area.

Mr. Phippard stated that his client needs two Variances to accommodate the proposed use on the property. He continued that the EV charging station is not defined as an industrial use in the

Ordinance having talked about it at length with John Rogers (Zoning Administrator). It is a “vehicle fueling station” and just happens to be an alternative fuel – electricity, rather than gasoline or diesel. There is a tremendous difference between a gas station with gasoline and diesel and an EV charging station. Most gas stations in the Keene area have convenience stores, drive-thrus, or some other use with them. The only dedicated, single fuel station he can think of is Cheshire Oil off Rt. 101. They only sell fuel; they do not have a store or anything else associated with it. The EV charging station does not have any of that. They want the EV charging station open to the public, knowing there are not yet many EV charging stations in Keene. The City has a public station available in the parking lot areas near downtown, and three of the car dealers have EV charging stations, primarily available for their customers. Someone traveling a long distance in an electric car, and needing to charge along the way, can go to some of the EV chargers that sponsor these, and they will tell you where these charging stations are located. His client would like this to be one of those locations, being close to Rt. 101 and thus convenient.

Mr. Phippard continued that it would have at least two types of chargers, level 2 and level 3, which are the faster chargers. At a gas station, filling up your car takes five or ten minutes. This is not that. Plugging your EV in for the quick charge, which comes with a higher fee, takes about half an hour. That is probably the quickest turnover, depending on what type of EV you have, knowing there is a big difference between EVs. For the longest time, it was Tesla, and if you did not drive a Tesla, you could not plug in your car and charge it because it would not fit as Tesla’s plug was proprietary. Now, they have opened their market and offer the original plugs as well as newer ones that fit models other than Tesla. A customer not going for the more expensive quick charge will be plugging their EV in for three to six hours. This is not like a gas station, where you drive up, fill up your tank, and drive away; it does not work that way. There is a big difference, and he wishes the Zoning Ordinance reflected that. There is increasing political pressure to (transition) to electric cars, and there needs to be a support system to allow that. That will not happen fast enough unless (people) do not need a Variance every time they want to locate one of these (charging stations) in Keene.

Mr. Phippard stated that the rest of the project his client proposes is self-storage units, wanting a low-intensity use. They could not find a user that did manufacturing, or research and development for this site. After four years of searching, they are now trying for a Variance to allow self-storage, which is a very low-intensity use. He has worked on projects for thousands of self-storage units in Walpole, Keene, Swanzey, Fitzwilliam, and Troy, NH. Thus, he knows how it works and how to make it fit a site. It takes about a year to fill the (self-storage units), and then the traffic goes to almost nothing. He talked with the owners of local storage units on Dunbar St. and Bradco St. There are a couple units available on Dunbar St., but Bradco St. is full, they will put your name on a waiting list. Swanzey is full and has a waiting list. Walpole is about 80% full and will probably be full by the end of this year. The traffic is busier when they are trying to fill units, with people who come and go as they are looking at units. Once the units are full, (it is different). Dunbar St. has over 100 units and they get about six cars a day. Bradco St. has almost 200 storage units and gets about 10 cars a day. People just do not come and go every day; it is not like a commercial use. The Zoning Ordinance recognizes self-storage units as a commercial use, not as an industrial use and he

thinks that is a mistake. Mr. Rogers knows he disagrees with it and that he thinks of it as a “light industrial use.” It is industrial in nature because it is storage. It is not commercial, because you cannot go there and buy anything since (self-storage units) are not selling products. People who go there, go to their own storage unit where they have furniture or whatever they are storing, which is different from a traditional commercial entity. It is not like an office or retail store. He thinks that is significant.

Mr. Phippard stated that he will go through the criteria.

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

Mr. Phippard stated that he believes this is true, because there is a continuing need for more units. He continued that Keene does not have a lot of land for anything. On a regular basis, he receives calls from national companies that build storage units all over the country – they are looking for anything and everything, because there is still such a demand for self-storage units. After the first year, the units are full, and people tend to stay there for 3-17 years. Once established, these businesses generate a lot of money as they are inexpensive to build. A new industrial building like Samson Manufacturing today would cost between \$300 and \$400 per square foot. Storage buildings are between \$30 and \$40 per square foot, if unheated. Many developers look at these as placeholders. If they can put a use on a (property) that will pay for itself and cover the taxes, and in a few years a business comes around that is a better user/better generator for income, they can tear it down. They have reserved it, created the pad, brought in utilities so it is ready to go. It ends up being a very good investment.

Mr. Phippard continued that he believes self-storage units in this location would be a very low-intensity use, generating less than a dozen cars a day once the units are occupied. The Institute of Transportation Engineers says that a large storage facility like this would generate about 90 cars a day. Maybe when it is first built and available to lease, but once occupied, there is no way (it is that many); he has not seen that. He has worked on at least a dozen of these sites and has been in contact with the owners. The traffic goes down to almost nothing, making it one of the lowest intensity uses you can have and would be compatible in an area like this. It will not overtax the roadway, is in close proximity to Rt. 101, so people can drive on a state highway to get to it, instead of using the streets through town. It is not like an entity with 200 employees, which would generate a high volume of traffic during peak hours in the morning and evening. This is a uniformly low-intensity use.

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

Mr. Phippard stated that part of the Industrial Park District, as Mr. Hagan read, is low intensity uses, manufacturing and research and development. This is neither of those, but it is a low intensity use. He believes it is industrial in nature, as he described. As long as it is properly screened and constructed, he thinks it is an appropriate use and meets the spirit of the Ordinance. The self-storage units would be surrounded by six-foot chain-link fencing, primarily for security. Access is via a

gate controlled by a keycard where the keycards record when a person enters and leaves. The units would be screened along the frontage of Optical Ave. with arborvitae hedge. These are only single-story buildings, 10 feet high at the eave and 12 feet high at the ridge, except for the wider buildings, which are 18 feet high at the ridge. They are not very visible to start with, and with an effective, quick-growing hedge that starts at six feet high, this will not even be visible to traffic on Optical Ave. People will not even know it is there unless they read the sign and go look. He thinks it meets the spirit of the Ordinance.

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

Mr. Phippard stated that substantial justice would be done because this would enable the property owner to have a reasonable use of his property with little to no effect on the neighbors/abutting properties. He does not believe there is any public benefit to denying a Variance where he does not have a significant negative effect on any of the abutting properties.

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

Mr. Phippard stated that usually, abutting properties become affected when a use goes in that is high intensity, has a lot of lighting 24 hours a day, or generates noise or fumes. He continued that this would not be doing any of that as traffic is very low, lighting will be full cut-off LED fixtures, wall-mounted only, no pole lights. The lights would be on timers, reducing to 50% after 10:00 PM, which the City Ordinance requires. The owner is willing to go to motion sensor lights if that would make the neighbors and boards happier, as this proposal would have to go to the Planning Board if the Variance is granted. The factors that primarily affect surrounding property values would be minor, would be addressed, and would not have a significant effect on property values. This area is large, paved, and has several buildings. The site's elevation is 487 at the rear and 483 down at the road, so it slopes naturally away from the residential area at the rear. That is why the plan has a large storm water detention area. They [the values of surrounding properties] will not be affected by runoff, lighting, or traffic. He does not think they will be affected by noise. He thinks this is a reasonable use in this location.

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.*

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 this is one of the toughest issues, when they are talking about a use Variance, which is what they are talking about for both the EV charging stations and the self-storage units. He continued that as he stated in the background information, Keene's regulations are considered restrictive. That is not something he is personally saying, it is something he hears from customers/clients who are looking at the city and saying they want to build their business here. One client, just two months ago, [wanted a] 50,000-square foot building but cannot go here without a Variance. He told the client he thought he could get it, since the client is a big enough user, with good, high-paying jobs. However, the client's primary use is not manufacturing or research and development, and just does not fit under the Ordinance. This client is now talking to Swanzey. Another client wants to build a new building and has been in Keene for 60 years. He wants to relocate to this portion of the city and cannot do it without a Variance. That is enough to discourage these clients.

Mr. Phippard continued that he has learned throughout his career that industrial users want sites that are ready to go and want to know that the City of Keene will work with them, as they build their \$15- to \$20-million facilities. He tries to assure these industrial users that the City will work with them, and that they do want these users to come to Keene; all they have to do is get a Variance, which he can do. He is in front of the Zoning Board too many times. He has been successful over the years. Staff tells him he has a 96% approval rating, which may or may not be accurate. He encourages his customers to see the process through, to come talk with City staff, and meet with the City Manager. The company (he is talking about tonight) has been in the area for many years and has been on Optical Ave. since 2016. He is trying hard to stay here and wants to utilize the rest of his property. This (self-storage units) would be a rather benign way to do it, without interfering with abutters or overtaxing the road system, but he needs a Variance. This argument, that the City's own Zoning regulations become a special condition that affects a property, is true. He is not personally making it up; he hears it from other entities that are trying to come into Keene. He hopes the Board recognizes this.

Mr. Phippard continued that he understands that if the Variance is not granted, then they have to try to get the City Council to fix the Zoning again. For two years, he served on the committee when the LDC was being redeveloped and spent a lot of time providing comments and input. As time went on and there was increasing pressure to get something on paper so the new regulations could be in place, the attitude became, "Well, we'll fix it later; let's just get something approved and in place." Staff has been doing that. Mr. Rogers has been diligently trying to clean up the changes, gaps, and conflicts in the rules as they were developed, but it still leaves him (Mr. Phippard) in this situation where he has to say, "I'm sorry, Mr. Client, you can't come to this site without a Variance, because of the existing regulations. Maybe [the City] will fix it next year; I don't know." At least he can go for a Variance, make everyone aware of it, and hopefully get it. That is his argument for the special condition that has been created by the City's regulations. He knows one (ZBA) member wants it to be a unique situation for this one property. It affects actually about three properties in the Industrial

Park District. He feels that is unique and a special condition, which is hard to overcome. It puts a burden on the landowners to carry these properties year after year, because this restriction prevents this type of use. As uses keep changing over time, he sees more and more situations where it does not fit exactly in the description in the regulations, and he ends up having to come to the ZBA. He hopes he is almost done with that. He has two more Variances next month and then thinks he is done and will not bother the Board any more. He hopes the Board works with him and his client on this and he is happy to answer questions.

Mr. Welsh stated that the ZBA is not tired of Mr. Phippard, and they appreciate his history of working on the Ordinance and on specific issues. He continued that he is interested in Mr. Phippard's history of work, as he mentioned working on the recent revision of the LDC and therefore was present for many of the discussions about specific points of revision. He wonders if, in his work, Mr. Phippard recalls any discussion about the Industrial Park District, either its specific parameters or where it would apply in the city.

Mr. Phippard replied that his role on that committee was primarily representing the development community, and primarily he complained. He continued that he felt it was part of his job to make (the City) aware of what was seen as a problem by the development community and property owners. The discussion he remembers about the Industrial Park District was that it was "antiquated." It came from the 1950s and was very effective then, where they succeeded in getting many large companies to come in. Today, it does not fit as well with the same four or five uses are listed. He thinks the City added "office use with special exception," which is because C&S came in and wanted that to salvage one of the buildings, and redeveloped it for ES3. That went very well, where the City supported that and changed the Ordinance to allow it. Other than that, he thinks the attitude was to protect it. (The City) sees (The Industrial Park District) as a gateway into Keene and felt that the buildings should be primarily brick, not metal industrial buildings. They wanted it to be clean, with bigger setbacks than normally required. He understands all that. Those aspects, the setbacks, are satisfied by the proposed plan the Board is considering tonight. The storage buildings will not be brick but will be well screened. The (Industrial Park District) did not get a lot of discussion. He did not receive a lot of feedback, and did not see any changes come about as a result.

Mr. Welsh stated that it seems like they are addressing ZBA 23-03 and ZBA 23-04 together, and he has a question about 04, regarding accessory uses in some of the facilities. He understands that vendors, and commercial users, are acceptable as long as they are demonstrably an accessory to the overall facility. He imagines that an industrial facility with a cafeteria, for example, would be an acceptable use if it sold food primarily for employees of the factory, even though it would not be acceptable as a standalone restaurant on the corner of the lot. Mr. Phippard replied that that is his understanding. Mr. Welsh replied that if a cafeteria is an acceptable use if primarily for employees' use, his question is why an electric vehicle fueling station would not be pitched as primarily for the employees' use. Then it could be an accessory use and not need a Variance.

Mr. Phippard replied that it could be if that is allowed as an accessory use. He continued that he and Mr. Rogers talked about that. (His client) wants the charging station to be open to and available to

the public, and that makes it a primary use, not “accessory.” He asked Mr. Samson if he wants to put in a solar array on the ground if the ZBA does not approve the storage units, and Mr. Samson does not want that. He himself agrees with that decision. He pointed out that Mr. Samson has 50,000 square feet of roof area next door and asked if he wanted to use that. Mr. Samson’s answer was no, because he wants to create a separate lot with separate uses and wants the ability to sell it. Mr. Samson is approaching the end of his working career and wants the ability to sell it and get out. Thus, he wants this entirely separate. Putting the solar array on the roofs of the storage units, all on one lot, would be permitted. It would be permitted to be larger than 2,000 square feet, because 2,000 square feet would not service a 10-space EV charging station. It would not service a single charging station with a level 3 charger. You need a much larger solar array to accomplish that, which is what Mr. Samson is trying to do, making it is a creative, innovative plan. Ten charging stations is great; that is more than the City of Keene has today as is having it open to the public is great.

Mr. Phippard continued that in talking with the car dealers, he has heard plenty of stories of people having driven from, say, New York City, and stopping in Keene because they heard there were charging stations at Fairfields. Those are busy all the time. Unless someone can come after 6:00 PM to occupy one of the stations and essentially stay the night in Keene, they will not be able to charge their car there. There are not enough charging stations in Keene to keep up with the EV growth. Thus, he thought (Mr. Samson’s) idea was great and ideally located close to Rt. 101. If he registers this with the companies that manufacture these chargers, they get listed on websites. Depending on the service you are providing, these websites can tell people whether a charging station is available. If you are driving from Massachusetts and know that in 75 miles you need to charge your EV, you can check the website to see if there is an available charging station in Keene. It would say, ‘yes, there are three charging stations available at 32 Optical Ave.,’ and you would park there and then head into Keene.

Mr. Phippard continued that a part of the project he has not talked about yet is that Samson Associates proposes adding a bus stop to this location with a small, covered seating area. The City Express would make this a new stop, approximately every hour. People could park, plug in their car for a three-hour charge, and take the bus into downtown Keene to have dinner or walk around. The charging station will send a text to let you know when your car is charged, to 50% or whatever amount you need, and then you can go pick up your car. Again, this is nothing like a gas station. It is completely different and evolving all the time. He is amazed learning how this work and are continually improving. This would be the first one in Keene like this and he hopes the Board can support it. His client wants the buildings to hold the solar array, because they need over 20,000 square feet of photovoltaic systems to support these charging stations. Otherwise, it is all on the grid, and that is not what Samson Associates is trying to do.

Mr. Gorman stated that he is curious about the rear boundary, which he believes abuts residential properties. He asked if that will be screened or if it is already naturally screened. Mr. Phippard replied that it is forested now, and they will leave trees standing within 10 feet of the property, which is the setback, and put a chain-link fence around that area. Mr. Gorman asked if it is evergreen. Mr. Phippard replied that it is a mix of trees, such as white pines, scrub shrub, a few

hardwoods. Mr. Gorman then asked about the long boundary. Mr. Phippard replied that it is all forested. He showed the location of EVS Metals nearby and continued that they propose an expansion on their building, but the area (Mr. Gorman is referring to) is all forest. Mr. Gorman asked if it is correct that it is zoned Industrial, not Residential. Mr. Phippard replied yes. Mr. Gorman asked if it is correct that the Residential zone is to the rear. Mr. Phippard replied yes, up the hill onto Marlboro St., it is mostly single-family homes.

Ms. Taylor asked Mr. Phippard to clarify his position on the hardship criterion, asking if she heard correctly that Mr. Phippard thinks the special condition is the Zoning. Mr. Phippard replied that he thinks the existing Zoning creates a special condition that exists and runs with this property. He continued that if the property owner cannot get a Variance, they would have to seek a zone change from the City Council in order to try to address it.

Ms. Taylor asked if the development issue and economic return is the basic reason why they are asking for the Variance. Mr. Phippard replied that he is shocked that he could not find a user between 2018 and today. He continued that he showed this property, and the (former) drive-in property, and he frequently does a lot of this without the owners' knowledge. Mr. Samson did not know that he was showing his property as a potential usable area. If he found a potential user, then he would have approached Mr. Samson and asked for his thoughts. When the Keene Sentinel purchased the (former) drive-in property, he had discussions with Mr. Ewing about users for that property, which all would have required Variances because of the Zoning restrictions, similar to what they are today. In all that time, he could not find a user willing to go through that process in Keene.

Ms. Taylor asked if that means he will not find somebody tomorrow. Mr. Phippard replied no, it is possible he could find someone tomorrow. He continued that what he is seeing happening, however, is that these (potential users) have gone to Swanzey or other towns where they do not face such restrictions.

Mr. Gorman stated that Mr. Phippard mentioned there are four/a small handful of uses (allowed). He asked if he knows those off the top of his head. Mr. Rogers replied that Section 6.3, which covers Industrial Park, lists the following as uses: office, which requires a special exception; research and development; daycare center; data center; industrial, light; and conservation area. He continued that also allowed are infrastructure uses dealing with all three levels of solar energy, some requiring CUPs; and telecommunications facilities. Mr. Gorman asked if the solar farm being created here would be a use as well. Mr. Rogers replied yes, it is of a scale that would meet the medium- or large-scale (definition); it would not be an accessory use. Accessory use solar is only allowed up to 2,000 square feet. From the presentation, he did not hear the actual square footage, but it would be a medium- or large-scale, requiring a CUP from the Planning Board as it would be a use allowed in that district. Mr. Gorman asked if mixed uses are allowed. Mr. Rogers replied yes.

Ms. Taylor stated that Mr. Phippard said he served on the committee that was reviewing the Ordinances and that resulted in the big changes (to the LDC) in 2021. She continued that usually

they see Zoning districts that have purposes, but this one is rather express. It says, “*Service operations and sales activities are excluded from the district, except for minor sales that may be accessory to the primary use.*” She found that to be a rather explicit statement. She was wondering, since Mr. Phippard sat on the committee, if he had any knowledge as to why they would have made such a firm, expressed statement if they did not mean it.

Mr. Phippard replied that he believes it came from the original documents. He continued that in the 1950’s, the documents were created as restrictive covenants that ran with this land area. It was not just an area zoned by the City; it had the recorded, restrictive covenants that were in place for 25 years. At the end of the 25 years, then they could start making changes if necessary. By that time, there were existing buildings that were already 100 feet back from the road, so that stayed in. Most of these restrictions just stayed in because they had always been there. There were some legal questions around the end of that period, regarding whether those restrictions actually expired. They spent a lot of time with attorneys for C&S researching that and determined that they did expire. Then it was just the City’s Zoning that took over, and the office use could be allowed by special exception.

Ms. Taylor stated that there was the opportunity to change the purpose of (the district), as part of the review process. Mr. Phippard replied yes, he believed so, and he wanted to change it, but he was a lone voice in that group.

Chair Hoppock stated that he has questions regarding the unnecessary hardship criterion. He continued that Mr. Phippard is saying the restrictions in this Zone create the special condition for this parcel. Mr. Phippard replied yes. Chair Hoppock asked, if wouldn’t that be true for every parcel in the district. Mr. Phippard replied yes, but most of the other parcels are already developed. He continued that this is a vacant piece of land. It is easier to go into an existing building that becomes vacant, like C&S did. The City did not want to leave that large building vacant, and this was an opportunity to convert it to mostly office use, which is what (C&S) needed. The City went along with that change. It was a burden then and is a burden now. He believes they had the opportunity, because of who the user was, to be open to that change, and that is why (the City) allowed it. However, (it is different for) the rest of those properties. If Markem Corporation became a vacant building tomorrow and some other user the City does not allow came in, he questions what their chance would be of getting a Variance so they could occupy that building. He would advise them that their chances are good and would think they would get a lot of community support. They do not want 200,000 square feet of vacant building. The Kingbury property is 300,000 square feet of vacant building and that is not positive for any community. He believes this is legitimately a special condition and does not agree with Ms. Taylor that it has to be only one property affected. He thinks if it affects six properties, it is still a special condition that is unique, when you look at the community as a whole.

Chair Hoppock stated that Mr. Phippard would have to agree that the rule does say “*a special condition of the property that distinguishes it from other properties in the area.*” He continued that he finds himself in the middle ground between Ms. Taylor’s and Mr. Phippard’s positions, because

he can see two or three similar properties would distinguish it. However, Mr. Phippard is just painting with a broad brush (and saying) the entire district is affected because of the Zoning conditions and he has a hard time with that.

Mr. Phippard replied it is, but primarily it is the vacant lots. Chair Hoppock replied that this is not a vacant lot yet. Mr. Phippard replied that it would be a 4-acre vacant lot.

Mr. Gorman stated that Mr. Phippard is using this analogy of vacant buildings, but to be clear, this is not a vacant building. He continued that this is part of a lot that was purchased this way and asked when Samson Associates purchased this lot. Mr. Phippard replied that he believes it was 2016. Mr. Gorman stated that in 2016, according to what Mr. Phippard said, the Zone was substantially alike what it is now, in terms of permitted uses. He continued that not many changes were brought forth in this recent rewrite (of the LDC). Thus, when Mr. Phippard's client bought the property seven years ago, the Zoning was similar. If the Zoning was so bad, he questions why Mr. Samson would have purchased it, knowing that he was getting what he was getting.

Mr. Phippard replied that Samson Manufacturing is a manufacturer, who wanted a larger building to expand into and this building became available. It used to be part of MPB and then Tidland Corporation. At the time, it was an existing manufacturing (building), it was a permitted use, and Mr. Samson could move right in, making this property enticing to him. He knew he had area where he could expand if he wanted to. Given what has happened since 2016, they are just barely starting to see some of the local manufacturers trying to expand. EVS Metals got approval to expand their building, though they cannot find any employees, which is why they have not broken ground. That is part of today's challenges. For Samson Associates, this was a good investment. As everything has happened with the pandemic, changes in companies, and the nature of large companies, this is just four acres of land that he is carrying and wants to find a good use for. As he explained, storage units are inexpensive to build and are great placeholders. If Mr. Samson gets permits to develop this, it will be an area to be developed in the future, because it will have already been altered, paved, had drainage addressed, connected to City water and sewer, and three phase electrics, making it essentially a ready-to-go site. There are industrial companies, such as the large, international one he spoke about earlier, who are not afraid to buy a site with an existing building and tear it down, throwing away millions of dollars. They have the ability to do that if it meets their needs.

Mr. Phippard continued that he thinks this is a smart move on (Mr. Samson's) part, and a good move for the City of Keene. He hopes the Board supports it.

Mr. Gorman stated that he does not disagree that this is a good project. He continued that his question is the hardship criterion. He is not sure about it, going by Mr. Phippard's point, which he was asking Mr. Phippard to elaborate on. If Mr. Phippard thinks the Zoning is the crux of the problem, he would have anticipated that there would have been a substantial change during the LDC rewrite that took the applicant by storm, but that does not seem to be case. This appears to be exactly what (Mr. Samson) bought. The Zoning was such then that it is now, and Mr. Samson likely did diligence when he bought it, and must have known what the Zoning is. If he did not, then the onus is on him. To see a hardship, he (Mr. Gorman) would have to see something change

remarkably between 2016 and now that made the Zoning so dysfunctional. He does not know what that is. Perhaps it is the evolution of business; he does not know. He asked for further elaboration.

Mr. Phippard replied that he feels that the Zoning has been dysfunctional since the early 2000s. Once the restrictions/land covenants that had been developed in the 1950's expired, the City Council should have taken a hard look at the Industrial Park and thought about what they need to do to drive the economy in Keene, what business needs to see, and what they could change in the Ordinance to make it easier for business to come in. Since that time, C&S has gone in there, but other than that, he (Mr. Phippard) met with about a dozen companies who looked at the area and said no; Keene is too hard to deal with, and there would be opposition. C&S had a lot of opposition to going in there, but thankfully, they are there. Other large companies from outside the region looked at this area and wanted to come in. It has been interesting to watch what has been happening after companies moved out of Massachusetts, trying to get away from the cities and into the more rural areas like Keene. What has been holding them back are local regulations in Keene, and workforce. The (lack of) workforce is now attributed to the lack of housing, making it a complicated picture. He feels that the Zoning regulations in the Industrial Park District have been dysfunctional ever since the original covenants expired. If it is not possible to get a Variance to allow this type of use, which he thinks is quite creative and innovative, he thinks it is time to talk to the City Council. They need to do something.

Chair Hoppock asked if anyone else had questions for Mr. Phippard. Hearing none, he asked for public comment, beginning with people wanting to speak in opposition.

Tom Hanna stated that he is a lawyer at 41 School St. with the firm of BCM Environmental and Land Law. He continued that like Mr. Phippard, he has been doing this work for more than 40 years, and he is not retiring. He represents Jim Putnam and three of his siblings who comprise HL Realty Holdings, LLC. Over the years, HL Holdings purchased all three of the four-acre lots directly across Optical Ave. from the Samson Associates site, which the lots were formerly the drive-in theater. Markem purchased two of those four-acre lots. Jim and Ruth Ewing purchased one, thinking that the Keene Sentinel might move there. Eventually, HL Realty acquired the Ewing properties, so they have these four lots.

Mr. Hanna stated that this case requires going through the individual criteria for a Variance, but there are some other things raised by Mr. Phippard and previously by the law firm that wrote a letter on May 16. He asked if the Board received his Friday letter in response to that letter from Burns & Levinson, indicating that Ms. Marcou had distributed it. He did not receive the (May 16) letter until the Tuesday after Memorial Day, through the kindness of Mr. Phippard. The attorneys did not copy him on the letter, even though they indicated that it was an effort to refute, in part, the memorandum that he and Tara Kessler prepared.

Chair Hoppock stated that the Board has Mr. Hanna's letter from June 2, 2023. He continued that it is on the record.

Mr. Hanna stated that earlier in the week, he submitted a one-page letter from Jim Putnam. The Board should have that, too. He continued that Mr. Phippard is creative, did not have typical responses to the issue of special condition, and came up with this idea that the restrictions of the Zoning Ordinance in and of themselves created a special condition. To him (Mr. Hanna), that seems the most problematic of his arguments. He thinks Mr. Phippard has minimized the importance of the political process here, and minimized the attention given to the Industrial Park Zone by this latest political effort to review the entire Zoning Ordinance. Tara Kessler was a Planner (for the City) for many years and was very involved in the LDC rewrite. On page 2 of her memo, she indicated, *“the Industrial Park District was revisited with the most recent code adoption and was updated to provide more modern uses that are aligned with its underlying purpose. Self-Storage and Vehicle Fueling Stations were not identified as uses appropriate for this District.”* As a Board member pointed out, this is one of the more explicit enabling provisions at the beginning of a Zoning district that he has seen, where it not only indicates the underlying purpose of the district but expressly indicates what is not allowed. The proposed uses before the Board for these Variances are not allowed.

Mr. Hanna continued that as it relates to at least one of those uses, the self-storage, page 2 of the memo says,

“During this same Code update, the City accounted for the recent demand for self-storage by expanding the areas where this use is permitted and by distinguishing between interior and exterior self-storage facilities. Prior to the adoption of the 2021 Land Development Code, Self-Storage was only permitted outright in the Commerce Limited District and by special exception in the Industrial District. Today, Exterior Self-Storage [which is what they are dealing with tonight, added Mr. Hanna] is permitted outright in the Commerce, Commerce Limited, and Industrial Districts.”

Mr. Hanna continued that he does not deny that there may be a need for self-storage, (but) there are opportunities (for it elsewhere) in the city. If the self-storage is in derogation of the intent clause of the Industrial Park District, then it does not matter that there is a need for it throughout the city, especially if there are provisions for that use.

Mr. Hanna stated that he has one more comment regarding Mr. Phippard’s comments that the City did explicitly recognize EV stations. He continued that on page 2 of the memo, Ms. Kessler sets out Section 8.3.2, which defines a Vehicle Fueling Station as *“a commercial establishment primarily engaged in the retail sales of vehicle fuels, traditional and alternative fuel types (e.g. electric charging stations, [etc]).”* There was not a separate definition for EV stations, but that (definition) is clear, and it is clear that it is a use that is not permitted in the Industrial Park District, and that the (people in) the recent political process knew exactly what they were doing.

Mr. Hanna stated that Samson Associates’ lawyer who wrote the letter a couple weeks ago talked about this being a symbiotic project whereby the many storage units become platforms for solar-powered EV stations. He continued that that does not alter the fact that each use is not only prohibited in this Zone but violates the intent and it cannot be argued that they satisfy the intent.

Certainly, you cannot argue that they satisfy the spirit of the Ordinance, because it is not correct to look to certain goals in the LDC, such as promoting sustainability and promoting climate change (adaptations). The intent provision in the Ordinance they need to look at is the intent of the particular District. Once again, it bears repeating that the intent of this District is *“to provide for relatively low-intensity manufacturing and research and development firms that are employee intensive [...]”* That “employee intensive” part is key. Clearly, the uses proposed for these Variances are not employee intensive. The intent is also *“to promote an attractive industrial park environment.”* The intent further states, *“Service operations and sales activities are excluded from this district [...]”* The applicant alleges that there is a need for self-storage units and EV stations, not necessarily deniable, and that these uses advance the City’s sustainability and climate change goals. There may be merit in that, but it misses the mark in terms of a Variance analysis. Again, one must look at the purpose of an Ordinance with respect to the Industrial Park District.

Mr. Hanna stated that if the proposed uses advance the cause of a goal of the LDC that is unrelated to the Industrial Park District, then the applicant’s argument fails if it is not a goal of the District itself. He continued that regarding the issue of the special condition, and the hardship criterion, Burns & Levinson raised the *Harrington v. Town of Warner* case. He wants to address two aspects of that. One, it discusses the special condition issue, and says the property must be burdened by a Zoning restriction in a manner that is distinct from other, similarly situated properties. He continued that Chair Hoppock raised that point that the burden must arise from the property, not the applicant’s individual plight. In this case, the fact that the entire Zoning District is affected or burdened by these Zoning restrictions simply does not meet the special condition test that Samson Associates’ own lawyer referred to when he referred to the *Harrington* case. Burns & Levinson’s letter said, *“...a strict application of the Industrial Park District constraints on this Property would limit the utility of the Property and effectively restrict the land to the one existing amenity...”* and, *“it is important to consider the landowner’s ability to receive a reasonable return.”* He is also troubled by the fact that this property has not been put up for sale to flesh out whether there are opportunities to use the property in compliance with the Zoning Ordinance. To the best of his knowledge, even though he takes Mr. Phippard at his word that he complained, it sounds generally of the Industrial Park District, he did not hear any indication that Mr. Samson engaged in the process in any way to say, ‘Look, this is a hardship for me. You need to either change the purpose of this Ordinance or you need to change/broaden the uses.’ That was an opportunity to do it. This is an unusual situation where the City has just finished looking at this whole issue.

Mr. Hanna stated that moreover, as has been cited before, there are quite a few uses that could go in this property. Office use, for one, by Special Exception. As this Board well knows, a Special Exception means that it is a permitted use.

With the loss of internet connection, no further minutes are available except for the written notes of John Rogers, Zoning Administrator, Michael Hagan, Plans Examiner, and Corinne Marcou, Board Clerk, on each of the motions before the Board. John Hillock of 511 Marlboro St. and Penny Bell of 511 Marlboro St. both stated their opposition to the application.

Mr. Gorman made a motion to approve ZBA 23-03. Mr. Welsh seconded the motion.

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

The Finding of Facts for Criterion #1: The proposed project does not meet the intent of Industrial Park District Purpose statement.

Not met, with a vote of 1-4. Chair Hoppock, Ms. Taylor, Mr. Welsh and Mr. Clough voted in opposition.

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

The Finding of Facts for Criterion #2: The proposed project does not meet the intent of Industrial Park District Purpose statement.

Not met, with a unanimous vote of 0-5.

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

The Finding of Facts for Criterion #3: There are other permitted uses the proposed project could use.

Met with a vote of 3-2. Chair Hoppock and Ms. Taylor voted in opposition.

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

The Finding of Facts for Criterion #4: Evidence that the proposed project would diminish surrounding property values without restrictions.

Not met, with a vote of 1-4. Chair Hoppock, Mr. Gorman, Mr. Welsh, and Mr. Clough voted in opposition.

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.*

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.

The Finding of Facts for Criterion #5: The Board's purview is not to change the ordinance and zoning is not a hardship.

Not met, with a unanimous vote of 0-5.

The motion to approve ZBA 23-03 failed with a unanimous vote of 0-5.

Mr. Gorman made a motion to deny ZBA 23-03, which was seconded by Mr. Welsh and passed with a unanimous vote of 5-0.

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. Gorman made a motion to approve ZBA 23-04. Ms. Taylor seconded the motion.

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

The Finding of Facts for Criterion #1: The proposed project does not meet the intent of Industrial Park District Purpose statement.

Not met, with a vote of 2-3. Chair Hoppock, Ms. Taylor, and Mr. Welsh voted in opposition.

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

The Finding of Facts for Criterion #2: The proposed project does not meet the intent of Industrial Park District Purpose statement.

Not met, with a unanimous vote of 0-5.

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

The Finding of Facts for Criterion #3: There are other permitted uses the proposed project could use.

Met with a vote of 3-2. Chair Hoppock and Ms. Taylor voted in opposition.

The Finding of Facts for Criterion #4: Evidence that the proposed project would diminish surrounding property values without restrictions.

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

Not met, with a vote of 1-4. Chair Hoppock, Mr. Welsh, Mr. Gorman and Mr. Clough voted in opposition.

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.*

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.*

The Finding of Facts for Criterion #5: The Board's purview is not to change the ordinance and zoning is not a hardship.

Not met, with a unanimous vote of 0-5.

The motion to approve ZBA 23-04 failed with a unanimous vote of 0-5.

Mr. Gorman made a motion to deny ZBA 23-04, which was seconded by Ms. Taylor and passed with a unanimous vote of 5-0.

C) ZBA 23-16: Petitioner, 147-151 Main Street, LLC and represented by Jim Phippard, of Brickstone Land Use Consultants, LLC, requests a Special Exception for property located at 147 Main St., Tax Map #584-060-000-000-000 and is in the Downtown Core District. The Petitioner requests to permit a drive-through use in the Downtown Core District at this property, per Chapter 100, Article 8.4.2.C.2 of the Zoning Regulations.

After hearing testimony from Mr. Phippard on this proposed project, the Board voted unanimously to continue this petition to the July 3, 2023 meeting. The Board questioned a previously approved

petition for the neighboring property, 143 Main St., owned by the same individual as 147 Main St. This continuance will provide Staff an opportunity to research the previous decision then report to the Board. According to Mr. Phippard's testimony, the owner of 147 Main St. will seek to do a boundary line adjustment with 143 Main St. to enlarge the lot at 147 Main St. for their proposed project before the Board. The Board questions if the previous decision required the property of 143 Main St. to use this section of the proposed boundary line adjustment for parking.

Mr. Gorman made the motion to continue petition ZBA 23-16 to the July 3, 2023, meeting. Mr. Welsh seconded. The motion passed unanimously.

D) ZBA 23-17: Petitioner, Wayne E. Brown Jr. Revocable Trust of 28 Village Rd. Surry, requests a Variance for property located at 661 Main St., Tax Map #120-056-000-000- 000 and is in the Low Density District. The Petitioner requests two buildings on a single lot containing two independent dwelling units, which are designed, occupied or intended for occupancy by separate families and a non- conforming use shall not be changed to a different non-conforming use, per Chapter 100, Articles 8.3.1.E.1 and 18.2.4 of the Zoning Regulations.

Mr. Gorman made a motion to approve ZBA 23-17. Ms. Taylor seconded the motion.

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

The Finding of Facts for Criterion #1: The proposed use will be more conforming with a residential feel and an improvement to the lost four units.

Met with a unanimous vote of 5-0.

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

The Finding of Facts for Criterion #2: The proposed use will be a benefit to the community that will not alter the neighborhood.

Met with a vote of 5-0.

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

The Finding of Facts for Criterion #3: The proposed use will be a loss to the public if denied, will be an improvement to the area and not a detriment to the public.

Met with a unanimous vote of 5-0.

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

The Finding of Facts for Criterion #4: The proposed use will remove the burnt building, improving the area, and will not diminish the surrounding property values.

Met with a unanimous vote of 5-0.

5. *Unnecessary Hardship*

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

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

and

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

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

Met with a unanimous vote of 5-0.

V) **New Business**

VI) **Communications and Miscellaneous**

VII) **Non-Public Session: (if required)**

VIII) **Adjournment**

There being no further business, Chair Hoppock adjourned the meeting at 10:00 PM.

Respectfully submitted by,
Britta Reida, Minute Taker

Reviewed and edited by,
Corinne Marcou, Board Clerk