

TOWN OF AMHERST  
Zoning Board of Adjustment

June 16, 2020

**APPROVED**

In attendance: Doug Kirkwood – Chair, Robert Rowe – Vice Chair, Jamie Ramsay – Secretary/Treasurer, Charlie Vars, Danielle Pray, and Tim Kachmar (Alternate).  
Staff present: Nic Strong, Community Development Director, Natasha Kypfer, Town Planner, and Kristan Patenaude, Minute Taker.

Doug Kirkwood called the meeting to order at 7:08 p.m., with the following statement. As Chair of the Amherst Zoning Board of Adjustment, I find that due to the State of Emergency declared by the Governor as a result of the COVID-19 pandemic and in accordance with the Governor's Emergency Order #12 pursuant to Executive Order 2020-04, this public body is authorized to meet electronically.

Please note that there is no physical location to observe and listen contemporaneously to this meeting, which was authorized pursuant to the Governor's Emergency Order.

However, in accordance with the Emergency Order, I am confirming that we are:

Providing public access to the meeting by telephone, with additional access possibilities by video or other electronic means:

We are utilizing Zoom for this electronic meeting.

All members of the Board have the ability to communicate contemporaneously during this meeting through this platform, and the public has access to contemporaneously listen and, if necessary, participate in this meeting through dialing the following phone #312-626-6799 and password 867 6891 3592, or by clicking on the following website address: <https://zoom.us/j/86768913592> that was included in the public notice of this meeting.

Providing public notice of the necessary information for accessing the meeting:

We previously gave notice to the public of the necessary information for accessing the meeting, including how to access the meeting using Zoom or telephonically. Instructions have also been provided on the website of the Zoning Board of Adjustment at:

[www.amherstnh.gov](http://www.amherstnh.gov).

Providing a mechanism for the public to alert the public body during the meeting if there are problems with access: If anybody has a problem, please call 603-440-8248.

Adjourning the meeting if the public is unable to access the meeting:

In the event the public is unable to access the meeting, the meeting will be adjourned and rescheduled.

Please note that all votes that are taken during this meeting shall be done by roll call vote.

Let's start the meeting by taking a roll call attendance. When each member states their presence, please also state whether there is anyone in the room with you during this meeting, which is required under the Right-to- Know law.

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**Roll call attendance: Danielle Pray – husband and children are in the home with her; Jamie Ramsay – alone; Bob Rowe – alone; Tim Kachmar – wife in the house with him; Charlie Vars – alone; and Doug Kirkwood - alone.**

Doug Kirkwood explained that Jamie Ramsay, Secretary, will read and open each case and then the applicant will have a chance to speak to it. The ZBA will then carry out its business for each case.

NEW BUSINESS:

**1. CASE #: PZ12444-032020 – VARIANCE**

**Sarah Gallo & Allister Glennly (Applicants) & Michael Spyridakis (Owner) – 292 Route 101, Unit #7, PIN #: 008-044-003 – Request for relief from Article IV, Section 4.8, Paragraph 8 to allow operation of a preschool program (ages 3-5) licensed by the Department of Health & Human Services Child Care Licensing Unit. Zoned Limited Commercial.**

Jamie Ramsay read and opened the case.

Sarah Gallo and Allister Glennly presented the application. Sarah Gallo explained that her intention is to open a preschool program (ages 3-5) that will operate for three hours per day, Monday – Friday, at an open unit in Salzburg Square. She does not believe that any harm will be done to the community in allowing relief from the restriction in this case. She explained that Salzburg Square is a mixed use area, already containing businesses such as a hair salon, yoga study, restaurant, and karate studio for children. She believes that the preschool program would be an added benefit to the commercial complex and town. She stated that she will work with the Department of Health & Human Services to obtain the correct licensing necessary for the business, but first this variance must be obtained.

Sarah Gallo explained that there are currently wait lists for all of the other preschool programs in town, demonstrating a need for this business. She explained that the Little Einsteins preschool program, located in the Meeting Place Plaza, will be closing this year. She hopes that the proposed preschool program will help existing families in the area.

Sarah Gallo explained that the zoning restriction in this area does not specifically list preschool programs, but also does not negate them as a potential business type. She noted that family daycare homes are permitted in this zone and that a preschool program is a very similar type of business.

Allister Glennly stated that the staff report mentions concerns with outdoor access and traffic to the area. He explained that there will be no outdoor play access allowed for the Salzburg Square preschool, so all activities for gross motor skills and other similar skills will be located inside the center. This proposed unit is located in the middle of Salzburg Square and has a rear entrance that can be used in order to cut down on traffic in front of the buildings. He agreed with the note

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in the staff report that relief is being sought from Article IV, Section 4.8, and Paragraph A – not Paragraph 8.

Allister Glennly noted that there will be no negative impacts to the abutters, as this particular unit is not visible from the road at all. He believes that the business will add value to Salzburg Square as it will be an additional tenant and thus increase the value of the property. He stated that the preschool program will be expecting approximately 12 students at any one time, and thus the traffic flow will be increased by about 24 additional car trips to/from Salzburg Square in a day. There are multiple entrances and exits into Salzburg Square, so this business will not conflict with the rest of the use of the property. He believes the proposed business will bring more benefits than potential drawbacks to the community.

Sarah Gallo addressed the five tests:

- 1) The variance will not be contrary to the public interest because the variance being requested is to lease unit 7 in the Salzburg Square commercial complex for the purposes of opening a preschool program, licensed under the NH DHHS Child Care Licensing Unit from 9am-1pm Monday – Friday. Currently there are waitlists for all Amherst preschool programs for fall 2020, with the expected closure of Little Einsteins in June 2020. We are aiming to serve families in Amherst, as well as the surrounding towns, in need of preschool programming for their 3-5 year old children.
- 2) The variance is consistent with the spirit and intent of the Ordinance because the spirit of the ordinance is to serve the limited commercial needs of various neighborhoods in the area. Offering a program for Amherst families with preschool age children would, by all accounts, ensure the spirit of the ordinance is served. Salzburg Square is also a mixed use commercial complex, with other family uses currently within it, such as the karate studio.
- 3) Substantial justice will be done because there is no harm to the general public by granting this variance. In fact, it offers more benefits to the community than any potential drawbacks.
- 4) The values of the surrounding properties will not be diminished. The preschool business would be located in the heart of Salzburg Square. This building, in particular, is not visible from nearby residences, as it is in the interior of the complex. Since it would increase the occupancy rate of the property, it would add value as the occupancy rate is a measure of the overall value. The proposed business will bring more daily foot traffic into Salzburg Square, thus becoming a boon to the other surrounding businesses.
- 5) Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship because:
  - A) The preschool is intended to serve the community as preschool programs in the town are highly sought and not readily available due to demand.
  - B) The unit in Salzburg Square fits the requirements (location, size, affordability) for our potential preschool program. We prefer to have our business reside in Amherst, as we reside in the town and want to serve our neighbors and surrounding community. In addition, it is along Route 101, close to the current

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location of Little Einsteins, which is closing in June 2020, making it a convenient option for families seeking preschool programs for fall 2020. It should be noted that Little Einsteins was granted a variance upon opening a preschool program in 2005. We did seek to lease in the existing location of Little Einsteins, but unfortunately, Hirsch Leasing Co. had an informal agreement in place with another tenant looking to expand. Lastly, we hoped to bring attention to language included in Section 4.8.A.1 of the zoning ordinance, which states “the foregoing shall include, but not necessarily be limited to” the types listed. We would further assert that the permitted uses were established in 1976, before the popularity of, and need for, education-based child care programs grew.

Bob Rowe noted that the variance will not be given to the applicants themselves, but rather will run with the property. The applicants have authorization from the owner of the property to seek this variance. Bob Rowe noted, however, that if the variance is granted and the property owner decides to evict the applicants tomorrow, the owner could then bring in other tenants to have a preschool program in the same space. The applicants acknowledged this statement.

In response to a question from Charlie Vars, Allister Glenney stated that the entrance to the building will more than likely be on the lower level in the back of the building.

Charlie Vars noted that the parking spaces in that section of Salzburg Square run parallel in one direction. The applicants acknowledged this fact.

In response to a question from Danielle Pray regarding a discrepancy between the application which noted that the preschool program would be for three hours a day and separately that it would be open from 9 am - 1pm, Sarah Gallo explained that the preschool intends to operate from 9am-12pm, Monday – Friday, with a possible extension of the day through lunchtime, until 1pm, as many preschool programs in the area offer something similar.

Public Comment:

In response to a question from Ellen Grudzien, 18 Buckridge Drive, Sarah Gallo explained that the preschool is aiming to service about 8-10 preschoolers on any one day, with a cap at 12.

Craig Kelly, 10 Blueberry Hill Road, spoke in support of the proposed preschool. He stated that he has heard the in-depth plan for the business and believes that it will add value to the community. He’s glad that the applicants are dedicated to keep this preschool business in Amherst, as it adds to a sense of community for the town.

Tiffany Remy, 3 Ravine Road, spoke in support of the proposed preschool. She stated that there are waitlists at many of the other preschool programs in town and she is used to experiencing trying to navigate those. She believes the proposed business will bring a special type of educational experience to the community.

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In response to a question from Jamie Ramsay, Sarah Gallo stated that Little Einsteins came before the ZBA 15 years ago to apply for the same variance to run their preschool out of Meeting Place Plaza.

**Charlie Vars moved to enter deliberations. Danielle Pray seconded.**

**Roll call vote: Danielle Pray – aye; Jamie Ramsay – aye; Bob Rowe – aye; Charlie Vars – aye; and Doug Kirkwood – aye. Motion carried unanimously.**

**CASE #: PZ12444–032020:**

**Jamie Ramsay moved no regional impact. Charlie Vars seconded.**

**Roll call vote: Danielle Pray – aye; Jamie Ramsay – aye; Bob Rowe – aye; Charlie Vars – aye; and Doug Kirkwood – aye. Motion carried unanimously.**

**Discussion:**

Jamie Ramsay explained that, in 1976 when the zoning ordinance was adopted, the ZBA probably didn't contemplate preschool programs as a specific use because they simply weren't on the radar. This type of business is not specifically included or excluded in the zoning ordinance. An alteration of the ordinance to include this type of business could be considered on a case-by-case basis. He is, in general, agreeable to the variance, if this type of business is agreeable to the owner, as it seems to serve the town of Amherst.

Bob Rowe noted that, in the permitted uses section of the ordinance, #6 includes interior recreational establishments. He doesn't believe there is much difference between that permitted use and an interior learning establishment, as is being proposed. He believes this type of use (preschool program) will cause no significant changes to the abutters or public, compared to the permitted uses in this area.

1. The Variance will not be contrary to the public interest.

- D. Pray – true, the applicant has satisfied this test in that there will be no significant change to the character of the neighborhood or commercial property by granting of this variance. The proposed children to this preschool program will be inside the building only and there will be no noticeable change to the outside of the property. There are a proposed limited number of students that will attend the preschool and no change to the traffic in the area. The proposal is not contrary to the public interest.
- J. Ramsay – true, the proposal is not contrary to the public interest. The proposal favors the town of Amherst.
- R. Rowe – true, he agreed with the points made by Danielle Pray.
- C. Vars – true, the proposal is not contrary in any way to the public interest. He also noted that the proposed type is not a forbidden use in the zoning ordinance.
- D. Kirkwood – true, the proposed use is a less intense and impacting use than a more structured learning business. He believes the proposed location is a decent one for the proposal that will cause no negative impacts to the town. If there are waitlists at a

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217 number of the other preschools in town, this shows a need for this type of business in  
218 Amherst.

219 **5 True**

220

221 2. The Variance is consistent with the spirit and the intent of the Ordinance

222 • J. Ramsay – true, the proposal fosters the younger members of the community and  
223 will be a good use of the space.

224 • R. Rowe – true.

225 • C. Vars – true, the spirit of the ordinance is observed. This area is zoned for a limited  
226 commercial use, and the proposed business fits into that. There is also a demonstrated  
227 need for this type of business in town.

228 • D. Pray – true, the spirit of the ordinance is observed. The purpose of this zone is to  
229 provide a commercial area with some general commercial needs of the public. With  
230 the separate preschool program going out of business this year, the proposed  
231 preschool will serve the needs of the public and meet the criteria for this zone.

232 • D. Kirkwood – true, he is unsure why this type of business is not overtly included in  
233 the permitted uses of this zone, but the town seems to be the beneficiary for this type  
234 of business.

235 **5 True**

236

237 3. Substantial justice is done.

238 • J. Ramsay – true, he doesn't see this use changing the neighborhood or commercial  
239 complex at all. He doesn't see any drawbacks to granting the variance.

240 • C. Vars – true, he stated that he believes the Preschool in the Village will need to be  
241 cutting back on some of its student numbers due to COVID-19, so there may even  
242 more of a need for another preschool program in town.

243 • R. Rowe – true, he doesn't believe that using this location as a preschool will have  
244 more impact on the public than any of the other permitted uses for this area. The  
245 applicant will also need state approval in order to assure a safe educational space.

246 • D. Pray – true, the proposed use is consistent with the other businesses currently in  
247 the commercial complex. There will be no harm to the general public to grant this  
248 variance.

249 • D. Kirkwood – true, if there is a waitlist at the other town preschools then there is a  
250 clear need for this type of business. He believes the proposed preschool will provide  
251 an alternative option for those on the waitlists at other preschools; this is a benefit to  
252 the community and demonstrates that justice is done.

253 **5 True**

254

255 4. The values of the surrounding properties will not be diminished.

256 • R. Rowe – true, he doesn't believe that granting this variance will make a change in  
257 the value of the surrounding properties any more so than a permitted use of the  
258 facility.

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- C. Vars – true, he doesn't believe that the owner of the property would be in support of this business if it would cause the other surrounding properties' values to be diminished.
- J. Ramsay – true, he believes the proposed business will be a stronghold for the Salzburg Square complex.
- D. Pray – true, there has been no evidence shown that the surrounding properties' values will be diminished. The applicant has shown this is not the case.
- D. Kirkwood – true.

**5 True**

5. Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship.

- D. Pray – true, this type of business would have needed a variance anywhere within this particular property. There are other permitted uses, such as daycare facilities, that would be permitted in the district and she doesn't believe there are any special qualities of the proposed business that make it unsuitable for this location.
- J. Ramsay – true, he believes the only hardship is that this shows a possible omission in the zoning ordinance that could be addressed. Preschool programs weren't contemplated as potential uses when the zoning ordinance was written. He hopes the omission of this particular use doesn't become a hurdle in the future because these types of businesses are necessary for the community.
- C. Vars – true, the literal enforcement of the zoning ordinance would be a hardship, in this case. This would cause a good use for this property to be denied. There is no precedence set from past Planning Board decisions, but a variance was granted 15 years ago to a similar business so that it could be located in the Meeting Place Plaza.
- R. Rowe – true, he believes that this type of business would have been included in the list of permitted uses, if the zoning ordinance was created now. He believes the proposed use and impact of this business are similar to many of the other permitted uses listed.
- D. Kirkwood – true.

**5 True**

**The Chair stated that the application, as it passed all of the tests, is granted.**

**Jamie Ramsay moved to exit deliberations. Bob Rowe seconded.**

**Roll call vote: Danielle Pray – aye; Jamie Ramsay – aye; Bob Rowe – aye; Charlie Vars – aye; and Doug Kirkwood – aye. Motion carried unanimously.**

- 2. CASE #: PZ12445-032320 – APPEAL OF ADMINISTRATIVE DECISION**  
**Linda L. Robinson, Trustee of the Linda L. Robinson 2000 Trust (Owner & Applicant) – 312 Boston Post Road, PIN 004-011-000 – Request for relief from Article IV, Section 4, Paragraph 3 to construct a detached garage with a 50' front setback on Boston Post Road and a 20' setback on North Meadow Road. Zoned Residential Rural.**

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Jamie Ramsay read and opened the case.

Tom Quinn, representative for Linda Robinson and her husband, addressed the appeal. He explained that the property is located in the Residential Rural district and is about 3.3 acres on a corner lot. The property has about 327 feet of frontage on Boston Post Road and 587 feet of frontage on North Meadow Road. The property currently consists of a residential dwelling and barn. In the fall, his clients planned to construct a garage. The plans were drawn for the building and the area was surveyed. When the applicant went to Town Hall to pull the building permit, they were told that a variance was needed because the structure was not 50' setback from both streets. The application has since been in a holding pattern.

Tom Quinn explained that the ordinance states that the structure must have a 50' front setback, but that for an accessory structure, that becomes 20' for the side setback. In February, the applicant submitted an application for a building permit. The proposed structure is a two-car garage, 20'x36' which will have more than a 50' setback from Boston Post Road, a 31' setback from one corner, and 36' from the other corner on North Meadow Road.

Tom Quinn noted that a revised plan was submitted to the Board this afternoon from Meridian Land Services that shows both the 50' setback line from North Meadow Road and the 20' setback line, as originally only the 50' setback line was noted, because it was assumed a variance would be sought. Later in February the applicants heard that Scott Tenney, Building Inspector, denied their application for a building permit based on his interpretation of the zoning ordinance that states that all structures must have 50' setbacks from both streets. The applicants filed an appeal to this decision in March.

Tom Quinn stated that the Board has the authorization, per RSA 674:33 I and II, to: "Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16; and (b) ... II. In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken."

Tom Quinn explained that the Board, in this capacity, can assume all of the powers of the official from whom the appeal was taken. On an appeal, the Board has the power and obligation, if the language of the ordinance is unambiguous to restrict its view to the language itself. The Board is set to stand in the shoes of the Building Official if the language of the ordinance is clear and unambiguous. The Board should not look for further issues of legislative intent.

Tom Quinn read from Article 4 Section 4.3, D: YARD REQUIREMENTS.

1. Each dwelling, building, or structure shall be set back at least fifty (50) feet from the front lot line, or at such distance that will be no closer than an existing structure. An addition may not be extended laterally more than a maximum of a fifty percent (50%)



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increase of the lineal frontage of the existing structure and must conform to any other setback requirements on the lot

2. ...each dwelling, building, or structure shall be set back at least twenty-five (25) feet from side and rear lot lines. In the case of corner property, this distance shall be increased to fifty (50) feet on that side bordering a street, lane, or public way.

3. Any accessory buildings or structures shall be set back at least twenty (20) feet from side and rear lot lines and at least fifty (50) feet from the front lot line and not exceed twenty-two feet in height. The height requirement may be waived for farm structures.

Tom Quinn explained that the key to this section is item 3. This includes a special rule for accessory buildings to be setback at least 20'. As the proposed garage is an accessory structure, it shouldn't need to be set more than 20' back from the sides. He explained that, in the view of the Building Official, the setbacks from both streets need to be 50', but this is an erroneous interpretation and clearly contrary to section 3. Section 1 appears to set forth a general rule, section 2 sets forth a special rule for corner lots, and section 3 creates a special rule for accessory buildings.

Tom Quinn addressed an issue from the staff memo stating that this is an appeal to the Building Code of Appeals; it is not. This is an appeal of the administrative decision made under the zoning ordinance. Under the RSA, the Board should act as the Board of Appeals in this case. He ran through a list of other items that do not apply to this appeal, as would be part of the staff report as written.

Nic Strong, Community Development Director, explained that the template used for the staff report was the incorrect one. She stated that this was her mistake and Tom Quinn was correct in his assessment. This is not an issue with the building code.

Jamie Ramsay noted that Scott Tenney, in his assessments, reviews not just the building structure, but also the specific zoning ordinances that apply, including, in this case, the proper setbacks. He sides with Scott Tenney in this case.

Tom Quinn again noted section 3, which specifically states the different setbacks for accessory buildings. There is also nothing in that section that notes that a structure needs two front setbacks.

Jamie Ramsay stated that the property in question is still a corner lot, and should be treated as such.

Tom Quinn noted that it doesn't matter whether the proposed garage is considered a building or a structure; per section 3 an accessory structure needs to have 20' setbacks from the side and rear lot lines and this proposed structure will comply with both of those.

Bob Rowe noted that while all accessory buildings are considered structures, not all structures are considered accessory buildings. He agreed with Jamie Ramsay's assessment of the appeal.

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Tom Quinn explained that there is a section (2) regarding corner lots and their setbacks, but section 3 deals with accessory buildings which have separate rules for setbacks, which this proposed garage complies with.

Jamie Ramsay noted that this does not preclude the general rule that the proposed garage is a structure and thus requires a 50' setback from both public ways.

Tom Quinn stated that the Board should not interpret the intent of the ordinance. If the ordinance contains plain and unambiguous language, no other sections should be read into the decision.

Danielle Pray stated that she's confused as to why section 3 would have been added if this type of accessory building is covered under sections 1 or 2. It seems that accessory buildings only fall under section 3. She explained that this is not the only area in the zoning ordinance that uses this type of language; it is also found under the Northern Transitional Zone and others. She believes this could be a flaw in the ordinance, but that the ordinance still needs to be interpreted as it is currently written. She stated that there is an existing house on the lot, and that the use of the proposed structure is clearly incidental, so it should be determined to be an accessory structure.

Jamie Ramsay stated that there is already a barn on the property that has setbacks well from the roads. The existing house does too. He questioned if, through loose interpretation of the ordinance, the Board would now allow an accessory structure to be built closer to the public right of ways than either of the existing historic structures.

Tom Quinn noted that the proposed structure is also a fraction of the size of the existing structures. It thus makes sense for the proposed garage to be closer to the streets.

Danielle Pray noted that the ordinance is written in the way it is so that setbacks of that length are possible. The ordinance may need to be amended but that will not solve anything for this case.

Charlie Vars stated that his interpretation has always been that every corner lot has 50' setbacks for both roads.

Tom Quinn stated that people learn new things all the time. The fact that this discussion has not come up before is not germane to this conversation. The ordinance needs to be read as it is written and, per section 3, that means that for the special case of an accessory building, side setbacks are 20'.

Doug Kirkwood noted that the setbacks for corner lots have been followed a certain way for years. The literal wording seems to say that a setback should be 20', per section 3. This raises the question of whether the ordinance should be interpreted not on the intention, but as written. If this proposed structure is looked at as a special case, as per the ordinance, then it leaves the Board without much of a choice.

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In response to a question from Charlie Vars, Tom Quinn explained that Meridian noted the 50' setbacks on the plan because the initial thought was to get a variance for the structure.

Charlie Vars noted that a variance would have been the way to go. Tom Quinn countered that the ordinance language is plain.

In response to a question from Nic Strong, Tom Quinn stated that the definition for 'frontage' doesn't come into play here.

Bob Rowe noted that all accessory buildings are structures, thus the other sections of this ordinance apply. Tom Quinn stated that this kind of a structure is a special one though, and thus covered only under section 3.

Bob Rowe explained that a structure is a structure. The proposed structure is not the primary structure on the site. The only section that applies to lots with two frontages is section 2.

Tom Quinn explained that if there was already a special rule in the ordinance for accessory structures, then there would be no need for section 3. However, there is a section 3 that treats accessory structures differently from other structures.

Bob Rowe noted that the ordinance reads, "accessory building or structure." Tom Quinn stated that this should be interpreted to be, "accessory building or accessory structure." Bob Rowe disagreed.

In response to a question from Danielle Pray, Tom Quinn stated that the definition of frontage doesn't come into play here. Front setbacks are different than frontage.

In response to a question from Danielle Pray, Tom Quinn noted that the applicant is only looking for relief from the section of the ordinance as it was interpreted by the building inspector, including a reversal of his decision.

Tom Quinn noted that an abutter and neighbor to the applicant, John Moriarity, will be speaking in support of the project. He will be able to see the proposed structure from out his front door.

Public Comment:

John Moriarity, 3 North Meadow Road, spoke in support of the project and stated that he has no problem with the placement as proposed.

In response to a question from Jamie Ramsay, Bob Rowe stated that the next step for the Board is to interpret the zoning ordinance in response to the request made.

Tom Quinn noted that the applicant will only be back before the Board for a variance if the appeal fails tonight.

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**Charlie Vars moved to enter deliberations. Bob Rowe seconded.**

**Roll call vote: Danielle Pray – aye; Jamie Ramsay – aye; Bob Rowe – aye; Charlie Vars – aye; and Doug Kirkwood – aye. Motion carried unanimously.**

**CASE #: PZ12445–032320:**

**Jamie Ramsay moved no regional impact. Charlie Vars seconded.**

**Roll call vote: Danielle Pray – aye; Jamie Ramsay – aye; Bob Rowe – aye; Charlie Vars – aye; and Doug Kirkwood – aye. Motion carried unanimously.**

**Discussion:**

Doug Kirkwood explained that the decision to be made is if there was an error made in the interpretation of the zoning ordinance by the administrative official.

Danielle Pray suggested that, no matter the vote, this section of the zoning ordinance, and the others similarly worded, be referred to the Planning Board for clearer interpretation and wording.

Danielle Pray stated that she would not support the decision as was made by the administrative official.

Jamie Ramsay stated that he would support Scott Tenney's decision.

Bob Rowe stated that he would support Scott Tenney's decision because the proposed garage is an accessory structure and there is only one section that mentions corner lots, section 2. This is the section that was followed by the administrative official. He does think it is too bad that the applicant will have to go through two hearings for this project.

Charlie Vars stated that he accepts the interpretation as made by the Building Official.

**Regarding the question of whether there was an error made in the interpretation of the zoning ordinance by the Building Official in this case:**

**1 True, 4 Not True.**

**The Chair stated that the appeal of the administrative official's decision has been denied.**

**Bob Rowe moved to exit deliberations. Charlie Vars seconded.**

**Roll call vote: Danielle Pray – aye; Jamie Ramsay – aye; Bob Rowe – aye; Charlie Vars – aye; and Doug Kirkwood – aye. Motion carried unanimously.**

*Bob Rowe left the meeting.*

*Tim Kachmar sat for Bob Rowe.*

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3. CASE #: PZ124646-051720 – VARIANCE

**Donzi Realty LLC (Owner), 96 Route 101A, PIN #: 002-053-000 & S&E Realty LLC (Applicant & Owner), 98 Route 101A, PIN #: 002-049-000 – Request for relief from Article IV, Section 4.3, Paragraph A to construct and maintain parking spaces as shown on plan. Commercial and Residential Rural.**

Jamie Ramsay read and opened the case.

The Board agreed to hear the case in its entirety, even if it carried on after 10p.m.

Greg Michael, attorney for the applicant, presented the case. He explained that the parking on these properties is in a split zone area. There are two parcels, owned by two individuals. His client will have the option to purchase both parcels and hopes to eventually combine the two into one with a Subaru dealership thereon. Both lots are located on Route 101A. Relief from this article will allow for additional parking spaces. The proposed building complies with the zoning here, even though the lots are not considered consolidated yet. If any of the parking spaces cross over the property lines, this will be initially handled through easements that will expire once the properties are combined.

Greg Michael noted that the request is an appropriate one because this area is surrounded by other commercial properties and is located in the Route 101A principal commercial district.

Brett Allard, as associate with the firm of Bernstein, Shur, Sawyer, & Nelson, P.A., addressed the five tests:

- 1) The variance will not be contrary to the public interest because the applicant's property is already being used for commercial purposes, consistent with the manner in which the majority of the property is zoned. The purpose of establishing and distinguishing between residential and commercial zones is to segregate uses consistent with what is appropriate for the area. However, since the applicant's property is split-zoned, and since it fronts along the busy Route 101A corridor where most of the property is zoned commercial, allowing parking on the rear portion of the property that is technically zoned "residential" does not conflict with the purpose of segregating uses because there is no practical means to simultaneously use the rear portion of the property for residential purposes and the front portion of the property for commercial purposes. The public already views this property as commercial and thus it is not contrary to the public interest to allow the entire property to be used for commercial purposes by allowing parking spaces on its rear portion. For these same reasons, granting the variance would not threaten public health, safety, or welfare, particularly where the applicant only seeks to construct and maintain parking spaces on the rear portion of the lots, which is a relatively passive use.
- 2) Because it is in the public's interest to uphold the spirit of the ordinance, the Courts have held that these two criteria are related. If you meet one test you almost certainly meet the other. See Farrar v. Keene, 158 N.H. 684 (2009). In addition to the above-stated reasons, which are incorporated herein by reference, granting the variance will

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not alter the essential character of the area because this area alone Route 101A is already zoned commercial and the proposed use is consistent with the area's present use. Therefore, the spirit of the ordinance is observed.

- 3) There is no harm to the general public by allowing parking spaces on the rear portion of this commercial property. This is a use that the public typically expects on commercial properties, particularly car dealerships. As such, there is no gain to the public if the variance is denied. There would only be loss to the applicant in that it would be restricted from using its entire property for a single purpose. Therefore, the loss to the applicant when balancing public and private rights outweighs any loss or injury to the general public (none).
- 4) The values of the surrounding properties will not be diminished because the applicant's property is already used for commercial purposes, consistent with surrounding uses on Route 101A which are also commercial. Granting the variance will also not diminish the value of the residential properties that abut the rear portion of the applicant's property because it is public knowledge that these lots abut many commercial uses, and since the applicant's property is already established as a commercial use, the market inherently contemplates that use continuing. In other words, the applicant is not proposing to establish a new commercial use that would be foreign to an otherwise residential area. The market already accounts for properties located close to Route 101A in this area being abutted by commercial uses, and the applicant does not propose to change that. Indeed, with modern land use philosophy generally trending away from use segregation towards mixed and integrated uses, many view close proximity between residential and commercial lots as a value-added benefit.
- 5) Unnecessary Hardship under A-1:  
The applicant's property has special conditions that distinguish it from other properties in the area. First, it is a split-zoned property, with the majority of its area being zoned commercial and only a smaller rear portion of the property zoned residential. Second, the property is already established as a commercial use. Third, it is much larger than other properties in the area. In total, the applicant's property is 6.1 acres. By contrast, according to NRPC's GIS data for developed abutting lots on Route 101A, lot 2-55-1 is only 1 acre; lot 2-52 is only 0.36 acres; lot 2-51 is only 0.45 acres; lot 2-50 is only 5 acres; lot 2-48 is only 0.21 acres; and lot 2-47-1 is only 0.54 acres.

Owing to these special conditions, among others, relative to other properties in the area, there is no fair and substantial relationship between the general purpose of the zoning ordinance's prohibition on parking spaces on the rear portion of the applicant's property and its application to the applicant's property. There is no practical means or reason under the zoning ordinance or otherwise to restrict the rear portion of the property to residential uses while allowing the front portion of the property to be used for commercial purposes. The public already views this property as entirely commercial and the applicant proposes to continue it as such. There is no reason to deprive the applicant of use of the rear portion of its property for a passive

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parking space use simply because it is bisected by a zoning boundary when the property is already used for commercial purposes. Moreover, due to its large size, the property can sufficiently accommodate the parking spaces proposed on the “residential” portion of the property.

Accordingly, the purpose that the zoning ordinance seeks to protect is not in any way threatened if this variance is granted. Even though this proposal requires this variance, the purpose that the zoning ordinance aims to protect will be preserved if granted.

A-2. The proposed use is reasonable because:

For all the reasons set forth above, which are incorporated herein by reference, the applicant’s proposed use is reasonable. The applicant’s property is already established as a commercial use and the applicant does not propose to change that. The public already views the property as a commercial one. The property is surrounded by other commercial uses on this busy portion of the Route 101A corridor, and parking spaces for vehicle display/sales and employee parking is a relative passive use.

*Jamie Ramsay took over as Chair for Doug Kirkwood briefly, while Doug Kirkwood stepped away.*

**CASE #: PZ12646–051720:**

**Tim Kachmar moved no regional impact. Charlie Vars seconded.**

**Roll call vote: Danielle Pray – aye; Jamie Ramsay – aye; Tim Kachmar – aye; Charlie Vars – aye. Motion carried unanimously.**

*Doug Kirkwood rejoined the meeting and retook his seat as Chair.*

In response to a question from Danielle Pray, Greg Michael explained that the properties are currently two separate lots, but his client has the option to purchase Map Lot 2-53.

In response to a question from Danielle Pray, Greg Michael explained that both of the properties are about  $\frac{2}{3}$  –  $\frac{3}{4}$  zoned commercial. The back lots of both properties are about  $\frac{1}{4}$ -  $\frac{1}{3}$  zoned residential.

In response to a question from Doug Kirkwood, Greg Michael stated that he believes there already exists somewhat of a visual barrier in the back of these lots between them and the residential lots. This proposal will next go for a site plan review, and buffering between the parcels will be further discussed at that time.

In response to a question from Charlie Vars, Greg Michael agreed that there could eventually be a new dealership placed on the combined lots. This new structure will comply with the ordinance.

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Tim Kachmar asked about how properties can become grandfathered in from being split zoned properties, instead of simply drawing a line down the property and splitting it into two zones.

Doug Kirkwood noted that there are other places in town where a line bisects certain properties.

Jamie Ramsay agreed that the zoning district boundary seems a little random and that the division of these two zones falls to the entirety of the stretch along Route 101A.

Public Comment:

Judy Koch, Executive Director for the Regional Services and Education Center (RSEC), stated that RSEC abuts the property. She has no objections to the proposal or to the potential new Subaru dealership on the property.

**Jamie Ramsay moved to enter into deliberations. Tim Kachmar seconded.  
Roll call vote: Charlie Vars – aye; Jamie Ramsay – aye; Danielle Pray – aye; Tim Kachmar – aye; and Doug Kirkwood – aye. Motion carried unanimously.**

**Jamie Ramsay moved no regional impact. Charlie Vars seconded.**

**Jamie Ramsay withdrew the previous motion as it was already moved earlier.**

**Discussion:**

Jamie Ramsay noted that it is surprising that neither of the two lots is entirely zoned commercial. He doesn't believe there is any wisdom in considering the properties as being in two separate zones, other than for continuity along the Route 101A corridor.

1. The Variance will not be contrary to the public interest.

- C. Vars – true, a commercial building already exists on the site and a similar size one will be built when the two lots are condensed. He doesn't believe there is an issue with the rear of the properties because no one wants to build a house much closer to commercial properties anyway. Thus the application is not contrary to the public interest.
- J. Ramsay – true, the proposal is not contrary to the public interest. He believes it is surprising that these properties are in split zones. He believes it is unlikely that anyone would want to build a new home closer to the rear of a car dealership.
- D. Pray – true, she does not believe that granting this variance will be contrary to the public interest. The proposal will not alter the character of the neighborhood. If approved, the proposed parking lot area is a passive use for the property.
- T. Kachmar – true, he agreed with the points made by the other Board members.
- D. Kirkwood – true.

**5 True**

2. The Variance is consistent with the spirit and the intent of the Ordinance



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- 699           • J. Ramsay – true, he doesn't believe that the proposal goes against the health, safety,  
700           of welfare of the public.
- 701           • D. Pray – true, the spirit of the ordinance is observed. She doesn't believe that the  
702           proposal will affect the general health, safety, or welfare of the public. The proposal  
703           is consistent with the current use present already in this area.
- 704           • T. Kachmar – true.
- 705           • C. Vars – true, he doesn't believe there is any gain to the public if the Board denies  
706           this request. The proposed use is also passive and for vehicles only.
- 707           • D. Kirkwood – true.
- 708           **5 True**
- 709
- 710           3. Substantial justice is done.
- 711           • D. Pray – true, the proposal will allow substantial justice to be done. There will be no  
712           gain to the public if the variance is denied. The proposed use is specifically for  
713           parking, which is passive, not intrusive, and will not affect the public.
- 714           • T. Kachmar – true.
- 715           • C. Vars – true.
- 716           • J. Ramsay – true.
- 717           • D. Kirkwood – true.
- 718           **5 True**
- 719
- 720           4. The values of the surrounding properties will not be diminished.
- 721           • T. Kachmar – true, this is already a commercial area. Parking spaces placed in the  
722           back residential zoned location with barriers erected will be okay.
- 723           • C. Vars – true, the value of surrounding properties will not be diminished. Also none  
724           of the closest abutters objected to the proposal.
- 725           • J. Ramsay – true, there was no objection from the closest abutters to the west, and the  
726           proposed use is consistent with all businesses to the east.
- 727           • D. Pray – true, the applicant's testimony showed that the values of surrounding  
728           properties will not be diminished.
- 729           • D. Kirkwood – true, there was no objection from RSEC.
- 730           **5 True**
- 731
- 732           5. Literal enforcement of the provisions of the Ordinance would result in an unnecessary  
733           hardship.
- 734           • C. Vars – true, he believes there would be a hardship to the applicant to deny this  
735           variance. The proposed use is for passive sales purposes and for employee parking.  
736           This, otherwise, meets all of the requirements.
- 737           • J. Ramsay – true, he believes holding this business to the letter of the ordinance,  
738           regarding it being a split zone property, would be unrealistic and unreasonable. The  
739           split zone on a six acre property is the hardship.

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- D. Pray – true, the split zoning on these properties is a unique condition for demonstrating hardship. It is a hardship because of the character of the property. The proposed passive use of the property is a reasonable use in the residential zone.
- T. Kachmar – true.
- D. Kirkwood – true, the proposed use is reasonable. There is already a house behind the business here. If a visual buffer is erected there should be no issues to the residential properties. To treat this property as a single zoned property is the best and most reasonable use.

**5 True**

**The Chair stated that the application, as it passed all of the tests, is granted.**

**Charlie Vars moved to exit deliberations. Jamie Ramsay seconded.**

**Roll call vote: Danielle Pray – aye; Jamie Ramsay – aye; Tim Kachmar – aye; Charlie Vars – aye; and Doug Kirkwood – aye. Motion carried unanimously.**

**OTHER BUSINESS:**

The Board discussed the option to come by Town Hall in order to sign the finding sheets for these applications. It was noted that the sheets could be left in the lobby of the Town Hall since the building was not yet open to the public.

Due to the lateness of the hour, the Board determined not to act on their Officer reorganization or the minutes that were on the agenda for approval, from February 18, 2020.

**Charlie Vars moved to adjourn at 10:23 p.m. Tim Kachmar seconded.**

**Roll call vote: Danielle Pray – aye; Jamie Ramsay – aye; Tim Kachmar – aye; Charlie Vars – aye; and Doug Kirkwood – aye. Motion carried unanimously.**

Respectfully submitted,  
Kristan Patenaude

Minutes approved: November 17, 2020