

TOWN OF KINGSTON
ZONING BOARD OF ADJUSTMENT
PUBLIC HEARING
August 10, 2023
(concluding August 11, 2023)

PRESENT: Peter Coffin, Chair; Meghan Kelley, Vice Chair; Kyle Bache (alternate); Peter Broderick; Richard Russman; Shaw Tilton; Members

Also Present: Robin Carter, Land Use Administrator

Mr. Coffin called the meeting to order at 7:00 PM.

A quorum was present at the meeting.

BOARD BUSINESS

Approval of Meeting Minutes (July 13, 2023):

MOTION: by Ms. Kelley to accept the minutes as written.

SECOND: by Mr. Tilton

A vote was taken, All in favor, the motion passed. (5-0-0)

Correspondence:

Mr. Coffin referred to a letter dated August 9, 2023 to the Town of Kingston Zoning Board of Adjustments from Christopher Swiniarski of Divine Millimet who is counsel for one of the abutters to the proposed Summit Distributing, LLC, 249 Rte. 125 location. The letter mentioned that a particular member of the Board should recuse himself for alleged remarks of prejudgment. The member addressed the alleged remarks as referring to a previous hearing, which had been decided, and stated that he had not prejudged the current hearing before the Board. During discussion by the Board, a question was asked if another member of the Board should recuse himself for a statement made at a previous ZBA meeting before he was a Board member. That member also explained that it was not related to the current Special Exception hearing. Mr. Coffin asked if any member of the Board wanted a non-binding advisory vote on recusal. No request was made; no vote was taken. Mr. Coffin asked each member if he wanted to recuse himself from the Summit Distributing, LLC hearing. Neither Board member recused himself.

PUBLIC HEARING

<Board note: hearing opened at 7:22 PM>

**Summit Distributing, LLC Kingston Crossing, Inc.
249 N.H. Route 125
Map R40 Lot 15**

Mr. Coffin read the legal notice:

The applicant is requesting a **Special Exception (Article 109:7)** to allow a retail motor fuel outlet with a 5,100 sf convenience store/quick service restaurant and 5 retail fuel dispenser islands (10 fueling locations) and 3 high speed commercial diesel islands (2 fueling locations) within the Commercial II District.

Applicant: Present at the hearing was Tom Frawley, President and Owner of Summit Distributing, LLC, Brian Bouchard, Attorney with Sheehan Phinney Bass & Green, PA, Portsmouth, NH office; Heather Monticup, P.E., Vice President/Director of Land Development of Greenman-Pedersen, Inc. (GPI) is the traffic engineer; Nicole Duquette, P.E., LEED AP, Project Manager of GPI.

Attorney Brian Bouchard spoke and said that he represents the applicant, Summit Distributing, LLC. Mr. Bouchard noted that he submitted a letter to the Board, dated August 10, 2023. He mentioned, in June, 2023 that this Board previously determined and granted a Special Exception in the aquifer protection district that the proposed project does not detrimentally affect the quality of the groundwater contained in the aquifer. This decision was later upheld in a decision by the Rockingham Superior Court.

He explained that the application for the special exception is only for the gas station use. The retail use and restaurant uses are permitted in the C-II zone.

Mr. Bouchard talked about how to measure the traffic and how traffic will change in comparison to other commercial uses that are permitted in the C-II zone. He gave some examples of a truck terminal, a supermarket, and a few others. All of these would change the traffic patterns significantly from a vacant lot. He commented that when the Board is analyzing this criterion, they need to analyze it as compared to other uses that are permitted in the C-II zone. The applicant's proposal for a retail operation and restaurant are permitted by right.

Mr. Bouchard brought up that at a prior hearing in June, 2023 that there were residents that urged the Board to take a position that if the applicant could not guarantee, with 100% certainty that no gasoline would ever leak and that there would never be an incident, then the Board should deny the application. He explained that Summit Distributing, LLC has never had a leak at any of its facilities and doesn't anticipate any here. The system has been designed with myriad redundancies to avoid any leaking into the environment. Mr. Bouchard said that the ordinance does not require or demand a 100% certainty guarantee. He read criterion #4 of the special exception (109.7(A)(4), "no hazard to the public or adjacent property on account of potential fire, explosion or release of toxic materials." He remarked that this criterion encourages the Board to consider reasonable possibilities, reasonable potentializes, to evaluate the mitigation systems, and redundancies. But it is not one that requires a 100% certain guarantee or invite consideration of conjecture and unfounded speculation.

Mr. Bouchard pointed out that TFMoran confirmed in their letter dated August 9, 2023 that they do not have any further traffic concerns. He referred to a letter from Truslow Resource Consulting, LLC dated August 7, 2023 and quoted text from the letter, "*The release of toxic materials from the proposed Summit Fuel depot is unlikely based on the proposed site design, management and controls. There should be no hazard to the public or adjacent property owners from hydrologic impacts or stormwater releases of toxic materials from the site if all controls listed area installed and maintained, and stated emergency response measured are followed.*"

Mr. Bouchard explained that the owner of this project is a local NH business owner, cares about this community and has a well-regarded reputation in the State of managing distribution systems like this. GPI and the applicant have addressed to resolve all the comments and concerns raised by the three experts contracted by the Board.

Heather Monticup of GPI gave an update on traffic. She said that TFMoran (TFM) did a traffic review (letter dated July 7, 2023) of GPI's Traffic Impact and Site Access Study. GPI responded

to the letter from TFMoran on July 26, 2023. The comments addressed where Covid adjustments and trip generation comparisons. They have addressed all the comments and updated all the analysis.

Ms. Monticup mentioned that even if the warehouse project (266 Rte. 125) does not move forward in signaling the intersection of route 125 and 107 that it will be a remediation measure of this project.

She said that they received a letter from TFMoran dated August 9, 2023 and every comment on it has been noted as resolved. There are no further outstanding issues on the traffic side of the project.

Nicole Duquette of GPI spoke and mentioned that they received comments from Danna Truslow of Truslow Resource Consulting, LLC and Dennis Quintal, Civil Construction Management, Inc.

She brought up the potential releases to the site. They can't say it will never happen to the site; there may be the potential, but they have planned for the possibility of this. They have made sure that there are redundancies to contain a potential spill on the property.

Ms. Duquette went through some elements of their treatment train system. The pre-treatment train is the initial system on the property. She referred to a diagram and explained the layout of the property. The area shown in yellow and orange is the only area they are asking for the special exception on. She explained that if there was ever a spill at the dispensers, each of the islands on the retail section is surrounded by positive limited area a/k/a the retaining grooves. These are capable of retaining 5 gallons of gasoline or diesel fuel. On both of these there are canopies, so do not have to worry about snow cover. If there was a spill that was over 5 gallons (at the dispenser island) then it would go into a catch basin. All the catch basins have eliminators. This is a T type system that allows floatables to build up in each of the catch basins and will stay at the top and the water will settle down. In each of the catch basins there is the ability to contain 66 gallons of floatables. This is the first line of defense. If there is a spill over 71 gallons, it goes to an oil/water separator. Ms. Duquette went through the NH public records for the last 10 years (2012-2021) and the largest spill recorded by a dispenser was 17 gallons. If there is a spill greater than 71 gallons, they do have a 1,500-gallon oil/water separator tank. For the fuel delivery area, it goes through basically the same process except for the containing grooves around it because there is not a canopy. In the first defense system they have about 190 gallons of floatable capacity. There is a 1,500 oil/water separator in the front and there is a 3,500 oil/water separator in the fuel delivery area which has 2,000+ gallons for storage for floatables. This is well over what is required by the State regulations. Knowing that the Town is very sensitive to making sure that they are containing oils they have the much larger oil/water separator there. In the last 10 years, the NH public records for the maximum amount of spill for delivery is 500 gallons. They are well above this for containment. They have numerous redundancies to make sure they are containing everything on site.

Ms. Duquette addressed a comment made about the dissolve of petroleum and this is where the treatment system comes in mentioned in the Stormwater Management report. From here it goes on to the lined sediment system and bioretention area. This is a lined system so is not going directly into the groundwater. According to a UNH Stormwater testing center, where the DES gets their recommendations on stormwater from, they have tested wooded bioretention areas and have found it as a 99 % rate of removing hydrocarbons. Both areas have the bioretention area to deal with the suspended hydrocarbons within the stormwater.

Board comment(s):

Mr. Coffin asked what happens to the hydrocarbons? Ms. Duquette said it is because of the carbon material breakdowns within the system. Because the Town is very sensitive to this issue the applicant has proposed another additional treatment system. Even though this system meets DES requirements and meets 99% removable just with the bioretention area, they will be adding a 2nd treatment device on each area. It will be an enclosed mechanical storm filter treatment system and the filters will be made of granular activated carbon (GAC).

There was mention about the wells. Ms. Duquette said that NH DES Underground Storage Tank Bureau has regulations for separations to wells. A public water system (any system that services over 25 people) should be permitted as a public water supply system. The DES requires this type of water supply to be 500 feet from any gasoline system component and 400 to diesel. There is a 250-foot radius to private wells for gasoline components and 75 for diesel. The closest well to the system will be their public water supply. They will be meeting DES setbacks for wells and fueling supplies.

Ms. Duquette said these are a few of things they did change: One was the comment from Mr. Quintal about the notation with the Oil/Water Separators. This was changed from 2,500 to show 3,500 gallons. The other is the landscaping to make sure its 99% removal in the bioretention area, they added more vegetation to the bottom of this area. Another addition would be adding the storm filter. This information will be added to the initial application information that was submitted.

Mr. Coffin asked about the well radius, and it was mentioned that the closest well was theirs at 500 feet. He questioned how far it is from the fueling area to the to the edge of the property and would they need a well radius in the protection area that goes into adjacent properties. Ms. Duquette said that would be a setback and that the distance between the public water supply and components is a setback. The well radius is different. Mr. Coffin asked if the setback requirement from the fueling facility-does it cross the property lines; would you need an easement from keeping people from putting in a well. Ms. Duquette said they have the area on the property that is needed. She mentioned that in the letter from Verdantas dated August 3, 2023, there is a recommendation to have groundwater and wells leaning towards the outlets of the property, Verdantas recommended three monitoring wells.

Danna Truslow, who prepared the Hydrologic Evaluation was present and came to the table and gave an overview of her review. A concern she had was the discharge from stormwater in the bioretention areas. Her concerns were during a rainstorm where there is a prediction of a certain amount of discharge. Ms. Duquette gave information on storms and said that a 2-year storm is 3.15 inches in 24 hours, a 10-year is 4.8 inches in 24 hours, and 50-year is 7.4 inches in 24 hours. Mr. Frawley said the tankers do not make deliveries in hazardous conditions.

Mr. Broderick asked if the retention areas were ponds or tanks. Ms. Duquette responded that the pretreatment system is all enclosed concrete structures. He asked if there was a baffle at the outflow. Ms. Duquette said there is. Mr. Broderick said that any petroleum products are lighter than water and would go to the top (like a septic tank) therefore the outflow is likely to just be water.

Mr. Tilton brought up the storm we just had and the heavy rain. Ms. Duquette said that they are required that their pre and post flow water rate is mitigated on site. Their systems are designed to handle large storm events. The pretreatment systems are designed to make sure the first flush is taken care of, like everything in the parking lot.

202
203 Mr. Coffin asked how they know when the pretreatment system is full. Ms. Duquette explained
204 that they are required to address how this is handled in the stormwater regulations.
205

206 Ms. Truslow provided more information from her review. She clarified a comment Ms. Duquette
207 mentioned earlier about stormwater and the 99% hydrocarbons removal efficiency, pertained to
208 diesel range hydrocarbons. The lighter range tends to be gasolines and are more soluble. Ms.
209 Truslow said that is why she was satisfied that the granular filter system as long as it is properly
210 contained and maintained. She said the adsorption of petroleum is what happens in the
211 bioretention system, the bacteria corrodes and breakdown the products, it's a natural
212 remediation system.
213

214 Mr. Tilton brought up the 1% and what are the risk factors. Ms. Duquette said that there was a
215 letter submitted with the response to Ms. Truslow's comments by Verdantas (dated August 3,
216 2023). Ms. Duquette referred the Board to page 2 of the Verdantas letter regarding monitoring
217 and detection of petroleum. Ms. Duquette said the system that is proposed for this site far
218 surpasses what is in place at some of the other sites mentioned in the letter.
219

220 Ms. Truslow noted that UNH Stormwater Center did a report that may help explain more
221 information on the 99% approval rate. Ms. Truslow said she could make this report available if
222 anyone was interested in it.
223

224 Ms. Truslow said there is going to eventually be stormwater discharge/drainage. The adjacent
225 property is going to be continued to be owned by the same owner. Mr. Coffin commented that
226 Summit still plans on doing the lot line adjustment and will be owned by the same owner,
227 however, this may not be permanent conditions and the adjacent lot may be sold. Will they need
228 some kind of an easement permitting the well and the setback for mitigating stormwater. Ms.
229 Duquette said they will need a drainage easement in back, a slope easement that goes down
230 and an easement for groundwater for the upper lot and that these are things that are usually
231 taken care of at the planning board.
232

233 Ms. Truslow mentioned that there are no guarantees but there is a lot of redundancies built into
234 the system and a lot of conditional work done to mitigate contaminate release. She commented
235 that the stormwater discharge plan could be addressed at the planning board level. Mr. Coffin
236 noted that is why the ZBA requested the hydrologic evaluation and that ZBA included in their
237 October 12, 2021 decision to put a condition that the Planning Board would determine what was
238 required for the aquifer protection. He commented that the hydrologic evaluation was done to
239 understand the affect to abutting properties.
240

241 Mr. Broderick asked Ms. Truslow if she is comfortable with the system Summit is proposing to
242 install. Ms. Truslow said with the redundancies, especially with the granular activated carbon
243 that is at the backend of the retention system that she understands will treat anything that may
244 discharge into the ground. It comes down to management, maintenance, and checking that
245 everything is being followed.
246

247 Mr. Coffin said that Kingston doesn't have the resources to do ongoing monitoring for a project
248 of this size and would want to come up with a plan to oversee it and a condition would most
249 likely be having to set up an escrow fund to hire an engineer, consultants and other resources
250 that may be needed. This is usually a condition that would be set by the Planning Board.
251

252 Public comment opened at 8:20 PM.

Public comment(s):

Mr. Coffin asked if Mr. Swiniarski of Divine Millimet would give further explanation on his comments outlined in his letter dated August 9, 2023. Mr. Coffin referred to the comments about the traffic and engineering review not being complete yet. He asked Mr. Swiniarski if he was all set now that they have been received and a copy provided to him. Mr. Swiniarski said he is not because the traffic one came in around 5:02 pm today (via email), one yesterday and another one a couple of days before. He explained that the Town's peer reviews, and applicant had about 30 days to respond, and he doesn't think it is fair for them to have expert review in less than two hours before the meeting. He also said the residents should be able to make the decision if they want to engage experts to be able to review them. Mr. Swiniarski said he hasn't had a chance to review the information.

Mr. Coffin said that the initial 3rd party reviews were distributed a few weeks ago giving time for review. He explained that the way things are normally done is plans and material are reviewed at the hearings. Mr. Swiniarski said everyone is entitled to review it and have a reasonable time to review the material and they haven't had a reasonable time.

Mr. Coffin referred to item II. 2. In Mr. Swiniarski's letter, "Third Party Review of the Application by Civil Construction Management, Inc. is not complete because it relies upon a blatant falsehood." The statement that is being referred to is from Summit's August 3, 2023 peer review response letter prepared by Civil Construction Management, Inc., dated July 19, 2023. *"Convenience stores and quick service restaurants and the utilities necessary to service them are allowed by right within the Commercial II District, and therefore, are not part of the Special Exception for a gas station within the CII District requested by the applicant."*

Mr. Coffin asked Mr. Swiniarski to explain why he believes convenience stores and quick service restaurants are not permitted by ordinance in the C-II zone. Mr. Swiniarski said in June, he submitted a detailed written explanation on this. Mr. Coffin referred to the C-II ordinance under permitted uses, Article 109.5.I. "Establishments service food and beverage such as, but not limited to: restaurants, cafes, and taverns"; and K. is Retail stores, Mr. Coffin noted that this ordinance hasn't changed and asked Mr. Swiniarski why he thought it was a blatant falsehood because the ordinance shows they are permitted. Mr. Swiniarski commented that the property is also in an overlay district. Mr. Coffin said that the Board has already heard the application on the aquifer protection overlay zone and we are not here to discuss it. He asked Mr. Swiniarski that their statement that says it is permitted by right in a CII zone, is a falsehood? Mr. Swiniarski said it is a falsehood, it doesn't tell the whole truth and that this is in an overlay district. He said that we know that the Board was reluctant to make a decision as to whether additional relief is necessary or not. Mr. Swiniarski remarked that if the Board is going to be relying on those statements and rendering a decision tonight, then the Board is going to be making that decision and that is the decision they are going to appeal. This is the same decision the Planning Board will have to make if they get involved. He brought up that if there is a Code Enforcement Officer, they will be making that decision as well when they request it and they will be appealing that decision too if it is wrong. Mr. Swiniarski said that this is a material issue.

David Mezey, 1 Monarch Way –

- Mr. Mezey said he is a resident of Kingston.
- In favor of the development.
- He is a retired healthcare professional, and he has dealt specifically and directly with medical, pharmaceutical, and chemotherapy waste. He commented in comparison that the 17-gallon gasoline spill over a 10-year period fails in comparison because every day

- 303 pharmaceutical waste comes out of humans and goes into the septic systems.
- 304 • He applauds the applicant for all the fail safes and safety requirements they seem to
 - 305 have met and exceeded.
 - 306 • He commented that this is a great thing for the Town.

307

308 Phil Coombs, 6 Little River Road –

- 309 • Mr. Coombs mentioned that he is a downstream abutter to this project.
- 310 • Asked about the traffic light and if there would be one. Mr. Coffin said yes, and the 266
- 311 Rte. 125 project is responsible for it but if that project doesn't happen then Summit would
- 312 be required by the State to put it in, and the right and left turning lanes at the intersection
- 313 also.
- 314 • He said he has an issue with the applicant saying they have no spills.
- 315 • There have been 3 rain events with over 3 inches in the past few months. 3.2", 4.86",
- 316 4.86" in under 6 hours. This is a large volume in a short amount of time.
- 317 • This proposal does not address the groundwater.
- 318 • Article 109.7.A.3. C-11 district has not been taken into consideration. "No excess
- 319 demand on municipal services including, but not limited to water, sewer, waste disposal,
- 320 police, fire protection, and schools." The ZBA has not addressed this with the police and
- 321 fire department. The Planning Board sent out a set of plans requesting comments, but it
- 322 did not ask if there would be any excess demand on these services. Mr. Coffin said that
- 323 Summit has not gone to the Planning Board yet. Mr. Coombs asked if the subject matter
- 324 experts on the impact of this operation have been consulted (Police and Fire). Mr. Coffin
- 325 said other than them receiving a copy of the plans, no. Mr. Coombs mentioned that a
- 326 similar, but smaller truck stop in Town had through June 1st of this year, had 69 calls
- 327 from the police department: in 2022-128 calls and in 2021-92 calls. This is a drain on
- 328 municipal services. The Board needs to consult with the Police and Fire on the amount
- 329 excess demand of municipal services on a similar operation in Town on the same road.
- 330 • He spoke to the matter of appropriate review time. It has been brought up that this Board
- 331 approved the aquifer protection measures. He would call this a blatant falsehood. In an
- 332 hour and 15 minutes with first hearing the information from the applicant, the Board took
- 333 that action. At no point was the public allowed to review any of the information, consult
- 334 with any experts or challenge any of the information. Mr. Coffin said that the appeal
- 335 period for this application is over. Mr. Coombs said he is aware of that, but it is
- 336 happening again here.
- 337 • The Board's job is to represent the residents of Kingston, not the applicants.

338

339 Stan Wentzell, 33 Rockrimmon Road –

- 340 • He is fundamentally against this. Yes, it would be good to have another place to go for
- 341 gas. But if this goes in it will have to come down someday. Is there a capital reserve fund
- 342 if the project has to close down. Does the Town get involved?

343

344 Tom Frawley, Summit Distributing, LLC –

- 345 • He commented on the decommissioning piece since it was brought up as a concern. If
- 346 this becomes a vacant gas station, who cleans it? NH has a petroleum cleanup fund. It's
- 347 a fee that is collected on every gallon of gasoline and goes into the fund. It is specifically
- 348 designed to clean up sites. There is an insurance fund that is part of many states in the
- 349 country. This is a state fund and there is federal funding associated with managing this
- 350 and also fees that the state collects. This fund is dispersed for cleanup operations
- 351 related to petroleum spills, and underground storage tank leaks, and other clean up.

Phil Coombs, 6 Little River Road – (2nd public comment)

- Mr. Coombs brought up that there have been spills from other gas stations in Town in the past and mentioned that this information is on the NH DES OneStop website.
 - Formerly Bayberry Variety, 71 Rte. 125-1800 gal storage tank (04/2005)
 - Formerly Crinkles Variety, 82 Main St-leaking underground storage tank ('91)
 - Hanson Foreign Auto, 44 Rte. 125-leaking underground storage tank (02/88)
 - Former Max Quick Shop, 122 Rte. 125-leaking underground storage tank (04/88)
 - Mr. Mikes (Alliance Energy), 37 Main St. (03/13)
 - NHDOT, 35 Newton Junction Rd.-1800 underground storage tank (09/83)
 - Northland Forest Products, 36 Depot Rd.-underground storage tank (08/95)
 - 126 Rte. 12 (06/04)
 - Pete's garage, 48 Church St.-leaking underground storage tanks (09/93)
 - Walter S. Clark and Son's, 138 Main St.-leaking underground storage tank (08/99)

Mr. Broderick asked Mr. Coombs if he knew when those tanks were installed. Mr. Coombs said that information was not available online. Mr. Broderick commented it was pre the double walled tanks.

Tom Frawley, Summit Distributing, LLC –

- Noted that from 2012 to 2021, 562 underground storage tank systems were installed and from this data set there have been 0% of these becoming underground storage tank problems in NH.
- This is the period of time when we have newer technology.
- He commented that historically he agrees. Now there are doubled tanks, double walled lining, electronic monitoring.

Mr. Coffin asked about what the applicant does for monitoring if the power goes out and they have no internet connection to report to a central location? Mr. Frawley explained that they have a redundant cellular system built in. And every new station they build they are putting in generators. Solar will probably not be adequate to completely run the service but will be right there for power needs.

Pam Brown, 23 Sunshine Drive –

- Restated her opposition to a gas station on top of the aquifer in Kingston.
- She referred to Article 109.7.A.4. "No hazard to the public....." She commented that the aquifer protection is the greatest potential to groundwater. Kingston has the largest aquifer protection in the area.
- Powwow River was selected by the State for evaluation for potential water supply.
- The Aquifer Protection ordinance 201.4.E.14 outlines that gas stations are a prohibited use in the aquifer protection zone. If the Board waives this what else will get waived.
- A restaurant or a mini mall or office complex are fine. There are plenty of gas stations in the area. If gas stations are on the prohibited list, then the Board should not be approving this project.
- She said she will boycott the facility if it goes through and wants them to withdraw their request.

Mr. Coffin said he understands concerns with the aquifer, but that is off the table for tonight and the Board has to make a decision based on the special exception criteria for the C-II zone.

Mr. Bouchard – Sheehan Phinney

- Concerns raised with 3rd party experts have been addressed and satisfied.
- Mr. Bouchard noted that this matter has been pending since April because a meeting was called to address regional impact. Abutters to the project have had notice for months and have had the opportunity to hire an expert if they wanted to and provide information to the Board.
- Regarding police and fire, he commented that this Board does not need an expert for everything. If the Board feels they need one, then are entitled to one. What the Supreme Court says is you bring your own experiences into these proceedings. You can't ignore what your experts have said that the concerns have been satisfied.
- Mr. Bouchard said in response to statistics cited by Mr. Coombs, a gas station is not unique in capacity to any retail store built in that area.
- This is a well-designed facility that will properly address any consideration. This project meets all the requirements for the special exception as many of the experts have indicated.

Muriel Ingalls, 100 Main Street -

- This is a large project and does Kingston have the expertise and personnel to work with the applicant and oversee it. There is no code enforcement officer now.
- Ms. Ingalls stated that she objects to the gas station in the aquifer protection zone and an ordinance was passed this year that doesn't permit gas stations in the aquifer zone.
- The Board needs to take the community into consideration. Who is the ZBA responsible to, the applicant or the residents of Kingston.

Mr. Coffin explained that the Aquifer Protection ordinance is not what is being addressed in this hearing. It was already addressed at a past hearing. In response to the Town of Kingston, if the use is approved in the C-II zone, the Board would have to create conditions to protect the aquifer zone of Kingston. If it means denying? Or can be with safeguards?

Ms. Duquette – GPI

- They did get their NH DES Alteration of Terrain (AOT) permit. One of the conditions of this permit is the professional design engineer is required to certify that all stormwater is installed properly. They have to inspect the pretreatment and treatment systems and sign off on them.

Mr. Coffin mentioned that this was something that came up with 266 Rte. 125, the warehouse project. That this is a very big project, and an escrow account was created to enable the hydrogeologist (Danna Truslow) to work with the applicant to create a system and a plan for a monitoring system. If this project was approved, a condition would be to have an escrow account set up to allow the Town Engineer to go and inspect and to have a maintenance and monitoring system.

Ms. Duquette – GPI

- She said they will have an underground storage system (UST). These systems are required to be inspected during construction. They have professional engineers in their office that just go out and inspect UST installations for certifications for UST permits.

Mr. Coffin asked if there was any other public comment. There was none.

Public comment was closed at 9:10 PM.

<The Board took a break at 9:10 PM and reconvened at 9:19 PM>.

Mr. Coffin referenced the letter from Civil Construction Management, Inc date July 19, 2023, regarding a discrepancy Mr. Quintal found in the volume of the Oil/Water Separators that showed 2,500 vs 3,500 and that this will be fixed on the revised plans.

Mr. Coffin brought up this comment noted in Mr. Quintal's letter. There is a "peak elevation in the Bio Retention Basin on large storms will be above the surface elevations in the Oil/Water Separators." Mr. Coffin asked Ms. Duquette how this has been addressed. Ms. Duquette explained that it is an online system. GPI provided a response on this and is found on pg. 2 of their response letter dated August 3, 2023. Mr. Coffin read from the letter – *"In the highly unlikely event of a large storm event and a fuel release occurring at the same time, the off-line pretreatment devices may be bypassed. However, the stormwater runoff would be directed to the sediment forebay and bioretention basin which is lined with an impermeable PVC liner for the purpose of containing a potential release."*

Mr. Coffin raised Mr. Quintal's comment about human error found (pg. 1, comment section/paragraph 4) in his July 18, 2023 review letter.

Mr. Coffin read the following section of the letter. *"However, there is no doubt that contaminants will leave the proposed site one way or the other. The question is to what degree and what affect it will have on the environment. Lab results from test wells may someday find contaminants in the groundwater what action will be taken then and at what cost to the Town."*

Mr. Coffin mentioned that this is why the Board asked about insurance and DES requirements for UST's. He questioned that the state insurance was 1 million to 2 million for total insurance coverage. Mr. Frawley said it's per incident and went on to explain that it is a million and half per incident for the state funding. Mr. Coffin asked what would happen if the company went bankrupt. Mr. Frawley explained that if there was a release at a location and it is registered with the State, and you are compliant, which you have to be to get approval for the UST system, and there is a release it automatically becomes the responsibility of the State to remediate that location. It still is the owners responsibly and the State manages and approves the remediation plan. Mr. Frawley said that in the recent history (last 25 years) the cost of individual UST system failures hasn't exceeded 2.5 million dollars for any individual site.

Ms. Duquette talked about petroleum clean up and containment. She mentioned the bioretention area and that it has a lined system and it has a monitoring system. If there is a larger spill that goes into the bioretention area any contamination is contained in the basin. In case there is a spill this makes it more cost effective too.

Mr. Tilton asked if the items of concern in Mr. Quintal's engineering review and Ms. Truslow's review regarding the hydrologic review have been addressed by the applicant. Mr. Duquette said they have. Mr. Tilton asked if a hydrogeologic study should be done. Mr. Coffin said that the hydrologic evaluation was done to specifically address the runoff and not aquifer protection for this hearing. The hydrogeologic is something that could be requested during the Planning Board process should that take place.

Mr. Russman asked if there was a catastrophic episode, would the owner of the LLC have any liability or would the State have the sole responsibility for cleanup. Mr. Bouchard said the

owners do have liability responsibilities under most things brought up. The LLC still has assets, it has to maintain insurances.

Mr. Coffin brought up that the Board received a list of suggestions from the Rockingham Planning Commission (RPC), dated June 5, 2023. This was sent to the ZBA and the Planning Board for the Determination of Regional Impact (DRI). He read some recommendations that were indicated in the memo.

- 1) Condition site approval of the installation of the proposed signal at NH 125/NH 107.
 - a. This has been taken care of and is part of the applicant's proposal.
- 2) They mentioned that they anticipated emissions of light, noise, smoke, odors or particles.
- 3) Recommendations under water supply: To mitigate any potential groundwater contamination they recommended a hydrogeologic study. 'Spill prevention, Control and Countermeasures Plans and that NHDES Best Management Practice for Groundwater Protection (Env. Wq 401) are followed."
 - a. This would be an item handled at the Planning Board process.
 - b. They listed other recommendation items for the Planning Board.

Mr. Broderick mentioned Article 109.5 and permitted uses are – referenced 109.5.C. Truck terminals are a permitted use, and that D. Accessory uses customarily incident to the above. A fuel dispenser system in a truck terminal would be an accessory use. If a truck terminal is a permitted use and a gas station is not mentioned as a permitted use and the truck terminal does the same thing as a gas station (minus the stores) could the Town end up with something worse than what is being proposed. Mr. Broderick brought this up because the RPC commented on trucks running.

Mr. Coffin noted that the applicant volunteered to have a hydrogeologic study done in October of 2021.

The Board discussed items that would be handled at the Planning Board process vs what the ZBA needs to address during this Special Exception hearing.

Ms. Kelley asked why the ZBA doesn't require a hydrogeologic study to be done. Mr. Coffin said that this type of study would relate to the previously approved special exception application in the aquifer protection. If the Board puts a condition of approval in that it has to be done it should be done at the Planning Board process.

Ms. Truslow spoke and said that a hydrogeologic study is triggered by a few uses. These are listed under the Aquifer Protection Ordinance, Article 201.4.B. Because it is not exclusively required, she suggested making it a condition for the Planning Board to address.

Mr. Tilton asked if the Board should ask for expert testimony from Police and Fire. Mr. Coffin mentioned this could be a condition the Board sets.

The Board went into deliberative session and went over the list of standards for Special Exceptions of Article 109.7 to determine if a special exception can be granted.

1. No detriment to property values in the vicinity or change in the essential characteristics of any area including residential neighborhoods or business and industrial districts on account of the location or scale of buildings and other structures,

parking area, access ways, odor, smoke, gas, dust or other pollutant, noise, glare, heat, vibration or unsightly outdoor storage of equipment, vehicles or other materials.

There was discussion between Board members on how to evaluate the impact of a gas station relative to permitted uses in the C-II zone. Mr. Russman said that this is a detriment to residential property values due to the scale of the building, odor, noise, and glare having an impact on the residential properties not far away. Mr. Coffin said that there is a lighting ordinance and a noise ordinance. Mr. Broderick described the surrounding commercial properties; Mr. Coffin said that this is a commercial use and will have an impact on property values; Ms. Kelley mentioned that does this impact property values more than other type of businesses in this district?

The Board determined by majority vote that there would be a detriment to property values, particularly to abutting residential property due to the location (proximity) and scale of the proposed structures and parking area, odor, smoke, gas, noise, and glare. Testimony was given by member Russman as an attorney who dealt extensively in real estate sales and purchases, and on June 1 by residential abutter Steve Kent, about the noise impact, increased lighting and impacts to property values.

VOTE: Agree: 2 Disagree: 3

2. No creation of traffic safety hazard or substantial increase in the level of traffic congestion in the vicinity.

The Board determined that there would be no creation of a traffic safety hazard, rather that there would be an improvement in safety due to the required signalization of the Rte. 107/Rte. 125 intersection, and that there would be no substantial increase in the level of traffic congestion caused by the proposed filling station. These findings were based on the applicant's traffic study, DOT mitigation plan, comments from Rockingham Planning Commission, and a peer review of the traffic study by TFMoran, Inc. traffic engineers.

VOTE: Agree: 4 Disagree: 1

3. No excess demand on municipal services including, but not limited to: water, sewer, waste disposal, police, fire protection, and schools.

The Board's vote on this issue was inconclusive with two members voting that the standard had been met, and three members abstaining, citing insufficient information provided to determine if the demand on police services would be excessive. Testimony had been received citing a large number of police calls to a similar business in town, but no comparative information about other businesses, particularly those that are permitted in the C-II zone.

VOTE: Agree: 2 Disagree: 0 Abstain: 3

4. No hazard to the public or adjacent property on account of potential fire, explosion or release of toxic materials.

The Board discussed that this was a very high standard to meet, and if the discussed conditions of approval were excluded, none of the Board members believed the standard could be met. The question was discussed with the addition of conditions that would require the recommendations proposed in the responses to the peer reports be added and that a funded monitoring system be established.

The Board determined that it was not shown that no hazard existed due to the potential release of toxic materials. While the hazards had been significantly reduced by alterations to the original plans, the peer reviews did point to certain conditions, such as human error and extreme storms, that could release toxic substances.

VOTE: Agree: 2 Disagree: 3

5. Notification of the hearing will be provided to the Planning Board, Conservation Commission and Board of Selectmen.

The Board voted unanimously to affirm that such notification had occurred based on retention of the certified mail receipts for notifications sent to all three boards.

VOTE: Agree: 5 Disagree: 0

Mr. Coffin asked for a vote.

MOTION: by Ms. Kelley

To deny the application as noted by the findings of facts for the failure to meet standards 1, 3 and 4 of Article 109.7.A.

SECOND: by Mr. Tilton

A vote was taken, 4 in favor, Mr. Broderick opposed, the motion passed, (4-1-0).

Mr. Coffin explained to the applicant that the Board's decision is appealable up to 30 days from today.

<Board note: hearing closed at 11:30>

<The Board took a break at 11:30 PM and reconvened at 11:38 PM>

**Housing Support, Inc.
186 Main Street
Map R34 Lot 21**

<Board note: hearing opened at 11:38 PM>

Mr. Coffin read the legal notice:

The applicant is requesting a **variance** to **Article P II Section B.13** to permit up to three unrelated persons within each unit of the existing two-family residence on the property.

Applicant: Present at the meeting was Paula Newcomb, Executive Director of Housing Support, Inc. Others present on behalf of Housing Support, Inc.: Attorney Kevin Baum of Hoefle, Phoenix, Gormley & Roberts, PLLC and Christopher Novelli of n3 Architecture.

Attorney Baum introduced himself and said he is representing Housing Support, Inc and gave an overview for the reason for the variance request.

Housing Support, Inc. is a non-profit 501(c) housing development corporation that provides housing and related support services.

The property is located in the Historic District (HD1), it is an existing 2.5 story 2-unit dwelling with 3 bedrooms on each side, a total of 6 bedrooms. They want to provide affordable housing for

veterans and subsidize rents for them. Mr. Baum said that they have an application before the Planning Board to convert the building to four 1-bedroom units. Housing Support and two of the abutters have come to an agreement that they would like to keep the two 2-units with the 3 bedrooms and rent out each bedroom to 3 people in each unit rather than create 4 new apartments.

Mr. Baum explained that the reason they were applying for the variance is because of the definition of family as defined in Article P II Section B.13. Their intent is to have 3 unrelated veterans in each side.

The exterior of the structure would only require limited renovation, that would be for a 186 sq. ft. addition in the back for handicap access. They will be making some esthetic upgrades to the building and landscaping. He noted that this property is in the HD1 zone. The driveway to the right will be extended so there is parking behind the building.

Ms. Newcomb explained that the building will be high efficiency. It will be historically appropriate; the interior will be renovated with sprinklers.

Mr. Baum mentioned that Housing Support is getting funding specifically for affordable housing that requires them to keep the property for 30 years.

Board comment(s):

Mr. Broderick asked about the parking and will there be room for 2 parking spots per person. Mr. Baum said that they are extending the right-side driveway and there is a driveway on the left too. They will probably have to go to the Planning Board for a waiver for the driveway setback. He noted that Housing Support has ten other properties and from past experience they are probably not going to need all those parking spaces. Mr. Broderick said that he had concern with the parking requirements for 6 people and additional parking for support people.

Mr. Broderick asked the applicant if they had looked into what the property could be used for that would be allowed according to the HD1 ordinance. Ms. Newcomb explained that there was research and inquiries with the Town and that the neighbors were not in favor of the 4 units. That is why they are seeking this variance to work out a solution with the neighbors.

Mr. Coffin explained that the applicant has done research and because this is in the HD1 it doesn't say single family or duplex it says "residences" (102.5.A.1.a.) under permitted uses. Town Counsel has provided input on this also. He commented there are apartment buildings in the HD and they are allowed in the HD. This used to be part of an overlay zone with rural residential, mixed use, but it is not now. Technically they are not required to get this variance because they could change the use from a 2-family to duplex, and our statutes do not require familiar relationship requirements for a duplex. This is part of a compromise agreement with the neighbors to keep this as a 2-family structure to reduce the number of people who can live there, and voluntarily on the part of Housing Support, Inc. to pursue this variance.

Applicant:

Mr. Baum went through the five (5) variance requirements.

He said that the first two (2) criteria are considered together and are under NH Supreme Court case law.

1. **The granted variance will not be contrary to the public interest.**
2. **The spirit of the ordinance is observed.**

- Mr. Baum explained that the test that the court has articulated is whether granting the variance would unduly and to a market conflict with the ordinance such that it violates its basic zoning objectives.
 - Their position is it does not. The property is in the Historic District I (HDI), the stated objective of the HD is generally to “to preserve the historical and architectural heritage of the town.” This proposal maintains and improves the existing historic building and barn.
 - This is in support of the intent of the district. The specific intent of HDI is to be an integrated area of mixed uses, primarily residential but with building service-related civic functions.
 - It will remain residential and meets its intent by providing the civic functions because they will be providing housing to veterans.
 - Mr. Baum said that another test is whether the variance, if granted, would alter the essential character of the neighborhood or threaten the health, safety or welfare. There are no material changes to the exterior of the structure, there are significant interior changes which are going to improve it and make it a nicer, safer building. Any exterior changes will be consistent with the HDC approval.
 - They believe the general intent of the unrelated rule is to avoid party apartments. This is not the case here. The occupancy will be adult veterans. Service will be provided through Housing Support to the residents that are going to be held to a lease that includes a requirement for conduct.
- 3. Substantial justice will be done in granting the variances.**
- Mr. Baum mentioned the test for this is whether there is a benefit to the public for the denial that outweighs the loss of the applicant.
 - In this case, the loss to the applicant is Housing Support cannot make full use of the house consistent with its mission. It reduces the number of people that it can serve. There is no real benefit to the neighborhood and there would be no real change to outside.
 - There is going to be support provided for 30 years, it will be ongoing, and the building will be maintained just as Housing Support maintains its 10 other properties.

Ms. Kelley asked who monitors the requirement for conduct? Mr. Baum said that Housing Support does. Ms. Kelley asked if onsite or offsite? Ms. Newcomb said that the VA will also provide services onsite that will regularly stop in and check on things. Mr. Baum explained that there is no onsite monitor that lives onsite but there will be regular services. Ms. Newcomb explained that most of the residence will most likely be over 55, on the first floor there will be two handicapped units. Mr. Broderick asked if there is someone responsible for making sure the property is maintained. Ms. Newcomb said that there will not be an overnight person, but there will be services and an individual assigned by the VA and Housing Support will also be onsite. Mr. Baum said if the Town has any issues, they can call Paula. He also noted that this is a non-profit that does care about taking care of their properties.

4. Granting the variances will not diminish surrounding property values.

- Mr. Baum commented it will be just the opposite. They will be making significant renovations to the property. Under this proposal they will be fixing the exterior up, putting in landscaping consistent with the HD, and there will be significant internal improvements. The expectation is the building itself will significantly improve. As a result, there will be improvements to surrounding property values as well, and certainly there is no evidence that it would be a detriment. He noted that two of the abutters are satisfied with this approach.

753 **5. Denial of the variances results in an unnecessary hardship.**

- 754 • There are three (3) criteria.
- 755 • 1) Special conditions exist that distinguish it from others in the area. -
- 756 ○ The property has an existing historic structure, on a relatively long narrow lot. There is
- 757 room density wise to put in more than they are proposing, but there is only so much
- 758 that can be done without stretching too far back as well as being constrained by the
- 759 HD. They believe special conditions apply.
- 760 • 2) There is no fair and substantial relationship that exists between the general public
- 761 purposes of the ordinance and its specific application.
- 762 ○ There is no specific purpose noted for the unrelated, it is really to avoid unruly party
- 763 tenants.
- 764 ○ There will be support services, there will be monitoring by VA and Housing Support.
- 765 This is the consideration for the unrelated rule and they do not think it applies here.
- 766 ○ It would allow two adults by right and they are looking for one more, per unit.
- 767 3) The proposed use has to be reasonable. Mr. Baum commented that the Supreme Court
- 768 says if the use is permitted it is deemed reasonable. This is permitted as residential use.
- 769 It is permitted as a 2-family, it will continue as both.
- 770
- 771 • Mr. Baum said that they believe they have met all five (5) criteria and asked the Board to
- 772 grant the request for relief.
- 773

774 Public comment opened at 12:23 AM.

775 **Public comment:**

776 Attorney Michael Donovan introduced himself and said he was representing his clients, the

777 Ouellette's and the Morse's.

778

779 Mr. Donovan said that his clients do not object to the approach that has been presented tonight.

780 They would appreciate it if the Board would make the driveway and the parking as shown on the

781 drawing a condition of the variance approval.

782

783 Mr. Tilton noted that this is a Vash (Veteran Administration Supportive Housing) program and

784 being a former VA employee that worked with Vash programs assistance, they offer substantial

785 national effort to provide veterans with housing; and the oversight that would go with this is very

786 different than anybody who would be opening up an apartment building. The requirements that

787 Housing Support will have to keep up to the standards, there's a significance there.

788

789 Mr. Coffin referenced the plan provided by the applicant and asked if the driveway was going to be

790 paved. Mr. Baum said it isn't necessarily going to be paved, the intent is it would be the existing

791 gravel and stay that way. It may be paved in the future and will work through those details with the

792 abutters. Mr. Coffin commented these are all details that can be worked out with the Planning Board.

793 Mr. Baum asked that the condition for the driveway be based on the plan because that is the

794 agreement they have with the neighbors. They have a plan that has been approved by the HDC and

795 includes a driveway extension. What they are proposing is that any approval given should include the

796 condition of the driveway being extended consistent with that plan.

797

798 Public comment was closed at 12:27 AM.

799

800 The Board briefly discussed the email from Glenn Greenwood, Town Planner (dated July 6,

801 2023) to Ms. Newcomb and Mr. Baum that gave explanation from Town Counsel (Huddy) on

802 this topic and is what also served as the denial for this application.

Mr. Baum spoke and commented that in regard to the July 6th email, he did speak to Glenn and Huddy and they indicated to him, and is his understanding, that the intent was to state that the proposal needed relief and that is why they are here before the Board tonight. It didn't address other issues with the variance application. It mentioned that absent this variance she didn't believe this ordinance permitted the three unrelated.

The Board went into deliberative session and went over the five (5) required criteria worksheet to determine whether a variance can be granted.

Mr. Coffin explained that traditionally the Board's procedure is to vote on each of the criteria and then propose a motion.

1. The proposed variance will not be contrary to the public interest, because...

Mr. Coffin said for the findings of fact the Board can state – For the reasons submitted in the application. He noted the applicant did read information from the application. *(A copy of the application is available in the ZBA office, upon request.)*

VOTE: All 5 vote "yes". (5-0)

2. The spirit of the ordinance is observed.

Mr. Coffin said for the reasons cited in the application.

VOTE: All 5 vote "yes".

3. Substantial justice will be done by granting the variance.

Mr. Coffin said for the reasons stated in the application.

VOTE: All 5 vote "yes".

4. The values of surrounding property values are not diminished.

Mr. Coffin said, because it remains a two-family house. For the reasons stated in the application.

VOTE: All 5 vote "yes".

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

Mr. Coffin said, it will prevent reasonable use of the property.

VOTE: All 5 vote "yes".

All five (5) criteria having passed unanimously. Mr. Coffin asked for a vote.

853 **MOTION:** by Mr. Russman
854 **To approve the Variance based on having met all five (5) standards of the criteria with the**
855 **condition of granting the driveway extension.**
856 **SECOND:** by Mr. Tilton
857 **A vote was taken, All in favor, the motion passed. (5-0-0)**
858 Discussion: It was brought up if the motion should include “per the plan”. Mr. Coffin asked the
859 applicant if they needed it to reference “per the plan”. Mr. Baum said, no. Mr. Coffin explained that
860 not including the plan reference enables them not to have to pave it if that is what the neighbors
861 want. This gives the flexibility to do what may be needed to comply with the Planning Board’s
862 requirements.
863
864 Mr. Coffin explained that the variance expires in two (2) years from today. Unless it is extended
865 by a Planning Board application based on this variance until that process is through.
866
867 Mr. Coffin informed the applicant that it is 30 days for an appeal of the variance and that the
868 Board recommends waiting 30 days from the granting of the variance to begin construction.
869
870 *<Board note: hearing closed at 12:49 AM>*
871
872 **ADJOURNMENT**
873 Meeting adjourned at 12:50 AM.