

**Board of Adjustment  
Canterbury, NH  
Minutes of Meeting**

**Case No. 2024-5 Variance and Special Exception**

Present were: Chairman Jim Wieck, Vice Chair Web Stout, Calvin Todd, Christopher Evans and Alternate Brendan O'Donnell.

Also present were: Ken Folsom, Gail Ober, Beth Blair, Kent Ruesswick, Ty Miller, Scott Herrick, Judy Patterson, Heather Cassavaugh, Mr. and Mrs. Harold French as well as Attorney John Arnold from Orr and Reno, PA and David Frothingham, Engineer and Project Manager from Wilcox & Barton.

Chairman Jim Wieck advised there are two variance applications and one special exception application from GRJH, Inc before the board this evening. He described the conduct of the hearing procedure to those present. He advised the Board would hear the application for the variance first. The application involves Tax Map 248, Lot 16 located at 125 West Road. Located in the Commercial Zone. The proposed use states "to allow (1) underground fuel storage tanks in the groundwater protection overlay district; and (2) a fueling canopy within the front yard setback". The application references Articles 17.8.H & 5.2.B.1. With the information provided by the applicant, it is his understanding there is the general question of whether or not a variance is required in this case. The Board will hear that first. Based upon the outcome of that we will proceed with the others.

Attorney John Arnold from Orr and Reno introduced himself saying he represents the applicant, GRJH, Inc. He introduced David Frothingham, Engineer and Project Manager here tonight to answer any of the tough questions. In general, as an overview it has been stated they are here tonight with two applications; he believes everyone is familiar with the site and the history of it. Just for some context, the gas station first opened in the late 80's, 1989 and was granted a special exception for the gas station. It operated from then until 2017 when it closed. It closed in 2017 because the underground fuel storage tank system, the USTs, needed to be replaced. The station operator left, vacated the site. At that point, GRJH began to undertake work to replace the UST system, find a new station operator. They were unsuccessful initially in finding a new operator, were delayed in the process. That delay got exacerbated by the onset of COVID a couple years later. They were finally able to secure replacement tanks, hire a contractor, line up a site operator earlier this year and begin to do the necessary site work. At that point, they realized, they were informed by the town, they needed some zoning approval before they could continue the site work. That is what led us to where we are now. The town has advised there are basically three different forms of relief needed. The first is a special exception to allow the gas station and use in the commercial district. The second is a variance to allow the UST system in the groundwater protection overlay district. The third is to allow the fueling canopy within the front yard setback. Chris asked that Attorney Arnold repeat the third requirement which he did saying he would explain more later with their plan. Attorney Arnold then directed those present to a review of the maps depicting various aspects of the plans. He noted there will be two pumps located relatively close together under the canopy. On the second map he noted the fueling canopy is larger and longer making access easier for vehicles pulling in and out and pumps access. In terms of the front setback, this canopy is about 36 feet at the lot line. There is a 50-foot setback required, so it is about 14 feet short of the required setback.

The existing canopy is just about the same, is actually a few inches closer to the street than this proposal. In terms of the first issue, the variance referencing section 17.8.H to allow underground fuel storage tanks in the groundwater protection overlay district. The second is a variance from section 5.2.B.1 about the front setback and canopy at 36 feet. The threshold issue of whether a variance is necessary in the first instance, this is particularly related to the UST system. He noted he would address the canopy in a moment. As mentioned, the station was built in 1989 and received a special exception at that time for the gas station use. At that time the groundwater protection overlay district didn't exist at least with respect to this property until the UST system was permitted by right as part of the approval when the gas station first began. Sometime after that, he is not certain of that date, when the groundwater protection overlay district was implemented and it was implemented, the UST system became a non-conforming use. It was legal when it went into place. It became unlawful because of the implementation of a new zoning ordinance and the groundwater protection district. As a matter of state constitutional law, common law and the Canterbury ordinance, a non-conforming use is entitled to continue indefinitely even though it doesn't conform as long as it is not abandoned or expanded. In section 17.7 of your ordinance, is the one that deals specifically with non-conforming uses in the groundwater protection overlay district. That says that non-conforming uses can continue provided it is not abandoned. The ordinance goes on to say that abandonment is presumed if the use ceases for a period of two years or more. Note that ordinance says that there is a presumption. What that means is that presumption can be rebutted if perhaps the circumstances are such that there hasn't been an abandonment as defined by NH common law. That standard is different than what the ordinance says with respect to special exceptions, for example. The ordinance is very clear with special exceptions to say if you have a special exception for a use and the use ceases for a year, then the special exception passes. If you don't use it for a year it is done. With respect to the non-conforming uses and the groundwater protection overlay district, the test is was the use abandoned. And the ordinance creates the presumption that there was abandonment that ceases for more than two years. So, what that means is they have looked at what constitutes abandonment. This is a legal theory that has been developed by the NH Supreme Court in a couple of landmark cases; the court has essentially established a two-part test for what constitutes abandonment for the non-conforming use for the purposes of zoning. The first part of the test is whether there is an intent to abandon the use. The second part is whether there has been some overt act or a failure to act that evidences a landowners' intent, landowners giving up of what that use is, either by overt act or by failure to act. So, if we look at that test under the first prong of the abandonment test, the question is, had there been any intent to abandon this underground fuel storage system. Attorney Arnold reviewed the history of the property by year.

In 2017, when the station closed, it was because the UST system needed to be upgraded due to new state requirements, it needed to be replaced. The station operator left. At that point, GRJH began to undertake efforts to get the station back up and running. Specifically, they sought out in 2017 when the station closed, they began looking for new operators, they began exploring what it was going to take to replace this UST system. In 2018, they designed a new septic system for the gas station that needs to be replaced also to get it back up and running. They invested the money in that, they did that design. In 2019, they applied to DES (Department of Environmental Services) for a replacement diesel tank, an underground tank for diesel. In 2020, they did environmental work,

engineering for the UST system. In 2021, they completed the work to put in the new septic system. In the beginning of 2023, they finalized the civil engineering work for all the site work that had to happen with the replacement. Then earlier this year, in 2024, they were able to secure a few tanks and the new fueling canopy and to line up the site contractor. So, in the course of that 2017 to 2024 timeframe, GRJH spent north of about \$325,000 in an effort to get this rehabbed, renovated, keyed up for the work to reopen the site. So, he thinks that history and the expense show that they clearly never intended to abandon this use. It obviously took them longer than they anticipated, longer than they would have liked to have gotten everything into place. Part of that was due to COVID and troubles with that, but part of it was just struggles they had with the site. In addition, not their intent, but that course of conduct between 2017 and 2024 shows that there wasn't any overt failure to act or any implication that they intended to just let this UST system.....it shows they clearly had intent to reopen this and were trying to reopen for a number of years. So, that's the overview on that point and our position is given their expenditures, given that course of conduct in the intervening years, they don't fail the abandonment test that has been established by the Supreme Court. He believes their conduct shows there has been no abandonment here. There hasn't been any abandonment.....then as a matter of .....of state law that non-conforming use is entitled to continue. What we are doing, we are changing the UST system as I mentioned from the existing style to an improved, upgraded system. He referenced Dave Frothingham being able to describe the improvements, how the system is different, that come into play because of the upgrades that have come in between 2017 and now. But the use itself in terms of having the USTs on the property is really no different from the past use of the thirty or so years. Dave described the maintenance and ongoing testing that has been required and ongoing over the period. Jim asked will the capacity be the same. Yes. He asked that Attorney Arnold address the special exception. Attorney Arnold replied if you were to say you know that it's been abandoned and you need a variance for the UST system, Dave is going to speak a little bit more about this specific design. Jim responded yes, if you could speak to that as well as for the canopy, it would probably be best, then we can close that portion, deliberate on it. Attorney Arnold suggested at this point it would be appropriate for him to pause, allow the Board to deliberate on whether there has been abandonment or not. Because if the Board decides, agrees with us that there has not been abandonment, then there's no reason for him to go through, or the Board to spend the time on thinking about the variance criteria a UST system. Jim concurred; it would save time.

Chairman Wieck asked if anyone wished to speak in opposition. Tyson Miller spoke addressing the notion of discontinued use over a two-year period. He asked do you have any sales slips, have you pumped any gas in that two-year period. We use the term abandoned because there have been no sales, no gas being pumped. He would like to hear about the tanks you want to put in the ground. But he thinks at this point, in the interest of public safety and the spirit of the ordinance that splitting hairs as to whether or not you were trying to put a new gas station in, but you didn't do it and you stopped pumping gas, so the use ended. So, you now fall back into being reexamined by this Board..... Chairman Wieck asked if anyone else wished to speak in opposition. No one else spoke. He asked if anyone wished to speak in favor. Harold French, abutter at 116-118 West Road spoke saying he is very much in favor of this Board granting the three requirements for this project to move forward. They would like to see it open again. He thinks it would be good for the town and the area. They feel with the safeguards that the engineers have put in to doing the tanks today it would be more than sufficient for protection of the area. Chris asked, you say you live near the location, are you an abutter? Mr. French concurred. No one else spoke in favor. Chairman Wieck

returned to the applicant for further input. Attorney Arnold said he would again like to be careful about blending issues and to try to stay focused on the question of abandonment. He said he wanted to circle back to the comment Mr. Miller made about 17.8.H and asking a question about gasoline sales. We fully concede, the station did close in 2017. It has been closed for more than two years. But the point I was trying to make in my initial remarks is that your ordinance doesn't set...your ordinance says that closed for two years creates a presumption of abandonment. The question that you've got to look at is has there actually been abandonment. That is the point I am trying to address. Chairman Wieck asked if anyone else wished to speak in opposition. He asked Tyson Miller if he had a different comment. Mr. Miller advised there is a proposal to build 40 housing units across the street, so public safety, that's what we ought to be looking at...not just abandonment. He asked again if anyone wished to speak in favor. Heather Cassavaugh, daughter of Judy Patterson introduced herself saying they live diagonally across the road from the site. She does not feel that this is an issue. The gas station was there for a very long time, and they made it work. It's a tight, little spot, but they made it work and everything was ok. It's a great spot for people who are traveling and don't want to stop in Concord to get gas or go all the way to Tilton to get gas, especially if they are in town. There is no other place to get gas in town other than the very busy station at exit 17 and dealing with the roundabout. Chairman Wieck advised with that he was closing the testimony portion, and the Board would now deliberate. Brendan spoke up saying he had two questions. One has to do with the timeline in terms of closure: Has there been any ownership change since 2017 when it stopped operating. No. Was the property ever listed for sale. Attorney Arnold did not believe so but did not know for certain. Given the efforts to reopen he would be surprised but does not recall hearing anything to that effect. You said that there was an operator.....is an operator the person who runs the store or has expertise, is trained, Attorney Arnold clarified an operator is someone who oversees the workings of the gasoline sales, the equipment and represents the gasoline company providing fuel. Brendan asked what their relationship to the retail convenience store manager is and does this account for the delay in finding someone to do the job. It depends upon whether or not you are going with a large corporation or a small independent brand. The station previously operated under the Gulf gas brand. Brendan asked did the owner of the property have the contract with Gulf or is it the operator that is hired have the direct contract. David spoke up saying the relationships can be a little convoluted. The owner is essentially a limb....the operator, they own the convenience store business, restaurant, whoever is in the building. The landlord owns the fuel system. The tenant operates the system, and you have to get a license from the state to operate the system. The actual gas in the tank is owned by the brand of the company. So, in this case it's Gulf. Brendan asked so of those two people who gets that license from the state. Dave responded, the operator, the tenant. It's called a Class A license. Everybody who works or runs a gas station has to have a Class A or D or E license depending what the responsibilities and how they are trained to run and operate a fuel station. A Class C license is someone who cannot be there on their own....a clerk during their shift who knows how to turn the emergency shut offs, but isn't responsible for day to day inspections or maintenance whereas a Class A operator takes on the responsibility of actually operating the whole system. Brendan stated in your timeline you said 2017 was when they stopped operating, do you know when in 2017 they stopped, what month. And then the first act after that in 2017 when you went about the septic system. Was there an application in the paperwork that I missed.....in the septic application, the proposed use. He requested a copy of that, he assumes it would show the

septic system size. He asked if it was state approved. Yes, it is state approved, and it has been installed. Brendan asked what the actual steps were taken to find a new owner. Attorney Arnold advised he could not speak to the specific steps that were taken, advertised as a commercial building, gas station for lease. Brendan asked where they would do that. Neither knew. Brendan said it would be helpful to see that, the concrete steps that were taken. Chris asked did you find an operator. Yes. One has been found. David advised they also actively submitted applications to the State of New Hampshire for replacement of these tanks starting in 2019. Attorney Arnold advised 2019 was the earliest application for the diesel tank. And you have to take into account the time it takes for the state department. Brendan restated he thinks it would be very helpful to have the timeline documents supporting what was done each year of the efforts that were taken to prove continued use by the owner. Attorney Arnold responded that he does understand what Brendan is saying, apologized that he did not have more specifics tonight. He would bring it back to if you look at the general timeline and perhaps between 2017 and 2024 with the kind of milestones that have been identified, the expenses that been incurred, those milestones are a reflection of whether or not there has been intent to abandon. He thinks all of these things conclusively establish, anyone wanting to give up the UST system, the gas station, wouldn't have done all of these things. We will respect your request for more detail, but he believes what they have shows that there has been no intent to abandon. Brendan countered saying you listed a lot of stuff over seven years, but the presumption starts at two years.....you listed a bunch of stuff that occurred after that. That's very different than showing the whole time went along the way.....there could be abandonment at some point in the middle there and then more activity thereafter. It does seem that all of those details are very relevant to establishing that presumption of abandonment. Attorney Arnold responded that he thinks that the two-year reference is a little bit different and how you are interpreting. The ordinance says that there is a presumption of abandonment when use ceases for two years. They do not dispute that the use ceased for a period of two years. But even if it ceases completely for two years, the question is whether there is an end which comes back to the question of intent. So, even if there hadn't been any ads in that period of two years to reopen the gas station, that is not inclusive of proof to show intent. Brendan replied, but our ordinance says there's a presumption of abandonment. I'm asking for more information to prove you've overcome that presumption. Attorney Arnold acknowledged what was being said and noted he is not trying to argue with you about it. He said he is just trying to clarify that he does not think that the relevant timeframe for what steps were taken is limited to two years. There were no further questions from the Board. Chairman Wieck closed the testimony portion at 7:30 PM.

Chris stated his initial response is there was no intent for abandonment. Clearly the property was not sold off to be used some other way. He stated he kind of understands where you are coming from in that two year period between 2017-2019, if I understand correctly.... Brendan interjected if all of these things happened as they say, he thinks it does show there was no intention to abandon. But he thinks as a Board we can ask for more specific information that will actually prove what they are saying about the steps they took and that builds a stronger evidentiary record to decide that presumption has been overcome. Jim stated whatever decision we have will be conditional on documentation. Brendan responded, maybe, there's a big difference let's say it closed in December of 2017 and they are applying for the septic in February of 2018, that's two months. That's massively different than abandoned in January, they applied for the septic in the end of the next

year, almost a year away, and that septic application is, who knows.... Chris noted that's got me too....the presumption, that term presumption. Brendan clarified usually what it means is, it's legally sufficient for something that happened, and the person wants to rebuff the presumption in one aspect that comes forward. Another thing in that time period is that they say happened, which I believe them, and I'd like to see documentation that they were looking for another operator. Calvin spoke saying there was period when there was a For Lease sign or a For Sale sign on the property. I don't remember, I drive by it, and I cannot remember when or for how long. There was a period of time it was advertised. Web spoke saying and then there's it says in or about February of 2017 getting back to a month or two can make a big difference. He said I do not think we have any reason not to believe them, but he thinks we need to see the applications, when it was closed, when the doors were closed and such so, we can make sure that was done in the time frames. Calvin spoke saying it was closed in 2017 because the tanks were incapable of use, of providing gas. Jim spoke saying he thinks you get to a point where we want to prove a variance then we make that a condition. Brendan replied, I really see that the condition is more the facts leaning toward.....overspeaking. Jim replied they testified these activities were occurring during that period of time, for the record that they actually occurred. Brendan, responded, if there's no abandonment then they're good, and taking one continuance to get all the evidence and information it seems to be better to weigh all the stuff at one point because when we take testimony, we evaluate the testimony, and those other supporting documents show us whether or not it's more credible. Chris spoke saying I'm assuming in order to establish the abandonment issue; we need to see something concrete between the day they closed in 2017 and 2019 when they made the application for the diesel. Brendan clarified there..... necessarily has to be something in that period is what the attorney was saying. The two-year period creates an initial presumption, but you can look at all these other facts to determine the total..... But certainly, the further away you get the more, the less likely.....you can look at everything. Chris asked, so it's not specific from your point of view that it must occur between a certain set period of time. Brendan concurred, but certainly if they come back with some affirmative steps during that period, that makes it a lot easier. Chris replied, if it's not time sensitive, then we're discussing whether or not they supplied sufficient evidence this evening. What's so urgent. Brendan, our ordinance says if there hasn't been any activity for two years, it's presumed to be abandoned unless....we can look at all the other stuff that they provide to rebuff that presumption. And so, it can be stuff that occurs between the two years, it can be stuff that occurs after, all things that we can consider to rebuff that. But if they had this place, and the operator leaves, and they took no actual permanent steps for two years, three years, and all they are doing is applying for a septic and there's nothing in that period. Jim interceded saying the applicant listed a number of things they did during that period of time, there is their testimony, and we have to consider their testimony. So, if we wanted additional documentation to provide proof that those steps did actually occur, I think we can ask for that. But I am not sure to what level you need to do that, to that they actually had expended the efforts they had described. I'm not sure I understand your viewpoint. Brendan responded there is one thing for someone to come in and tell us all the stuff they did and we as a Board just take their word for it and sometimes there are things that we do....(gave example of his sister when she first came to town and speaking with the road agent). Chairman Wieck so the issue here is that there be adequate documentation. Brendan concurred. Once we have that we can evaluate that. I tend to think if they provide the support for all of the things they've said, that shows there wasn't abandonment but can have them. Chris spoke saying he is just putting himself as a business owner. I had a property that had a gas station

and for whatever reason the operator failed, whatever. I'm thinking I've got to go through all these processes in order to reestablish this business. Abandonment couldn't have occurred if they'd gotten where they are. That doesn't make sense to me, unless that time period is so specifically important that I have to reconcile it. But it doesn't seem to me that it does need to be. Does that make sense? Because clearly, with what they have established which suggests that there was never any intention of abandonment. The one thing that concerns me is a For Sale sign or For Lease. That does concern me because that would suggest they want to move in a different direction. Perhaps For Lease means we're going to lease it to a different operator. Jim responded, we know when that occurred too because certainly it would be possible to have that be in in the first two years and then change course. I don't know that that makes a difference, if we knew exactly when that was in the timeline, but we don't know unless we can remember the date. Attorney Arnold and Chairman Wieck spoke with each other as Attorney Arnold asked if the Board wanted to reopen because they found the septic plan that went in so they can answer one of the questions. Brendan said he would like to just see a full presentation of supporting documents at one time. He said he does not think it's uncommon for a hearing to be continued so more information can be gathered and a continued hearing scheduled. Chairman Wieck asked would the Board be willing to reopen the hearing just specifically to the applicant to provide information about the septic tank, septic application so we have that now, or are we not inclined to do that because it's not going to be sufficient (the Board would have to determine sufficient). Chris said he wanted to restate any concerns I have to do with my understanding of how important this timeline thing is. If the timeline thing specifically is not paramount to this, and I believe abandonment did not occur, but again I am stating that I am not specifically clear on this timeline issue. Chairman Wieck said that is something we could try to clarify as well. Chris replied, it seems to me that's what this whole thing is. Clearly there was no abandonment with what they've shown they've done. I don't know about that time period. The timeline was important. That's all I've got. Web spoke, there has to be a timeline that is specific for abandonment, there has to be whether it's one year, two years, three or four years. I think what Brendan has asked for, and I agree, is just that information so that we have this so we can say yes, it wasn't abandonment. Chris replied, but you don't see the logic in everything they have done up to this point would absolutely prove without a doubt that there was no abandonment. Calvin spoke saying the one thing I am getting hung up on, I don't believe it was abandoned, but when I look at the time stamp and I see 2017, owner disappeared, they didn't apply for a remedy to the diesel till 2019. So, in my mind I have that 24-month gap. The situation that closed the station was not attempted to be fixed. So, I am thinking OK you made a new septic design, but that's not helping the gas pumps. That's not approaching the fuel tank system that wasn't up to snuff. So, did that 2019-2024 window .... abandonment. That's what my brain is going on it. I see where you're going, I see where Brendan is going, I'm just trying to find that in between what warrants abandonment and what doesn't. Clearly, they've made steps. There's a 7-year, 6-year record of progress, or said progress or attempts to keep it functioning, but that's the only date I'm having a hard time, the 2017-2019 addressing the fuel system.

Chairman Wieck asked if anyone wished to make a motion. Brendan made a motion to continue the hearing to next month to give the applicant the opportunity to provide.....Lisa advised we will not have the opportunity to do it in November because of the posting, because of two other already scheduled November applications and lack of meeting space. Attorney Arnold asked what if we proceed to the variance and if the variance is approved the abandonment issue becomes moot, but if the variance isn't approved, we can reschedule and come back to the abandonment issue.

Chairman Wieck said I don't think we can vote on it. Brendan spoke saying we could. There's two ways out of this where they get every single approval that they need, the simpler one is....you could essentially continue that question and if they ..... Jim noted the particular test is a challenging one. Brendan concurred; the variance will have a lot more criteria and will get into a lot of stuff we haven't talked about like the specific design. Chairman Wieck noted if we did that, we could only have a conditional approval. Extensive discussion not audially retrievable between Chairman Wieck and Brendan about the merits of going forward in any number of directions..... Chairman Wieck restated there is a motion for a continuance until a hearing to be scheduled in December. We have the option to do an additional meeting but there are time noticing constraints with that. Chris seconded the motion. Chairman Wieck called for a vote for all those in favor of having a continuance of this discussion. The four regular and one alternate voting members present voted unanimously to continue this hearing until it can be scheduled in December and the applicant can have the opportunity to provide clear documentation and a timeline of the case we are managing.

Chairman Wieck stated the other question before us is whether we should hear the variance at this point knowing that the first question effects it. He is not sure we should do this; it might make sense to do it later but is open to other opinions. Chris asked doesn't everything hinge on the first one? Brendan opined it seems to me it's simpler to continue and address .....if they come with the documents to sort of support everything they've said.....Chris asked what documents do we want to see? Shouldn't we be specific about this? Brendan concurred saying that would be very helpful because if they come back next time and they don't have something that we want..... Chris asked, so how do we establish that? Brendan said I guess I can just go through the timeline and if anyone wants something specific speak up. So, the first is in 2017, it closed and stopped operating when the operator left. When was the last time the store itself was open selling gas. Chris asked, are we going to call that closed? Brendan noted it may be different assuming when it closed, when the operator left, when he no longer had an operator. Chris noted that would suggest the operator, if they left, that just means there's no gas, but the store could still be operating. Brendan responded, so if there's different dates, provide information on when the store closed if it's different from when the operator left. That's why I looked at them as two things. They could be different. Any specific steps that you took starting in 2017 to find a new operator, listing the people you reached out to, anyone you were sending emails to, whatever that would look like, but any specific step you took to find the operator. 2018, when was the date of the septic application, how could the application be specifically, they applied to DES with their application and the approval order and date. 2021 was when the septic was completed. 2023 there was site work done and Attorney Arnold noted expenditures of \$325,000. When did those happen, are they all in the back end. What do they represent? What site work were you doing .....Chris asked aren't the two important things the 2017 stop date and the date of the septic application? Brendan added and the diesel storage tank. Chris concurred, but that came well after the septic, correct? Yes, but that would have been established within that two-year period. Brendan, the application for that is more significant than the application for the septic. Overtalking between Chairman Wieck and Brendan about what to demonstrate the gasoline, the UST system, that's part of the operation, was intended to be. Brendan, so those are the things that jump out..... Chris said, for clarity, go back to the operator and the convenience store operator. Let's say there are obviously two different operators, maybe. There's your person, business owner, and then there's the operator who maintains the licensure for the gasoline sales. What happens, what is our position if the store leasee maintaining a grocery



store.... Chairman Wieck interjected we're not going to discover that now. What we're doing is giving him a list right now of information that we want next time. Chris asked but doesn't that change the dates. Chairman Wieck, we want to keep this simple for them and just be clear about what we're asking for. The only reason that I ask is I go back to my original point that 2017 stop date and the date of the septic which would be relevant to the store operator and not the gas operator, was my point. Calvin noted, the gas pumps being obsolete in 2017 led to the closure of the gas. If they didn't apply until 2019, then that would be abandonment under that statute where if you are talking septic, that has nothing to do with gas. You could still sell sandwiches. Chairman Wieck noted, my point is they can provide a complete timeline of all of the operation the facility and all of those things and we can deal with it, but we're not prepared to discuss that right now. We're not trying to deliberate.....I realize there's been quite a bit of discussion about it. I think that is where we are tonight.

Lisa advised those present that the Board of Adjustment normally meets on the fourth Wednesday of the month. That will not be happening in the month of December. She will find a date, notice everyone and we'll start all over again. Attorney Arnold spoke saying you took action on the variance application. There hasn't been any action on the special exception application. He doesn't know if you want to do the special exception application tonight. Chairman Wieck asked what would be the advantage for your client to hear it tonight as opposed to waiting. Attorney Arnold responded the worst-case scenario would be the Board felt disinclined to grant a special exception for the gas station and if that's the case then all the stuff about abandonment and UST systems, a various for the canopy become moot and the reason to have us back next month. Chairman Wieck advised keeping in mind that issue of being in the groundwater protection overlay district would have been resolved and not be part of that discussion, presumably. Attorney Arnold stated the special exception is just to allow a gas station in the commercial district. The groundwater protection overlay, thus the variance request. Chairman Wieck queried the Board as to their willingness to hear the special exception application tonight. All agreed.

Chairman Wieck advised we would now move to 2024-5 special exception request. The application involves Tax Map 248, Lot 16 and is located at 125 West Road. It is located in the commercial zone. The proposed use states "Gasoline Station". The application references Article 5, Section 5.3.c- Table of Uses. He reminded those present the same conduct of hearing applies. Attorney John Arnold from Orr and Reno introduced himself for the record and Dave Frothingham from Wilcox and Barton representing GRJH, Inc. What I propose I do here rather than repeat all the background and context, I'll just refer back for purposes of the record to the testimony we provided in the prior application, if that works for you. As I said the ZBA granted a special exception for the gas station in 1989 with the ordinance. Unlike the issue we were just grappling with, it does have a bright line fast forward special exception says that special exceptions lapse if the use ceases, so it doesn't incorporate any of the management components. As I said we agree the station closed in 2017, so the use ceased for more than a year and that's why we need a special exception to open the gas station again. I'm going to try to separate the discussion here and talk about the gas station as a use in the commercial district which is what this application is about as opposed to the issues with the variance application that deal with whether a UST system is appropriate in the groundwater protection district. This discussion doesn't have anything to do with the groundwater protection district. Gas stations are only allowed by special exception in the commercial zone. So, the ordinance lays out seven criteria that we have to prove to get a special exception. I will attempt to summarize our responses to those criteria. I am happy to go into more detail on any of them.

1. Granting the permit would be in the public interest. Reopening the gas station is in the public interest for at least three reasons. The first being that the gas station just sat idle since 2017. The site has been vacant, has fallen to some degree of disrepair. It's fenced off, but it's not a particularly attractive site or beneficial to the town at the moment. Reopening it would bring new and improved facilities to the site and would resolve in ongoing business activity on maintenance and generally improved site appearance. Second, it provides necessary convenience services to residents. We heard that from a couple of folks during the last application. I don't think there is another gas station in Canterbury. A gas station in town does provide a public benefit and is in the public interest. Third of all, I would site improvements bringing to the facility a new canopy, new USTs and having an active business there. That's going to generate additional tax revenue for the town.
2. The proposed use would not adversely affect the property values in the district. The nice thing when we're thinking again just about the gas station use on this property, it's a known commodity. They operated there since 1989. I don't believe that any surrounding property values spiked when this gas station closed in 2017. Conversely, I don't expect they will plummet if the station reopens. The surrounding property values are what they are. I think actually reopening the site, improving the site is likely to be more beneficial to surrounding property values than allowing the site to continue to the degree of falling into disrepair.
3. The specific site is an appropriate location for the proposed use. I think that this is absolutely the case. It's adjacent to Route 93, it's right off the highway. It's historically been operated as a gas station. If you think about other locations in town, it's hard to imagine a better or more suitable location for a gas station.
4. The proposed use would not adversely affect the health and safety of the residents and others in the area and would not be detrimental to the use or development of adjacent or neighboring properties. Again, the nice thing about this site is it has a track record. It's operated here since the late 1980's and we're not aware of any issues with health and safety, development of surrounding properties. If there were negative consequences or impacts resulting from the gas station, we would have learned of them.
5. The proposed use would not constitute a nuisance because of offensive noise, vibration, smoke, dust, odors, heat, glare, or unsightliness. The good criteria is the gas station will not create a nuisance. Again, the same rationale. It's not like we're putting a new station here. There was one here. I don't think there is any argument that a nuisance was created by the gas station.
6. That granting of the permit would be in the spirit of this ordinance. This criteria overlaps the first criteria and the public interest. One of the main spirits of the ordinance is to allow reasonable use of property in town. I think that reopening the gas station on this site is really the best possible use of this property given not only its location, but also the existing facilities that are there. As with the other criteria the fact that the station operated for such a long period of time, there will be no ill effects on the public.
7. That the proposed use would not constitute a hazard because of traffic, hazardous materials, or other conditions. One of the things mentioned a moment ago is that one of the great strengths of this site for a gas station is it's right off Route 93. It's right at the interchange, near the Park and Ride. A number of the public have made the comment for folks who are going up the highway and want to stop for fuel, this is a very convenient location for them, but more important for the town. It's not bringing more traffic into quiet

neighborhoods or deep into the center of Canterbury looking for a gas station or things like that. People going along on the highway, they can stop to get gas, they can get back on the highway without creating traffic hazards or anything like that going through town. If the station were a hazard, in fact, it would have evidenced itself its history over prior operations.

So, that is the seven criteria and what I would just say as a general observation that Canterbury doesn't allow gas stations by right in any zoning district anywhere in town. They are only allowed by special exception in the commercial district or the industrial district. When you look at the zoning map and you look at the properties in town, this property because of its location, its proximity to the highway. Its historic use as a gas station plus facilities, it really, truly strikes me as one of the best locations that you could have a gas station. I think the use of the property is reasonable. I think reopening the site would not only be beneficial for the applicant who's put so much work into this over the past five years, six years, whatever it's been, but would also provide meaningful benefits for the town, its residents in terms of activity, tax generation, and convenience services. Attorney Arnold offered to go into greater detail. Brendan inquired about safety features.

Mr. Frothingham advised I would ignore the style of the tank. He described the new system for dispensing gasoline. The redeveloped, reconstructed dispensing area will be the same area as the existing dispensers located in front of the building, the building at West Road. It will consist of two dispensers, two hoses each, each dispensing gasoline and diesel. The dispensers are a self-contained unit and then they are mounted on a concrete island on top of a sump. So, all the piping in these systems is laid in a continuous run through no joints. They always terminate within an enclosed sump. These sumps are watertight, and they are monitored by an electric monitoring system that detects whether there is fuel or water in the system. Chris asked are those the pump handles that people...are they on both sides of the island. Yes, they are. There are two on each side. Yes. There will be gas on one side and gas and diesel on the other side of each. You can get them in various moving directions. So, those sumps are watertight, so if there is a leak in the piping or anything up under the dispenser, it all ends up in the sump. The piping themselves are all double-walled and they are manufactured as a double-wall system, so not one pipe installed inside another one. It's manufactured as a continuous pipe with a secondary containment system around the primary pipe. So, what this allow for, if there is a break in the primary pipe, any fuel that leaks out ends up in one of the sumps at either the beginning or the end of the pump. New Hampshire requires that these pumps be sloped, so they are sloped back to one of these sumps. The fueling pad itself, fuel dispensing always takes place on top of the concrete pad. The concrete pad is designed to take the loads of vehicles on it and also with controls to control where it cracks. Concrete over time does crack. All those joints are sealed with a petroleum resistant sealant, very specific, that is what we have to use. The sides of the pads, the primary pad has a positive living barrier. These are the grooves you see on the edges of all pads. They are required in the State of New Hampshire. They are required to hold five gallons of fuel so if there is a spill on the pad, pads slope from the center out to the edges and spills are contained within those grooves and can be cleaned up by the pump personnel. The grading around the pad sheds storm water away from the pads. We're not allowed to shed storm water on to the pad. It has to go away or around, so there is no run on of storm water onto these pads. That is a significant upgrade from the existing condition where water does run straight across the existing pad. We are proposing a larger canopy so that fueling takes place underneath the canopy and minimizes rainfall onto the pad. The canopy is

smaller than the pad, but still much larger than the existing one and still maintains fueling underneath the canopy. The fueling pad is sized such that the nozzle held out at full extension cannot reach the positive living barrier. So, it is physically impossible to take the nozzle and move it outside of the fueling area, so it's always contained. The piping runs back from this dispenser, back to this dispenser, back to this dispenser, and then back to the tanks. No matter what the tank is all this piping is underground, it's all buried. Chris asked does your design meet all state and federal requirements. It does and we received our permit from the state for this project. Chris asked are there any public failure rates, when the manufacturer puts all this together, how do they establish any standard deviation, failure rates. Tell us what that's like. There were some concerns about safety. Mr. Frothingham went on, I don't know if the manufacturer's established a potential failure rate for these systems. It's flexible piping, it has an integrated double-wall to it. This is the standard for the industry, and it is considerably better than what was installed originally and what was installed ten years ago. Chris asked and this system is what is required now? Yes, the State of New Hampshire is very specific about what is required. I have to send a list of every part I am using, manufacturer..... to the state for their approval. Chris asked what about locations that have older, previous, do they all have to be replaced with these? At one point, the State of New Hampshire required that all tanks be double walled. So if you had a single-walled tank you had to replace it. There have been certain pipes they have removed for approval. Officially, there was a recall essentially and they had to be replaced. At this point, if there is existing piping in the ground, and it doesn't pass its annual testing, they do test them every year to make certain they are tight, then it has to be replaced. That's the end of the conversation.

Web spoke, signage. Are you proposing some signage? Attorney Arnold responded I think there will be proposed signage, but it hasn't yet been determined. Gulf has recently lined up the operators as I mentioned. They haven't gotten far enough in the process. Chairman Wieck asked if there were any questions from the Board. There being none he asked if anyone wished to speak in opposition. Tyson Miller spoke saying he appreciates the work you are doing on this because you are taking kind of a risk here. You quote gasoline station being allowed in the Table of Use but in the section about the aquifer, underground storage tank gasoline stations, one long description, are disallowed. They are not allowed, at all, underground storage tanks and above the aquifer and which is in sand like above a lake all around. So, having said that, I know that the new kinds of gas tanks and stuff you are putting in, and I'm really glad to hear you say all this because I think it gives you guys something to hang your hat on. Somewhere down the road, ten years from now somebody in the housing development or who has a kid who has cancer and is claiming they drank water out of their well and there was gas in it, etc. The other thing I would be more comfortable with also, because I don't know, do they have to go to the site plan and the Planning Board for this too because they are going to be asking all the questions about signage and the neighbors and other things. I'm hoping they would go to that. As far as, I guess it's up to you guys to decide whether these new designs are adequate to cover your case here even though it's just about cause for a prohibited use. Chris spoke saying he would hope it's up to DES, the federal departments that are involved in this, I hope they are clear on this. Tyson responded if someone were to sue because their kid got sick, they're not going to worry about whether the state wakes up and comes around..... I guess I would suggest that maybe you could ask for as a conditional use some kind of an independent engineer that they pay for to look at their design. We're not experts. Have an independent engineer look at their design and approve it and you'd be all set. The Planning Board has the same issues. It is way above their abilities to decide right or wrong, they would hire an independent engineer to review it, just to

back it up. Again, I'm not against the gas station in that location. I just want to make sure there is coverage. Gail Ober spoke saying once all the variances and the special exception are approved it would go to site plan review. Chairman Wieck asked if anyone else wished to speak in opposition. No one spoke. He asked if anyone wished to speak in favor. No one spoke and he returned to the applicant for any further testimony. Attorney Arnold advised he had nothing further to add unless the Board requested clarifications. No one came forward in opposition or in favor. He asked if there were further questions from the Board. Web asked if there were monitoring wells installed ever. Mr. Frothingham advised it is not standard practice to install monitors around the tanks. Web said I was just wondering if there was anything around the old tanks for DES. Mr. Frothingham replied, it doesn't appear so from the survey. A brief interchange took place discussing the locations on the maps. Chris said, let's go back to the old tanks. What kind reclamation is required for that location. Mr. Frothingham responded that the tanks go through the State of New Hampshire closure process. The tanks are removed, soil samples are taken from around and under the tank and they are sent to a laboratory for testing for petroleum products. If there is petroleum products found in excess of the standards, then there is a remediation plan that is developed. It's tested as we pull it out of the ground and then it's sent to a laboratory for more detailed analysis and that whole report is submitted to the state. That is the standard for all tanks. We don't do that until the tanks are removed. Calvin asked what is the lifespan on the new systems? Mr. Frothingham advised the lifespan of the tanks is thirty years. The tanks are monitored constantly for leaks in the interstitial wall. The tightening systems are tested annually, the spill buckets, the surface feature you can see, there's also something for the dispensers are monitored on a weekly or daily basis by the site. Calvin responded, so the risk is mitigated dramatically compared to what is in there now with the new systems and technology. Correct. And this particular owner goes a step further. There's an electronic monitoring system for the entire underground storage tank system or above ground storage tank system. We use the same equipment. There are probes in the sumps that tell you if it's water or fuel in there. There are probes in the interstitial space in the tank that tells you whether there is a lowering or a raising of a level, if there's actually salt water in there. So, if you get a leak in the outer wall and water leaks out you know your outer shell failed. If you have a leak on the inside, if you get fuel in that, the water will go up. So, it detects multiple failures versus a dry system where you only know if something has failed if the ground water gets high enough or we get fuel. Calvin, so is the term encapsulated, does that make sense. Yes, it's closed. Chris asked and did you imply that it exceeds...the State of New Hampshire requires monitoring of the interstitial space. They do not require a brine system. It monitors more types of failures than a dry system because if your outer shell failed and the dry system and the ground water never rises above the tank. What they also do, is they subscribe to a 24/7 monitor service, whereas a standard system, there's an alarm in the building, but you only know if someone is there in the building. This owner subscribes to a monitoring system if something goes wrong with the tank, they get a call from a third party. Chris asked does that meet or exceed.... That exceeds. It is not required to alarm off site premises. Chairman Wieck asked if there were any additional questions from the Board. There were none. He closed the testimony at 8:30 PM.

He stated he has a particular concern in that one of the first conditions of a special exception is the same as the first condition for a variance; both being that it is in the public interest. I am really struggling with that because I think the business is fine. I didn't hear anything that sounded problematic to me, but the fact that it is actually within an aquifer. I know we are trying to separate these two things, but it's essentially the same question. I'm concerned that if we grant the special

exception, we are undermining any positions we might have when we hear the variance. Web responded I also think that we could say that's ok, but find ..... to be, doesn't fit, the variance is what I am saying which would null and void that. Chairman Wieck concurred. There are options. But are they, do they have to be, in the interest of the public, for one, do we have to find it for the other. I don't know the answer to that question, so I'm concerned about that. Chris said, the other shouldn't be relevant, should it? Chairman Wieck, well it's the same question as one of the questions in the variance. Chris said I understand that. Isn't this a stand-alone application? Chairman Wieck replied I'm not 100 percent certain that we can say that. Brendan added I don't know if it helps your question specifically, but I thought a necessary condition regardless would be that they obtain a variance or a decision that a variance isn't necessary.... Chris asked what's that got to do with.... Chairman Wieck responded, the variance is definitely required. Brendan advised, one way or the other we have to decide the public's interest question. Chairman Wieck, we are struggling with that. If we think that they are essentially the same answer or saying the same basis for it. It could be a different basis for it that excluded that, left that to the variance then I think it's an easier thing to discuss. Calvin asked what the public interest would be, because it's on an aquifer. You can argue that the safety of the .... shed right next door with all the sand and salt piles....Chairman Wieck spoke saying oh that's another issue. Calvin went on when you're sitting here thinking about it and you're hearing that it's just a mistake, it exceeds safety expectations...I don't want to say the aquifer is not important to me because it is, that's the root of life, water. But I'm just wondering, how much, what capacity of damage could this system do with the safety features put in place to the aquifer. I guess that's where, I see where you're coming from, but I'm just wondering if it's already.... Chairman Wieck interceded, Canterbury has a..... Everyone in that area has a well and they are consuming it. They are not testing their water. And I'm not suggesting we make the applicant do that. That's just how it's done in New Hampshire. There is a risk that's present to folks in the area and the greater aquifer if you look at the ordinance it does talk about impairing surface waters as well and that does flow to the Merrimack River. Admittedly a small impact to the river, but collectively all these small cuts are not in the public interest. Calvin responded, that's what I'm saying. You're argument against public interest is water safety. It's not convenience, it's water safety. Chairman Wieck said that's how I feel, there may be other opinions here about other issues, but not for me, my only issue is that first question is whether or not it really is in the public interest, is the fact that we have an aquifer protection district that doesn't allow things in that area. I get concerned about procedurally that we can accept this or grant the special exception or variance, then tying our hands relative to the variance, keeping in mind there are other conditions. But I don't know. Brendan spoke saying it seems the question of potential harm to the aquifer, it's more ..... public safety and then we're just looking at the public interest of having this business in this location and what that will do. You look at the health and safety issues in terms of public interest. Chairman Wieck responded, I'm not particularly concerned with the health and safety, I'm not unconcerned, but I believe there are requirement from DES that must be addressed so they are competently done. Mine is we have this aquifer protection district again, even not having an aquifer protection district, if we were just looking at it, where would we want to put a gas station. Where is a logical place to put one. I think the only way I could be in favor of this is if somehow that could be partitioned out and that is to say excluding impacts to the aquifer that it would be accomplished. Chris asked, didn't you also say at the beginning of your point that you believed that they covered all that through DES. Chairman Wieck replied I'm saying relative to the immediate hazards. They are doing what they can do there, but the bigger question of potential for impact to the public. If you were to say because it's a gas station that last condition was a problem,

then you'd have to disallow gas stations everywhere in Canterbury because they would be inherently dangerous, and they are to some degree. They all leak eventually, spills do occur.

Calvin, earlier I thought they said this system was 1,000 gallons, so it's a smaller system than was previously in. Has the town, have we had any history in 30-some-odd years with the tanks that have been there any issues of well contaminations. Personally, I look at this and I think of it as a public interest. A gas station would be a great thing for the town and on that side of town. Convenience wise it would be great for people. I'd love to get diesel in town and not have to drive 35 minutes somewhere else. Convenience-wise I think it's great. I understand the safety concerns. I'm wondering historically have there been any issues, have any neighbors, has anything ever been brought to light that we know of that....Chairman Wieck said, no we're not going to meet that, based on my own professional knowledge, it failed. Chris said that's why I asked earlier about failure rates, what do we know about this specific piece of equipment, whether.... Chairman Wieck said he thinks this is beyond the Board and really if DES approves it is consistent with the state of the practice and that is going to be sufficient to go there. I think the bigger picture is do you do it in that area or not because of the things that can't be addressed by engineering. I don't know the answer to that. My sense is, yes, we have the ability to weigh the different pros and cons, what are the benefits to that area as well as the potential risks. Calvin wondered if DES does aquifer testing. Chairman Wieck advised if the way testing showed up something, that's one other way for it to be detected as well. It is an aquifer and there is a reason we have a district there. But I do think that we are potentially tying our hands if we say to the public interest. We can't approve it if it doesn't pass that test. I guess we could conditionally do it. Calvin asked is it our job to analyze safety. Chairman Wieck stated it's an aquifer and you're putting a use in that is potentially dangerous. Brendan spoke saying so for that category there are two things you are supposed to look at: the right to use of an underground fuel storage tank versus public safety, amalgamizing public interest would not unduly conflict with the ordinance. Inaudible dialogue.

Chris asked for clarification where the aquifer is in the ordinance. It is in Article 17. Discussion back and forth between Chairman Wieck and Brendan overtalking. This is a special exception. Yet it has been brought to our attention because of this aquifer that the groundwater protection ordinance prohibits this use. Do I not have that correct? Chairman Wieck responded not necessarily for this site. And we could always do it by a variance. So, right now either the variance isn't necessary because there has been no abandonment or..... Chris interjected, but wait, this is a special exception. I'm not talking about the variance; I'm talking about this special exception. Chairman Wieck responded, right. So, we treat this like any other business, it doesn't have to be gasoline, the facts of it are there is a gasoline station. Chris, but that's your whole point about public safety. Brendan added, the answer is the overlay district prohibits an underground storage tank in the variance. If you have a variance, it doesn't prohibit it because you have a legal permission to not have to find .... Chris, so there's a variance.... Brendan, no, if they are a lawful non-conforming use, they also don't comply. So, from our perspective if we say you can have a special exception, condition on you obtaining a variance or decision saying you're a .... Non-conforming use. Those two things, if either of them ..... they are not subject to this prohibition. If they can't get those, then they can't meet the conditions.... Chris, and the special exception is moot. Brendan, right because they cannot meet the conditions. Calvin spoke saying did I read somewhere in the paperwork they cannot put the tanks above ground because of limitations of lot size? Did I read that in the paperwork somewhere? Brendan spoke saying he thinks that's relevant

to the variance criteria in terms of unnecessary hardship. Chairman Wieck replied he didn't know that that would achieve any better outcome in terms of risk. Calvin spoke saying in one of the folders in the file he thought there was a comment that was put out there that they have to be underground because of the lot size. Brendan added in addition to that point, the only other one subject to that condition to get approval, obtaining and maintaining all required state approvals for the removal of the tank, the installation of the new one and operation of the facility. Chairman Wieck spoke, with that section, that granting point number one, in the public interest, it's conditional to the question that is behind the variance. If someone wants to make a motion to that effect, do we want to do that.

Brendan made a motion that we move to approve the special exception, subject to two conditions:

1. The applicant must obtain a variance from Article 17.8.H, zoning ordinance or obtain a decision from the Board of Adjustment that a variance is not necessary.
2. The second condition is to obtain and maintain all required state approvals.

Chairman Wieck added for the record, my understanding is we're talking about that basically condition number one is not considering the location in the aquifer district. Web seconded the motion. The Board vote was a unanimous decision to **CONDITIONALLY GRANT** the application.

NOTE: If any person wishes to appeal this decision, you must act within 30 days of the date of this notice and apply to the Board of Adjustment for a rehearing. The Motion for Rehearing must set forth all the grounds upon which you base your appeal.

The Board voted to unanimously accept as written the Minutes of Hearing from Case No. 2024-4.

Renoticing for the Continued Hearing will be done with a date and location in December to be determined.

Respectfully submitted,

Lisa Carlson, Clerk  
Board of Adjustment