

**Town of Kingston
Zoning Board of Adjustment
February 10, 2022**

PRESENT: Electra Alessio, Chair; Larry Greenbaum, Vice Chair; Peter Coffin, Members; Chuck Hart, Alternate Member
ABSENT: Richard Johnson, Jackie Leone, Members

Chairwoman Alessio called the meeting to order at 7:00 PM

BOARD BUSINESS:

Approval of meeting minutes

MOTION: by Mr. Coffin, to approve the minutes of the January 13, 2022 meeting as submitted.

SECOND: by Mr. Greenbaum

All in favor

MOTION: by Mr. Coffin, to approve the minutes of the January 27, 2022 meeting with one amendment to the second to last paragraph on page 2: "... it would have been clear that easement holders go with ~~abutters~~ the applicant."

SECOND: by Mr. Greenbaum

All in favor

PUBLIC HEARINGS

7:05 p.m. Ida and James Ahern
 2 Third Street
 Kingston, NH 03848

IN RE: Tax Map U-4, Lot 141

This is a continuation from January 13, 2022, of a public hearing whereby the applicant seeks an Appeal from an Administrative Decision, a Special Exception, and five (5) variances so that the applicants can demolish and rebuild their single family home in approximately the same location. The applicants appeal the Administrative Decision regarding Article 301., Section 301.D, of the Town of Kingston Zoning Ordinance, whereby the Building Inspector denied the building permit.

Furthermore, the applicants seek a Special Exception to the terms of Article 205, Section 205.7, of the Town of Kingston Shoreland Protection District Zoning Ordinance, to permit the construction of a 1,540 square foot single family residence in the same approximate footprint as the existing residence and installing a new septic tank and leach field.

In addition, the applicants seek the following variances: Article 202, Section 202.5.B and Article 205, Section 205.4.C to permit construction of a 1,540 square foot single family residence in the same approximate footprint as the existing residence and installing a new septic tank and leach field; Article 301, Section 301.1.D to permit the improvement and/or placement of a single family dwelling structure located within 20 feet from the front property line; and to permit the improvement and/or placement of a staircase

located within 20 feet from the front property line; and to permit the improvement and/or placement of a deck located within 20 feet from the front property line.

Mr. and Mrs. Ahern were present with their attorney, Justin Pasay of DTC Lawyers in Portsmouth. Mr. Pasay asked if the board will only have four members this evening, and Chairwoman Alessio said yes, and as that is the case, the applicant has the option of requesting a continuance until next month. Mr. Pasay asked that the case be continued to next month.

MOTION: by Mr. Coffin to continue the hearing on 2 Third St., Tax Map U-4, Lot 141, to March 10, 2022 at 7:00 pm.

SECOND: by Mr. Greenbaum

All in favor

Summit Distributing, LLC
249 NH Route 125
Kingston, NH 03848

IN RE: Tax Map R-40, Lot 15

This is a public hearing which is a continuation from January 13, 2022, whereby the applicant seeks a Special Exception to the terms of Article 201, Section 4.E.14 of the Town of Kingston Zoning Ordinance, and asks that terms be waived to permit a retail motor fuel outlet with a 5,100 s.f. convenience store/quick service restaurant and five (5) retail fuel dispenser islands (ten [10] fueling locations), and three (3) high speed commercial diesel islands (two [2] fueling locations), within the Aquifer Protection District Zone B.

Chairwoman Alessio said she will be recusing herself from any further participation in this hearing. She said she has never done anything in the more than 20 years she has sat on this board to put the Town of Kingston at risk, and for that reason she will step down from this case. She said that Mr. Greenbaum will preside.

Mr. Greenbaum noted that there is no one in the room to represent Summit Distributing. After conferring with the other Board members, he read a letter received today from Sheehan Phinney attorney Mark Dell'Orfano on behalf of Summit Distributing, which stated they are appealing the Board's December 9 and January 27 decisions to the superior court. They requested that the Board reconsider and reverse its "legally erroneous" decisions no later than February 25, 2022, and that the rehearing be continued until a future date to be decided by the superior court. (Letter attached.)

The Board chose to hear comments of the public, as there were many people present interested in this case.

Attorney Christopher Swiniarski of Devine Millimet, representing CW Station, LLC, said that this request, which he only got an hour ago, is the third bite of the apple for this applicant, and there is nothing new in the letter aside from threat of litigation. He said

that while the Board has the authority to continue for cause, there was no cause in the letter, only old information, and the Board has to make a decision at some point. He said that the Board should forward the letter to its counsel, but it is not new information. He said the Board should seek advice of counsel and render a decision. He said this is a publicly noticed meeting, with almost everyone in the room here for this hearing, and this is the second time that the applicant has requested to just send them home at the last minute.

Mr. Greenbaum said that the matter has been forwarded to the Board's attorney, but that he has not heard from him personally. He said that he feels there is no choice but to await advice from the attorney. He added that the letter says that if the Board does not make a decision, they are going to court, so it may be out of this board's hands.

Mr. Coffin said that it is true that the Board is not required to continue the case, however, for the same reason this evening's first hearing was continued, now being down to a 3-member board is sufficient reason to continue the Summit case to a future meeting. He said that also to hear the case tonight with one-sided testimony would only add to their argument.

Mr. Swiniarski said he can agree with that, but suggested that advice of counsel should be obtained in case it happens again that there is not a full board.

The floor was opened to the public for questions and comments on the question of continuance only.

Ernest Anganes, 19 Hunt Road asked how many times after a decision is made it can be brought back to the board before the question is null. Mr. Greenbaum explained the appeal period after a decision is rendered, and said that there is no limit.

Rick Russman, 18 Beach Drive, said that in his opinion, the Board should deny the request for a continuance, default the applicant, and dismiss the application for Special Exception with prejudice.

Phil Coombs, 6 Little River Road, asked what the next step will be for this board if this continuance is granted, since the applicant has not yet filed with superior court. Mr. Greenbaum said that at the next meeting, March 10, this hearing will be reopened with both parties present. Mr. Coffin said that it will be a "de novo" hearing, as if starting all over again, and that there should be a full board present at that time.

MOTION: by Mr. Coffin, to grant a continuance of this rehearing to March 10 at 7:00 pm, given the unusual circumstance of having only three board members present, which is sufficient cause.

SECOND: by Mr. Hart
All in favor

Mr. Coffin informed those present that they will not receive further written notice, that this is their notice that the rehearing is set for March 10. He added that he personally will

not be inclined to continue any further.

Chairwoman Alessio returned to the Board table at this time.

**Hawks Ridge of South Kingston LLC
C/O James Dufresne
P.O. Box 175
Plaistow, NH 03865**

IN RE: Tax Map R-3, Lot 4-LU4020

This is a public hearing whereby the applicant seeks a Variance to the terms of Article 110, Section 110.4A of the Town of Kingston Zoning Ordinance, and asks that terms be waived to permit construction of one (1) age-restricted single family residential condo unit (part of Village at Granite Fields Condominiums) to be located within the 1,000- foot setback from Route 125. A 50 foot +/- Variance is required.

Present to discuss this application were the applicant, Jim Dufresne, and Engineer Charlie Zilch of SEC & Associates. In initial conversation it was affirmed that if the applicant is successful here, he will need to go on to the Planning Board for site plan approval.

Mr. Zilch introduced the application, related to the Hawks Ridge condominium development, saying the purpose is to seek a variance to relocate one of the age-restricted condominium residences from its current approved location to a new location that is partially within 1,000 feet of the Route 125 setback. Mr. Zilch said that the Granite Fields development consists of 5 land unit condominium areas, supports a mix of residential, recreational and commercial use, all within the Commercial III Zone, with a total of around 169 acres.

Mr. Zilch said his focus is on the condominium community which consists of 34 units, some partially completed or vacant. Each unit is located on a limited common area, and the rest is common area. The subject of this variance is one unit, not constructed, unit 20. He said there was some contention between the Planning Board and the previous developer, who wanted to move the unit without any Planning Board approval. Mr. Zilch pointed out the original approved location, and where the unit was relocated in 2018. Once the Town saw where the foundation was going in, the Selectmen issued a cease and desist because it was so far off the approved plan, and blocked access to the leach field. The foundation was eventually removed.

Mr. Zilch said that since Mr. Dufresne took over the project as developer, he has put a lot of money and effort into working with the Planning Board and inspectors to solve drainage issues, and now he wants to turn his attention to this issue. Mr. Zilch said that he believes this new location is a good solution. He then pointed out where it is proposed to go, and how the existing water and septic services will work for it. He said it

does not seem like it will adversely affect anyone, and it would not be discernible that it is 50' too close to Route 125. He said the various uses of the property mesh well together.

Mr. Coffin asked how many units are approved for the development in total. He said that in order to get approval, the Planning Board had required that unit 20 be removed, meaning there are now 33 units on the amended site plan. Mr. Zilch said that he had removed the unit from the plan set, but never agreed to lower the total number of units. Mr. Coffin said they need to work from the most recently approved amended plan, not the 2014 plan. Mr. Zilch said the most recently approved site plan was only for amendments to drainage and road improvement. Mr. Coffin said there is not approval at this time for a 34th unit; Mr. Zilch disagreed. Ms. Alessio said that in her conversations with the Building Inspector, she was told this (relocation of unit 20) helps to clear up the issues with the site plan.

Chairwoman Alessio asked Selectman Richard Wilson, who is the Select Board's representative to the Planning Board, for his input. Mr. Wilson said the original plan was for 34 houses, and that after all the shifting it went down to 33. However, he said he thinks the 34th unit still exists but that the Planning Board did not know where to put it on the plan, because of the issue with the driveways on the original placement. He said the Board of Selectmen had asked that the number on the plan be changed to 33, but it wasn't done; he speculated that this might have been because a new location was to be proposed and the plan would be back to Planning for amendment. He added that has nothing to do with the question for the ZBA about the 1,000-foot setback.

Mr. Wilson questioned whether the hardship would be on the applicant or the homeowners should the variance not be granted, as this may be the best solution to a problem.

Mr. Hart said that the decision of the ZBA is to decide whether to grant the 50-foot variance, and the Planning Board will deal with the rest. He said in his opinion it is not the role of the ZBA to speculate about what the Planning Board will approve.

Mr. Zilch reiterated that at the Technical Review meeting (prior to Planning Board review) he was asked to take the unit off the plan, but that he was never asked to change the total number to 33, that Mr. Dufresne would never agree to it. He repeated that this plan was strictly a revision of the drainage and roadway construction plan sheets, and not even recorded by the Registry. He said it was never asked of him to reduce the number, and that he took lot 20 off these pages because the Planning Board did not approve the location of it.

Mr. Coffin said that the original application requested the 1,000-foot setback and he has no problem with that, it is a commercial zone. He said that the application should be evaluated on the criteria for a variance and whether there is a valid reason for creating a new residential structure outside the Residential zone. Chairwoman Alessio said the applicant can only place the house on this lot if the ZBA approves it, and that the applicant will still need to go through the Planning process, and deal with Condominium

documents and the homeowners' association. She noted also that it is an age-restricted development.

Ms. Alessio said that she had been remiss in not letting the applicant know that with only 4 members present, he has the opportunity to continue without prejudice to the next meeting. Mr. Dufresne chose not to take this option.

Public Comment

Jim Scarpone, 11 Mulligan Way said he is against any further changes being approved. He said he takes exception to the description of previous vs. current developers, and to the misconception that (Mr. Dufresne) was not involved from the beginning. He said that Mr. Dufresne has all the knowledge of what went on before, including many changes made without approval and many things done wrong. He said in his opinion, enough variances and changes have been made. He said he has owned his house for six years, and if willy-nilly changes can be made, that is not what he paid for.

Holly Pouliot, 6 Bent Grass Circle, asked if the parcel of land proposed for lot 20 is owned by Mr. Dufresne or by the Homeowners Association. Mr. Dufresne said it is owned by Hawkes Ridge of South Kingston, LLC.

Renee Speitel, 8 Mulligan Way said that the condominium documents state that each house has limited common area assigned to it, and that the Association owns and manages all the common area in Land Unit 5, where all the homes are, so she is not quite sure how this works. Ms. Alessio asked if Ms. Speitel is saying that the condo association owns the land where the applicant wants the house to go, and said the board will try to find an answer to that. Ms. Speitel then asked which septic system the house would attach to, and Mr. Dufresne said it would attach to the Mulligan Way septic where it would have gone before, not to Bent Grass. Ms. Speitel said there is already trouble with the Bent Grass septic system.

Mr. Zilch said that the limited common area they are giving up in the old location becomes common area, so they are in essence making a trade and keeping the same total common area.

Ms. Speitel said that her question is since the residents own the common land, should they have a vote on its use? Mr. Greenbaum said that is a question for the association's attorney. Ms. Speitel said she just wants the board to be aware that they believe the association should have a say in this.

Mr. Dufresne said that lot 35 (where unit 20 is proposed to be moved) belongs to him and he pays the taxes on it, that it is not common land. Mr. Scarpone asked if a person can be granted a variance on property they do not own. Ms. Alessio said he is saying he owns the property. Mr. Scarpone asked if the variance would be revoked if it was found the applicant misrepresented himself. Chairwoman Alessio said that an applicant has to be the owner of record, or authorized by the owner of record. She said that unless there is something wrong with the town's records this is a valid application.

Mr. Coffin pointed out on the plan proposed commercial office space adjacent to the proposed unit 20 and asked about the distance between the two. It was estimated at 200 feet.

Beverly Lannon, 23 North Road, had questions about the relationship between the 50' variance and the width of the house, as well as the relationship of the house to Route 125.

Applicant addresses 5 criteria for approval:

Mr. Zilch then read from the application paperwork submitted to give his responses to the five criteria for variance (see attached).

Mr. Coffin read the definition of unnecessary hardship (RSA 674:33) and asked what makes this property unique where denial would create an unnecessary hardship. Mr. Zilch said that there is only one property with all the elements this has on one property; it already has commercial development on the Route 125 corridor, transitioned to recreational use, then to residential use. He said there shouldn't be a hard line on the 1000- foot setback.

The Board review and vote on the five criteria for approval:

1. Will there be a diminution in value of surrounding properties as a result of granting this variance? **Yes: 0; No: 4, passes**

2. Will the granting of this variance be of benefit to the public interest? **Yes: 3; No: 1 (Mr. Coffin); passes.** Mr. Coffin cited the opposition of the neighbors.

3. Will literal enforcement of the zoning ordinance result in an unnecessary hardship? **Yes: 3; No: 1 (Mr. Coffin); passes**

Ms. Alessio said she thinks it would because it will be hard to find another spot to locate this unit.

4. Will substantial justice be done if this variance is granted? **Yes: 4; No: 0; passes**

5. Will the use contemplated by the petitioner as a result of obtaining this variance be contrary to the spirit of this ordinance? **Yes: 1 (Mr. Coffin); No: 3; passes.** Mr. Coffin said that the setback in the ordinance is there for a reason.

MOTION: by Mr. Greenbaum, to grant a 50' variance for age restricted single family home, R3 Lot 4, Land Unit 4, Lot 20, to be located within the 1,000-foot setback from Route 125, with the condition that the plan must be approved by the Planning Board.

SECOND: by Mr. Hart

In favor: Alessio, Greenbaum, Hart; Opposed: Coffin; Passes

Chairwoman Alessio reminded the applicant of the 30-day appeal period.

Meeting adjourned at 8:25 PM.

Respectfully submitted,
Susan Ayer, Secretary

SHEEHAN PHINNEY

Boston • Concord • Manchester • Portsmouth • Upper Valley

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February 9, 2022

VIA OVERNIGHT COURIER.

Town of Kingston, New Hampshire
Zoning Board of Adjustment
163 Main St.
Kingston, NH 03848

Attention: Ms. Electra Alessio, Chairwoman.

RECEIVED

FEB 10 2022

TOWN OF KINGSTON
SELECTMEN'S OFFICE

**RE: Summit Distributing LLC's Motion for Continuance and Request
that the Board Reconsider its Decision of January 27, 2022, to
Deny Summit's Motion for Rehearing.**

Dear Ms. Alessio:

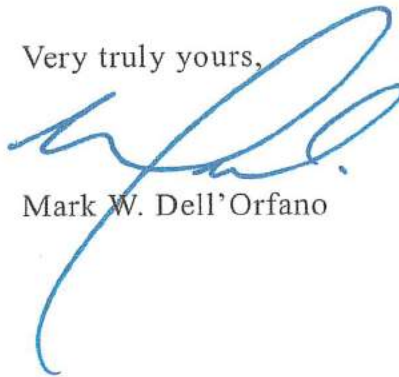
Summit Distributing, LLC's ("Summit") is appealing the Board's December 9 and January 27 decisions to the superior court. Please accept this correspondence as Summit's motion for continuance of the rehearing on Summit's application for special exception, scheduled for February 10, 2022, until a future date to be decided by the superior court.

Specifically, but among other matters, Summit is appealing the Board's decision to order a rehearing on Summit's application based on its unreasonable misinterpretation of RSA 676:7, I(a) – erroneously concluding that the Board was required to supply personal notice of its October 14, 2021 hearing on Summit's application to holders of conservation restrictions encumbering CW Station, LLC's property – and which forms the basis for the Board's December 9 decision, granting CW Station, LLC's motion for rehearing and ordering a rehearing on Summit's application.

Lastly, please also consider this correspondence as Summit's request to the Board to reconsider and reverse its legally erroneous decisions of December 9 and January 27 no later than February 25, 2022. The Board has the inherent authority to reconsider a decision to deny a request for rehearing and order suitable relief, upon its own motion or at the request of a party to the underlying proceeding, within the 30-day appeal period established under RSA 677:4. *74 Cox St., LLC v. City of Nashua*, 156 N.H. 228 (2007). Doing so may abrogate Summit's need to pursue a remedy in superior court.

We recommend that you turn a copy of this letter over to the Board's legal counsel. If the Board has no legal counsel, you may contact me, directly, to discuss any questions the Board might have about this correspondence.

Very truly yours,



Mark W. Dell'Orfano

MWD/nlt

Cc: Summit

46994-20722

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Criteria

**Re: Hawks Ridge of South Kingston, LLC
Application for Variance
Tax Map R-3 Lot 4 LU4020
Mulligan Way and Bent Grass Circle
Kingston, NH**

Request for Variance

Article 110 Commercial Zone C-III, Section 110.4 Prohibited Uses

- A. Residential construction is prohibited, except as provided in “pre-existing use” exception or in a mixed commercial/residential use plan when the residential structures are for over age 55 housing and are a minimum of 1,000 feet from the center line of Route 125. All residential buffers must apply.**

Variance Request To Permit:

To allow construction of one age restricted, single family residential condominium unit (to be part of the “Village at Granite Fields Condominiums” 34 total unit development) to be located within the 1,000 foot setback (no closer than 950’+/- at its closest point) from Route 125. Entire property is an existing, established mixed commercial/residential use.

- 1. The proposed variance will not be contrary to the public interest because:**
The proposed location of the relocated unit is in an area that would appear to be within the planned development. Access to the community water system and septic system is close by and can be tied to without interruption to the existing occupants. There is an available location for the driveway where ample sight distance exists to ensure that this proposed unit will not create an unsafe or disruptive access. The supporting LCA area to be dedicated to the unit will not encroach upon the abutting unit or the potential community center and its parking. In all, granting the variance will not be contrary to the public interest.
- 2. The spirit and intent of the ordinance is preserved because:** This zone allows for age restricted residential use with the restriction that it has to be setback 1,000’ from the centerline of Route 125. The 1,000’ setback from Route 125 is likely meant to maintain a commercial corridor along the highway. When considering this developed site, the existing

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commercial uses, contractor's yard, proposed commercial condominiums, indoor recreation building and golf club house achieve that goal. What makes this property special is that there is a transitioning from purely commercial uses located close to Route 125 to recreational uses (with an approved (by variance) 7 units of age restricted, veterans residential condominiums above the club house) closer to the 1,000' setback. Allowing this one unit to be located just within the 1,000' setback maintains that uniqueness. Granting the variance preserves the intent of the ordinance where it allows flexibility in how a property can be managed to transition from one use to another with consideration given to the intensity of the uses.

3. **There is substantial justice in granting the variance because:** Granting the variance will allow for resolution to a long standing conflict created by the previous developer. This will allow for the current developer to move forward with finalizing construction within the development so that the community can fully enjoy their neighborhood as intended. The request will not adversely affect the existing development but will only enhance it.
4. **The values of the surrounding properties will not be diminished because:** The existing development was designed and approved to support 34 total age restricted, single family condominium units. Relocating one unit to this location and abandoning its previous location ensures that the unit total remains at 34. The unit to be constructed in the requested location shall be in keeping with all of the previously constructed homes and will enhance the value of the community. The area in which this home is to be constructed, adjacent to LCU 34 will meld with existing development. Although the unit is proposed within the 1,000' setback, it would not be discernible due to the orientation of the development and the roadway that serves it. Meaning that this unit once constructed, would not be the first unit that you would encounter as you enter the neighborhood where units 9, 8 and 1 precede it on the left side of the roadway and as such the 1,000' setback would be indeterminable. Granting of the variance to allow the unit to be relocated to an area that maintains continuity with all other homes and allows for the final completion of the development would only enhance the surrounding property values.
5. **Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because:** The intent of the setback is to maintain a demarcation at 1,000' from the centerline of Route 125, between commercial uses and age restricted residential housing. The idea is to limit uses along the highway to commercial as the highest and best use for such corridor. In this particular case the property has supported both

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commercial and residential uses within the same project and each has benefitted from the other. Both access from the same roadway, utilize and share much of the same infrastructure and both are fully utilized without conflict. This request to allow one of the age restricted, single family condominium units to be just inside the setback does not adversely affect the intent of the ordinance as demonstrated. Denial of the request results in an unnecessary hardship where it forces the developer to construct the dwelling in the location originally approved but now partially occupied by a community member.