

TOWN OF KINGSTON  
ZONING BOARD OF ADJUSTMENT  
PUBLIC HEARING  
October 19, 2023

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

**Also Present:** Robin Carter, Land Use Administrator

Mr. Coffin called the meeting to order at 7:03 PM.

A quorum was present at the meeting.

**BOARD BUSINESS**

**Approval of Meeting Minutes (September 14, 2023):**

- Change the word "online" to "inline" on line 821 of the draft minutes.

**MOTION:** by Ms. Kelley **to accept the minutes as amended.**

**SECOND:** by Mr. Tilton

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

**Proposed changes to the Zoning Board of Adjustment By-Laws, Rules of Procedure and General Governing Rules (dated August 11, 2022)**

Change:

7.1 Change the time requirement to hold hearings (from date of application) from 45 days to 60 days to allow enough time for a hearing to be scheduled following the receipt of an application if the application is received shortly after the deadline for the following month's hearing. The State requires a hearing within 90 days.

Change: Paragraph 7.1, first sentence: change "45 days" to "60 days".

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Addition:

10.1 Board Business/hearings not in progress by 10:00 PM will be continued to the Board's next meeting; the meeting will adjourn no later than 10:30 PM. The above statement will appear on all agendas.

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Change: (this information is from the NH RSA statute).

13.0 Joint Meetings and Hearings

13.1 RSA 676:2 provides that the board of adjustment may hold joint meetings or hearings with other "land use boards," including the planning board, the historic district commission, the building code board of appeals, and the inspector of buildings, and that each board shall have discretion as to whether or not to hold a joint meeting with any other land use board.

13.2. Joint business meetings with any other land use board may be held at any time when called jointly by the chairperson of the two boards.

13.3. A public hearing on any appeal to the board of adjustment will be held jointly with another board only under the following conditions:

a. The joint public hearing must be a formal public hearing on appeals to both boards regarding the same subject matter; and

b. If the other board is the planning board, RSA 676:2 requires that the planning board

chairperson shall chair the joint hearing. If the other board is not the planning board, then the board of adjustment chairperson shall chair the joint hearing; and  
c. The provisions covering the conduct of public hearings, set forth in these rules, together with such additional provisions as may be required by the other board, shall be followed; and  
d. The other board shall concur in these conditions.

The Board took a vote on the proposed changes shown above to the ZBA By-Laws, ....

**MOTION:** by Mr. Russman **to accept the changes as proposed.**

**SECOND:** by Ms. Kelley

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

These changes will go into effect in 30 days. The ZBA by-Laws document will be updated and posted online on the Town website (ZBA page).

### **PUBLIC HEARING**

**Souhegan River View Investments**

**255 Rout 125**

**Map R40 Lot 12**

*<Board note: hearing opened at 7:10 PM>*

Mr. Coffin described the property and read the legal notice.

Property description. The applicant was recently approved for a skating rink through the Planning Board. There is a residence on the property. This is a commercial district (C-II, and in the Aquifer Protection Zone.

Legal notice.

The applicant is requesting a **variance to Article 109, Section 109.6.C** of the Town of Kingston Zoning Regulations to allow a vehicle repair facility in the C-II Zone. *Mr. Coffin commented that this is listed as a prohibited activity in this zone.*

In addition, the applicant is requesting a **Special Exception to Article 201, Section 201.4.E.10** to allow an automotive repair shop in Zone B of the Aquifer Protection District. This property is located in the Commercial Zone II. *Mr. Coffin commented that auto repair garages are permitted by Special Exception and the criteria is in the application to be met in the Aquifer Protection zone.*

Mr. Coffin explained that the reason the applicant is here is that while there had been an automotive repair shop there in the past it's been more than a year since it has last been used as an auto repair facility. It is prohibited in the C-II zone and in the Aquifer Protection zone it is only allowed by Special Exception. There are two (2) different requests here and both have different criteria.

**Applicant:** Andrew Jones of Jones & Beach Engineers introduced himself and presented on behalf of the applicant Terry Conner, the owner.

Mr. Jones referred to the plan and pointed out a pole barn that the applicant received approval for last month from the Planning Board for an ice skating rink. The reason why he is here tonight

is for the existing 42' x 45' garage. For a long time, this has been serving as an automotive repair shop. This is not an allowed use in the Commercial II zone.

**Variance application:**

- This property was sold to his client, Terry Conner, approximately 2 years ago.
- At the previous time the prior owner was operating the garage as an automotive repair shop.
- When it was sold to Mr. Conner, he is not an automotive technician and the shop is technically no longer operating and this is how they got into the 1 year discontinuance of a non-conforming use of this.
- Mr. Conner has been looking for tenants to fill the automotive repair shop since then and hasn't been able to find someone. As soon as he was able to find someone he was notified by the Town he couldn't move them in because they had the 1 year lapse from when that use and was no longer permitted.

Mr. Russman brought up that the Town Planner said it has been over 2 years since Mr. Conner bought the property.

Mr. Jones said yes, he bought the property 2 years ago with the understanding that the garage could continue because it is a grandfathered use. The use preexisted the change to the C-II zone that prohibited it. Mr. Conner bought it assuming he could rent it out as an automotive use (approximately 2 years ago).

Mr. Coffin commented that he wasn't told that he could. He said that the Board can't hear municipal estoppel. If he was told he could use it is irrelevant to the Board; that would have to go to a different court. Because it came in for site plan review before submitting the application he was told at the time, there was question if there was a variance on file or not and a variance would travel with the property, but it wasn't. The Planner at that time needed to check when it was last used because it had been more than a year. Then a meeting at the Planning Board (Mr. Coffin was not at that meeting), the applicant's representative was told the grandfathering had discontinued. Mr. Coffin explained that when we say grandfathering, we mean pre-existing non-conforming use. This was put in before 2000 and the ZBA heard this on September 12, 2004.

Mr. Broderick asked if this is where Mark's Auto was and that Mr. Conner owned the property when this use was grandfathered. Mr. Coffin said that this pre-existed Mark's, it pre-existed the building of that garage that was done without a permit. Mr. Jones said he doesn't believe there was a variance on file because the use existed before the zoning. Mr. Coffin said that there is not a variance on file. They were sent to the ZBA for a variance and the ZBA determined that it was a grandfathered use (NOD 09/12/2004). The use has been discontinued for a while.

Mr. Broderick summarized the situation and that it was used as a garage for 20+ years and prior owner sells it and Mr. Conner didn't operate it as a garage. Mr. Jones said that is the problem, Mr. Conner would have had to find a new tenant within the 1 year period and he failed to do so. Mr. Jones explained that the use existed before the use was prohibited in the C-II zone, therefore it was grandfathered. With the sale of the property logistical issues resulted in an over 1 year lapse per the local ordinances that caused the use to no longer be permitted. That is why they are here to ask for this use back. Because this is in the Aquifer Protection zone there is a 1 year limitation on pre-existing non-conforming uses. If it were not in the Aquifer Protection zone and was just in C-II then the use would not have expired. Mr. Coffin read from the C-II

ordinance, "Non-confirming uses may not be expanded or changed to other non-confirming uses." (Article 109.3). He noted that this would not be an expansion or change. Mr. Jones said that if there was someone to move in right away that was an automotive technician they technically would not need a new site plan because there is no change or expansion of use.

Because Mr. Conner is not a mechanic he wants to rent the land and build a pole barn outback. Mr. Coffin said they would have to do a site plan for the garage. Mr. Jones said that the garage is shown on the site plan that was done for the pole barn and does show drainage and stormwater. Mr. Coffin mentioned that the permit for the garage is residential only, it was never granted occupancy for commercial use. Mr. Jones replied that if the Board grants the variance and sends them back to the Planning Board it is more than fair.

Mr. Coffin brought up a denial from the building inspector for the barn. Mr. Jones explained that Mr. Conner thought that because it was for residential use he didn't need to go to the Planning Board. But because it is a commercial zone, anything requires a site plan and that is why he had to go to the Planning Board. It took time to do a boundary survey and a drainage study, and this took a few months to do this.

Mr. Jones went through the five (5) variance criteria.

**1. The proposed variance will not be Contrary to the public interest.**

*The existing use on the property prior to this transaction of the land was a vehicle repair shop. The project is located right on route 125 so it is not necessarily an inadequate location for a repair shop. A repair shop has operated there for 20 years up until the point of its sale.*

**2. The Spirit and Intent of the ordinance is preserved.**

*The use predates the zoning, so it is grandfathered use, it's a commercial use in a commercial zone.*

Mr. Coffin spoke and clarified that when you have lost your preexisting non-conforming use status we start from scratch. So, using the argument that it is grandfathered is not a valid argument because as Glenn Greenwood discussed with someone from Jones & Beach that terminates the pre-existing non-conforming grandfathering.

*Mr. Jones rephrased The original use predates the zoning and their proposal is to reinstate that use that has lapsed.*

Mr. Coffin said that *the spirit and intent of the ordinance* is what they are answering and the ordinance says it's a prohibited use. How is the applicant arguing that this prohibited use would be within the spirit and intent of the ordinance.

Mr. Jones stated that it is a little bit of a different question to answer because the uses don't have described purposes. They just have the description of the boundaries then a list of uses that are allowed and denied. This is in a Commercial II zone and it is not quite clear from zoning ordinance what the intent of the Commercial II zone is. It is a commercial use in a commercial zone on RT. 125 and there was an automotive repair shop there and what they are proposing is an automotive repair shop here. *In this regard the spirit of a commercial use in a commercial zone is observed* and anything more specific than that is difficult to get in to.

Mr. Coffin explained that if it was neither permitted nor prohibited it would be in the gray area. However, when it is added in as a prohibited use, that tells you (but not true of all the commercial

zones) that it is specifically prohibited in the C-II zone. They need an argument why the spirit and intent of the ordinance would not be validated by allowing a prohibited use.

Mr. Jones said he will circle back and continue.

**3. There is Substantial Justice in granting the variance.**

*Because this was a use that existed before the zoning ordinance changed had lapsed. The justice gained is he bought a property expecting to use the automotive garage that existed and continue to operate it. The detriment to the public is it would end up with a decrepit garage you can't use for anything because it is designed for commercial autobody stuff. It's not really a garage you can store toys in.*

**4. The values of Surrounding Properties are not Diminished.**

*There is no change in use or expansion of use, this use existed before and they are proposing to continue, so there would be no change.*

**5. Literal enforcement of the provisions of the ordinance would result in an Unnecessary Hardship.**

*The property was purchased with the understanding that the garage could be used, it lapsed in the meantime. That is a specific hardship that is unique to this property. If we were talking about construction of a new garage on the property. This is an existing garage on the existing lot, but if this was a new garage this would be expressly prohibited, but this is an existing garage on the existing lot. They are asking that the use be reinstated so they can continue to this use.*

Mr. Jones came back to answer this question **#2. The Spirit and Intent of the ordinance is preserved.**

Mr. Jones referred to the Master Plan on the Town website and looked into the vision for the 125 corridor. Mr. Coffin explained that zoning went into effect in the 1970's that the commercial zones didn't come into effect until the 1990's. Mr. Jones said there is a lot in the plan for the conservation and the protection of the Aquifer Protection District. He noted that this would be one of the primary drivers why the C-I and C-II zones prohibit automotive shops specifically tend to be viewed as a "dirty" use. In his case, he commented that any damage to the soil, that he doesn't believe exists, would have already been done before now. Modern automotive technician practices would be far cleaner than they were in the past. As far as he is aware there are no cleanup efforts by the DES, no documented oil spills, no contaminants of the soil.

*Mr. Jones stated that the use is going to be a clean use that isn't going to disturb any ground water aquifers underneath.*

Mr. Coffin noted that if this was to be granted that they would have to have the structure come up to current code for garages. Mr. Jones, replied absolutely. Mr. Coffin further mentioned they would need things like water separators, equipment and best practices that would clean that. Mr. Coffin asked what the surface was surrounding the garage. Mr. Jones said it was mostly impermeable gravel, a large portion has been paved, and grass. Mr. Coffin asked what the surface was inside, any floor drains? Mr. Jones said there are no floor drains, it is concrete floor. If you are cleaning the floor of an automotive shop it should be contained into a mop. Mr. Coffin said this information would all be based on a site plan review. Mr. Coffin mentioned that this use was never applied for. Mr. Coffin said that there is a fair amount of speculation of the ZBA not having to grant a variance because of the pre-existing non-conforming. He said that there is a fair amount of legal

documentation in the Town property file that the structure wasn't built legally. There is quite a number of gaps and there is no indication of how long it has been since it has previously been used, whether there was evidence if it was ever registered as a business with the State of NH as being used as a commercial garage, we do not know if it was used as an automotive garage for 20 years.

Mr. Coffin recapped the applicant's response to the spirit and intent of the ordinance. *The Master Plan is mostly about the Aquifer Protection zone.* Mr. Coffin explained that the applicant needs to address why the reasons why this exclusion, why this garage should be permitted. *Pre-existing*, which seems to be the argument for literal enforcement and would result in unnecessary hardship. If there was a known variance (variances do not expire) then that would be an issue that can't be taken up with the ZBA, it would have to be taken up with Superior Court or someplace. The Board has to base their decisions off of the evidence that is presented as if they wanted to put the garage in as a new business.

Mr. Jones said that is where this application gets a bit muddy because the presence of an existing automotive shop leans very heavily into criteria five, is because it is a unique hardship for the use. All of the infrastructure is in place and they can't move someone in because the expiring lapsed due to all sorts of different processes-looking for tenants, Planning Board approvals. As soon as Mr. Conner bought the property he engaged with the Town to look into whatever development he was looking for. It does take a significant amount of time to get a drainage study and survey together.

#### **Board comments(s):**

Mr. Broderick read from the Aquifer Protection ordinance, 201.7," No non-conforming use may be expanded, changed to another non-conforming use." Mr. Broderick brought attention to this section. No non-conforming use may be "*renewed after it has been discontinued for a period of 12 months or more.*"

Mr. Jones responded that is the reason why they are here. Mr. Broderick said that the Board has to justify why they may be allowed to have this. Mr. Jones explained that this isn't a case where the use has lapsed 10 years, it has gone through 3 owners and the newest owner wants to reinstate a use that the previous owner of the property used that use; and the property was purchased to continue that use and through whatever logistical reasons that occurred, and part due to site plan development that use was not reinstated at the time to meet the 1 year threshold. This is the core of his argument, it really comes down to logistics there were a lot of moving parts just to get the pole barn approved, not to mention to get tenants in the residential portion and a new tenant for the commercial garage. All of this came in to the 2 year timeline, now we finally have all the pieces pulled together except that use has expired.

Mr. Coffin went back to the question, *what the previous tenant had.* In the property files it shows that the occupancy permit for the garage was for residential use only. Mr. Coffin asked if they had any evidence that the previous tenant used it as an automotive repair facility. Mr. Jones said he doesn't have anything tonight but asked that the Board continue them so they could try and procure and produce that evidence "**if that's kind of (unintelligible)**". Mr. Coffin said that he can ask the Board, but it may be irrelevant because even if we knew the previous tenant had used it, the pre-existing non-conforming has expired during Mr. Conner owning it." But they are basing a lot of the argument that it has been used for 20 years and the property files seems to imply that it is not, the property file doesn't show that it has been continuously used for 20 years, there has been quite a few gaps and it seems it was approved for residential use only.

Mr. Jones said that the fact that it was a pre-existing use is only reason they can come in and ask for a use that is prohibited in a zone to be reinstated. This is the Board's chance to strike this from the entire property. He is asking that if his argument to the Board, this is a pre-existing use should be reinstated solely because it expired for logistical reasons is compelling, **then maybe** we continue this until he can get more evidence that the claim of the use coming up to at least the last few years is credible."

Ms. Kelley said that it is more than that the use has expired. This is similar to the application about use that the Board has seen recently in the Aquifer Protection District. Their application doesn't give any indication on how they are going to protect the aquifer. She realizes that they will be doing a lot of the garage work inside but if it is going to be rented to a tenant who may be storing cars outside they do not know what the cars may be leaking and there is nothing on the plan that shows that this will be taken care of. This is due diligence and not enough information has been provided to discuss this being in the aquifer. Mr. Jones said that due to the fact they have a site plan with a formal PE stamp drainage design that is designed to shed the pavement back, treat it and infiltrate it in to the ground to protect the aquifer. For the same reason the garage has spill guards. If the Board wanted to have a condition that no cars can be repaired in the parking lot and restrict to only inside the structure to avoid any possibility of spills he thinks they would welcome this. Mr. Coffin said if they get to the Special Exception there would be a lot of conditions put on this if it was approved then it would be reviewed by the Town Engineer at the Planning stage in order for the Board to be able to sign off on the final approval for any variance or Special Exception. For the Special Exception criteria. one of the requirements the Zoning Board would have to be comfortable with there would be no harmful effects in the Aquifer Protection zone and that would probably involve a hydrogeologic study and review done, this would be a decision of the Board on whether they would require this. All the necessary protections would have to be discussed at the meeting and would be put in as conditions and that would be taken to the Planning Board and they would understand that the conditions existed whether they put them on or not.

#### **Public comment(s):**

Public comment opened at 7:48 PM.

Phil Coombs, 6 Little River Road –

- He questioned if this was ever a legal use in the first place.
- He served on the Planning Board and the Select Board and this was brought up numerous times as an example of someone who didn't comply with the rules and kept going forward and the Town didn't have the where about to stop them. They didn't want to go to court, it was illegal from the beginning.
- This is a continuation of an illegal use, not a preexisting use. It was never a legal business in this area to his knowledge.

Mr. Coffin commented that happens to be backed up by the communications in the Town property file. The non-conforming pre-existing use started out and he had an auto repair shop in a smaller garage in Hampstead and he would occasionally bring cars home on the weekend and continue working on them in his own personal garage. That use stopped and apparently there was another applicant that wanted to have an auto sales there and that never got approved because it would have been a change. A new garage was built, plumbed into the house's septic they started using it and the occupancy said that the use was for a residential garage. Previously, in another board meeting one of the abutters gave testimony that it hasn't been used as a garage for some time. As Mr. Coombs pointed out there doesn't seem to be

any evidence that there was ever a legal operating business there.

- Mr. Coombs said he can see why someone may have been led to believe there was that use there but it was never a legal business in the first place or properly put in place.

Ms. Kelley said that the Board has already determined that it is no longer grandfathered and they are starting as if it were a new request.

Mr. Jones explained that the only distinction between this and a new proposal is the garage currently exists.

Public comment was closed at 7:53 PM.

The Board went into deliberations to review the five (5) criteria required for a variance.

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

*Board discussion: Mr. Coffin explained that they are basing it off that a repair shop was at this location for 20 years. Mr. Russman said that it is contrary to the public interest because the zoning article specifically says if. It was not used in over a year; it cannot be reestablished (in the Aquifer Protection District). Mr. Tilton noted it is specifically prohibited. Mr. Coffin said this is about the C-II and use is specifically prohibited (109.6.C). Previous use was not established as legal and has lapsed and therefore this is starting as a new application.*

**MOTION:** by Mr. Russman **that for these things stated the variance is contrary to the public interest.**

**SECOND:** by Ms. Kelley

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

**2. The spirit of the ordinance is observed.**

**MOTION:** by Ms. Kelley **that it is not preserved for the same reason as #1.**

*Mr. Coffin said that it is not preserved and that the intent of this ordinance is to prohibit this use.*

**SECOND:** by Mr. Russman

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

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

**MOTION:** by Mr. Tilton **that the harm to the public outweighs the loss to the individual because of the potential risk the ordinance tries to protect.**

**SECOND:** by Mr. Tilton

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

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

*Board discussion: Mr. Russman said that there is a change in use because it is not being used for anything now and they want to use it for an auto repair shop and that will potentially diminish the values surrounding it; and there has been no expert testimony offered to the contrary.*

**MOTION:** by Mr. Russman **that change in property values will be diminished since the change in use leads to an increase in noise and is hazardous to groundwater.**

**SECOND:** by Ms. Kelley

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



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

403 a) There is no fair and substantial relationship between the general public purposes of the  
404 ordinance provisions and the specific application of that provision to the property; and (b) The  
405 proposed use is a reasonable one.  
406

407 *Board discussion: Mr. Coffin mentioned that one of the arguments they brought up is whether*  
408 *there is an existing garage and if it was legally built and operated. The question is, can this*  
409 *property be used for something else. The house can be rented because that is a preexisting*  
410 *non-conforming use in C-II zone. It's been approved for an ice skating facility and has a site*  
411 *plan. The property says there is a residential garage and that can be used as a residential*  
412 *garage. Other uses can be made that are non-polluting and permissible in this zone. There is*  
413 *fair and substantial relationship between the general public purposes and the specific*  
414 *application of the provision for the property. Mr. Russman commented on the notion that the*  
415 *applicant specifically created the hardship he now seeks relief from. Mr. Coffin mentioned that*  
416 *the applicant certainly could have applied before the year period, they didn't have to wait for a*  
417 *mechanic, they could have applied to continue the use as a commercial garage and it would*  
418 *have had to be allowed because an earlier ZBA permitted it. That was well within their rights.*  
419 *They had the ordinance available to them and they could have read that.*  
420

421 **MOTION:** by Ms. Kelley **would not result in an unnecessary hardship because the land**  
422 **can be used for other purposes that are existing allowed residential and commercial**  
423 **uses. The applicant had the opportunity to continue the non-conforming preexisting use**  
424 **within the time and failed to do so.**

425 **SECOND:** by Mr. Tilton

426 **A vote was taken, All in favor, the motion passed. (5-0-0)**  
427 -----

428 **MOTION:** by Mr. Tilton **based on all five (5) criteria having not been met, deny the**  
429 **application for the variance.**

430 **SECOND:** by Mr. Russman

431 **A vote was taken, All in favor, the motion passed. (5-0-0)**  
432

433 Mr. Coffin explained the applicant that the variance request was denied and that a notice will be  
434 sent to the applicant. He said that the appeal period is 30 days and informed the applicant that  
435 the Town closes at noon on Fridays and if the 30 days expires on a Friday, Saturday or Sunday  
436 the office closes at noon on Friday so it would have to be in before noon on Friday.  
437

438 Mr. Russman asked if the applicant goes forward with the Special Exception because the Board  
439 denied variance. Mr. Coffin explained that we will ask the applicant if they want to because if  
440 they wanted to appeal the decision on the variance and we don't do the Special Exception  
441 request the Board would have to hear a Special Exception appeal. The only way it would be true  
442 is if the applicant wanted to withdraw the application for the Special Exception, or wanted to go  
443 through it the Board could do it. The Board could open up the appeal for the special exception  
444 and go through the criteria and could hear what the Board has to say, they do not have to  
445 withdraw the appeal application. It's up to the applicant.  
446

447 Mr. Coffin stated that the Board formally closed the hearing on the variance.  
448

449 Special Exception application -

450 Mr. Jones requested to formally withdraw the Special Exception to save the Board time and  
451 there is no real reason to go through with it where the variance was denied approving the use in

the Aquifer Protection District for this lot provides no real benefit to the applicant and in fact an initial denial would make any appeal the applicant may want to do would be more difficult.

Mr. Coffin closed this hearing at 8:17 PM.

Mr. Coffin explained that they will get a Notice of Decision to them within a week.

<Board note: hearing ended at 8:17 PM>

**Board Business:**

**Request for Rehearing – Greg and Scott Demetri, 83 RT. 125, Map R10 Lot 9**

The Board received a letter from John L. Arnold of Orr & Reno dated October 11, 2023, for a request for rehearing for their client Greg and Scott Demetri for the property located at 83 RT. 125, Map R10, Lot 9.

**Board discussion:**

Mr. Coffin explained the reasons for a rehearing, 1) the Board made a technical error in the first hearing; or 2) new evidence was not available at the first hearing that wasn't known to the applicant or the Board at the time of the first hearing.

Mr. Coffin said that the case they are making is the Board made a technical error in applying the rules, specifically the Board cited as a reason for denial that it was voted by the Town and that every ordinance has been voted in by the Town and can't use this as a reason to not grant a variance because no variance would be granted to allow uses. However, the reason the Board cited the intent of the ordinance was because that was the key issue whether the Planning Board correctly interpreted the ordinance in the first case (which Mr. Coffin recused himself from). In order to do this the Planning Board actually went to the Town Attorney got a definitive answer to this and they had no choice but to deny the application, but you can go to the ZBA. This was the administrative appeal.

**Administrative Appeal -**

For the administrative appeal they tried to claim a municipal estoppel. This is not something that the Zoning Board can hear here. Mr. Coffin explained what a municipal estoppel is-*if you go to a Town official and get told that you can or can't do something and make a decision based on that and it's wrong the Town can't change their mind and say you can't do something when you were told you could do it by the responsible official you relied on to provide the actual information.* He noted that did not happen in this case, but whether it happened or not the ZBA can only rule on zoning regulations, not on a civil case of municipal estoppel. He commented that he is sure the attorneys know this and is something that comes up every time in one of the ZBA trainings from the NHMA or NHOPD attorneys, they always mention we can't use this as a justification. The applicant can still go to Superior Court and claim municipal estoppel if they can prove they were allowed to do something and made their purchase decision based on this. They are responsible for reading the ordinances and understanding if that would be true or not.

Mr. Coffin commented that for the municipal appeal they do not bring up, unless anyone else read something else, that he didn't see they didn't bring up any decisions unlawful and unreasonable, "The Demetris hereby incorporate their written and oral testimony on the administrative appeal application and assert that the ZBA's decision was unlawful and unreasonable for the same reasons that the Planning Board's decision was incorrect." (ref.-letter from John L. Arnold to the Kingston Board of Adjustment dated October 11, 2023). Mr. Coffin mentioned that it has been demonstrated that the

Planning Board's decision was correct. Ms. Kelley commented that the Planning Board had to interpret the ordinance as written and when they got Legal Counsel's advice and said the Planning Board interpreted it correctly then they had no choice but to send the applicant to the ZBA. Mr. Coffin noted that the applicant cited the Planning Board minutes (Oct. 4, 2011) where the 1,000 buffer was discussed, the Board did receive comments from Glenn Coppelman and Ellen Faulconer in person stating that the intent was to include all the listed uses (110.3.K). It wasn't a matter of like uses, it was a matter of the law was written as intended. The Town didn't intend just to have car sales or RV sales or anything else shown there. It was correctly interpreted by the Planning Board and Town Attorney. They made the administrative decision by use; this was right and the Board had the testimony about the intent.

**Variance application –**

**#2. Spirit of the Ordinance is observed.**

Mr. Coffin brought up that they (current members of the ZBA) were not on the Planning Board when this ordinance was decided upon. The Board did have people to testify who were there when this decision was made and justified that that was the intent of the ordinance.

Mr. Russman spoke and said that his understanding of the ZBA is to allow slight deviations. Mr. Coffin responded, yes. Mr. Russman stated that this is a huge request for a very large deviation from what the 1,000 feet is, this is going to be 450 feet. This is not just a few feet this is half the distance, if it were 975/950 feet or something it would be a different matter, but half of the distance, almost 500 is substantial.

Ms. Kelley commented that she does see their argument, they are a different type of business. She does drive this portion every day because she lives that way and she did take a look around as she was driving and if it was to be put in as their use as they applied for it, Pat's Truck Sales almost looks like there are six (6) cars parked out front that could be parked in front of any building, as if they were going into a shopping area. It is not like Stratham has BMW and Porche, etc. If you look at the size of the lots of these other similar uses, they are not necessarily big car lots that there might have been a concern with at the time. The proposal is a 20,000-foot S.F. building with most of the parking being in back. It is too bad that they are so close. It is half the distance but is it different enough to grant it. Mr. Coffin said that it certainly was a discussion. Mr. Kelley noted that unfortunately they didn't give any new information to work on.

Mr. Coffin explained that they are basically basing it off of that the Board made a procedural error in the way the Board evaluated it, but not really a technical error because the Board asked previous Planning Board members to state whether that was the intent of the ordinance and they said that it was. Ms. Kelley said that she doesn't see how the Board made a technical error. Mr. Coffin explained that a technical error is if the Board made a legal mistake. They went through the procedures, they gave cited reasons for every single one of them, they had testimony about the spirit and intent of the ordinance. They said that the values of the surrounding properties would not be diminished and cited the reasons. All five (5) criteria have to pass, the first two (2) are important ones – Public Interest and Spirit and intent of the Ordinance - and they did not pass.

Mr. Bache questioned that in order to file for the appeal they have to have made a claim that the Board made a technical error. It is not that the Board made a technical error, it is that they are questioning criteria that the Board goes by. They are questioning how the first criteria should be different and we can't include that it was a vote of public interest and that it shouldn't matter because it's in the ordinance. Mr. Coffin commented that they have to appeal to the ZBA within the 30-day appeal period then that permits them to go to court and try and make an argument.

**MOTION:** by Mr. Tilton that the Board denies the Rehearing based on no new information from the applicant and affirming our previous decision was correct and there were no technical errors.

**SECOND:** by Mr. Russman

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

**2024 ZBA Budget:**

The Board reviewed and approved the 2024 budget with the changes discussed.

Mr. Russman recused himself from this vote. Mr. Bache was appointed a voting member.

**MOTION:** by Mr. Broderick to accept the 2024 budget as amended.

**SECOND:** by Ms. Kelley

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

Mr. Russman resumed as a voting member. Mr. Bache returned as an alternate member.

**Release of escrow funds:**

The Board voted to release the unused escrow funds for Summit Distributing, LLC and Until Service.

**Summit Distributing, LLC.** Mr. Coffin mentioned that they did not appeal the decision and any appeal period has expired.

**MOTION:** by Ms. Kelley to release the escrow funds to Summit Distributing, LLC.

**SECOND:** by Mr. Coffin

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

**Unitil Service.**

**MOTION:** by Ms. Kelley to release the escrow funds to Unitil.

**SECOND:** by Mr. Coffin

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

**ZBA Application:**

The Board reviewed updates to the ZBA application package.

**MOTION:** by Mr. Broderick to accept the ZBA application as amended.

**SECOND:** by Mr. Russman

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

**Correspondence:**

- 1) **Letters from Dave Lovely-Tailon, Director of Camping Service of YMCA Camp Lincoln** (dated September 11 & 13, 2023). The ZBA and the Planning Board were both sent a letter that they want to build 2 new cabins and new bathrooms for campers. They wanted to have a joint meeting with the ZBA and the Planning Board. Mr. Coffin mentioned that In looking over the plan that was provided and speaking with Glenn Greenwood there is nothing on there that requires Planning Board approval. It is a pre-existing non-conforming use in a residential zone. Camp Lincoln has been there a lot longer than zoning and this is a natural expansion. The Planning Board responded that they need a full application with a site plan review. The Planning Board would have to review it and if they issued a letter of denial for some reason, then they would need to go to the ZBA.

**ADJOURNMENT**

Meeting adjourned at 9:10 PM.