

**ZONING BOARD OF ADJUSTMENT
KINGSTON, NH**

**September 12, 2019
Public Hearing**

The Chairperson called the hearing to order at 7:00 PM.

Members in attendance:

Electra Alessio, Chairperson
Peter Coffin
Richard Johnson

Larry Greenbaum
Jackie Leone
Charles Hart, alternate

Absent Members: Richard Johnson

Acting Board (recording) secretary: Ellen Faulconer
Also present: Kevin St. James and Phil Coombs, Board of Selectmen

Ms. Alessio introduced the Board members.

Board Business:

MM&S to accept the August 8 minutes as amended, correcting the spelling of Coombs.
(Motion by Mr. Coffin, second by Mr. Greenbaum) **PUNA** (passed unanimously)

Letter received from George Fredette of SFC Engineering requesting a continuance from 10/10 to 11/14/19.

MM&S to continue the YMCA's request for a rehearing to 11/14/19 at 7:05 PM. (Motion by Mr. Coffin, second by Mr. Johnson) Discussion: Ms. Alessio explained that there was nothing before the Planning Board to review so there was no ability for a joint hearing; Ms. Alessio stated that she did have a check from the applicant for the abutter's notices and fees for the November hearing. Vote on the motion: **PUNA**

**James Dufresne
Diamond Oaks Golf Club, LLC
PO Box 175
Plaistow, NH 03805**

**Re: #7 Route 125
Kingston, NH
Tax Map R3 Lot 4 and 4 Land Unit 3**

Charlie Zilch, engineer and Charles Cleary, attorney, appeared before the Board representing the applicant who was also present. Mr. Zilch gave a quick update noting that this is a re-submittal to convert to condominiums. He stated that this had originally been presented as age-restricted, over 55, marketed to veterans with the Board initially granting the proposal but a motion for a re-hearing was granted. He added that the applicant is now submitting the proposal as condominiums: seven 1 bedroom units; the zone currently restricts the use to 1000 feet back from Rte. 125 in the C-III zone and they are asking for a variance. Photos were distributed showing the location of the clubhouse which has its own access road; the clubhouse is in an established mixed use development next to a recreation building; the next use beyond this is another age-restricted development. Mr. Zilch stated that he believed that clarifying the condo. issue resolves the issue for confirming that the housing would be for veterans. He added that the variance is for the use within the 1000 foot setback.

Ms. Alessio explained that she had spoken with the Town Attorney and Mr. Cleary about the proposal being re-noticed and re-notifying abutters; the notice includes both apartment and condominium. She noted that Mr. Dufresne had agreed at the August meeting to abide by Attorney Loughlin's recommendation regarding the notice requirements due to the addition of condominiums. She stated that the proposed condominium documents had been submitted.

Ms. Alessio asked if anyone was present to speak in support of the application. Attorney Cleary asked that the focus be on the 1000 ft. setback off of Route 125. He pondered the intent of the Town of Kingston in establishing this restriction. He said that this is already a mixed-use area which is almost fully built out; the proposal is in the second floor of a building; he said there are reasons to look at this and say the 1000 ft. setback doesn't make sense as there is a golf course and residential development; the Town wouldn't get a big box store on the existing road; it is set up differently than other lots on Rte. 125. Mr. Zilch reviewed their responses to the ZBA's five criteria: not contrary to the public interest as the Board has looked at the neighborhood that is currently residential and commercial and this doesn't alter the neighborhood; the spirit of the ordinance is met even though the Board of Selectmen are saying that a 1000 foot setback means 1000 feet but that is not a reason to deny and it doesn't make sense to hold them to it; it doesn't threaten public health, safety and welfare, the Board needs to weigh the cons and benefits and what is the harm as it adds working citizens, adds taxes and helps benefit those that need housing. He continued by explaining substantial justice by asking will there be any loss not outweighed by a gain to the public and adding that NH veterans need housing; the enforcement is in the document; the values of the area property will not be diminished. He reviewed the unnecessary hardship test by stating that there was no fair and subjective relation to the Ordinance and the property at issue; it didn't apply due to other buffers. Mr. Cleary said that the proposed use is a reasonable use and it is totally permitted in the zone adding that it benefits the Town generally and he questioned whether it was likely that commercial uses would clamor for the golf course.

Ms. Alessio asked if anyone was present to speak in opposition of the application. Mr. St. James spoke to the Board representing the voters, the general public and the Board of Selectmen. He stated that the voters had set up this area as commercial zoning and the residents want to see more businesses. He added that the property owner was aware that this zone was commercially

zoned when it was bought. He re-iterated that voters wanted more commercial property. He reviewed the Board's five criteria. He said that this would be contrary to the public interest as the public had voted to have this area be for commercial use and be commercially-zoned property and it was not established as a zone for mixed use. Mr. St. James stated that the spirit of the ordinance would not be observed as this was not established as a mixed use and the owner could add in a commercial use on the site. He continued that substantial justice would not be done as the Town, the Planning Board and the voters said that they wanted a separation of commercial and residential uses; a variance would be a gain to the property owner, not to the public; there are tons of residential properties in Kingston. Mr. St. James agreed that the property values criteria could be met. He added that the hardship criteria could not be met; the hardship is not to the applicant, it is a hardship to the property and there is none. He stated that the Board had a lot to look at adding that it was the voters that put them in office; the Board needed to look each of the five criteria individually and weigh them.

Ellen Faulconer clarified that she wished to speak not necessarily for or against, but to clarify that the statement that the use was an approved use in the zone was incorrect; she read the prohibited uses section of the ordinance that included residential development. She also replied to a previous question from the applicant's attorney regarding the Town's intent for creating this zone by explaining that the residential portion of the zone was a citizen's petition.

Mr. Greenbaum spoke regarding the Selectmen's position about the five criteria; he said he looks at the criteria and the first thing that jumps out at him is that they are subjective and what is the best thing for the Town. He said that the Town loses tax revenue but having a portion of the building vacant; he added that there is not a lot of rental property in Kingston and there is a need for it and property sells within a day. He continued that he knows it will sell and bring in property taxes and have far less of an impact; he stated that the building has been vacant for a number of years now and it lends itself to this type of development. Mr. Greenbaum stated that he could see why it is vacant as it doesn't lend itself to commercial and it is a benefit to the Town. He added that the variance for 300 feet is a small percentage as the Board has given 50 to 75% as a variance; the Board doesn't hold someone hostage, this is an excellent use of the property with small units next to recreation and near commercial. He stated that there is plenty of vacant commercial property right on Rte. 125; this is a quality property for the Town.

Mr. Coffin said that the residential use was a 2009 petitioned warrant article. Ms. Alessio added that the article was submitted by the applicant/petitioner and was specific to this piece of property. Mr. Coffin added that the plan was that all residential use would be beyond the 1000 ft. setback.

Ms. Alessio said that she, initially, had not been in favor as she felt she wanted more commercial use for the tax base and was concerned with how to guarantee the use for veterans; she stated that the condo. docs. would have something to guarantee the eligibility for veterans. She stated that she was changing her mind about the 1000 foot setback as the proposed condos are in the back of the zone; the back of the zone is not mixed use, it is residential. She stated she would want an elevator and the requirements be administered by a condo. association to confirm that the requirements are all met.

Ms. Leone said that she hadn't been opposed to the proposal; she stated she appreciated the applicant's explanation of the five criteria and thought they were all on-point; she doesn't see the downside to the proposal. She stated that this is a public hearing and hadn't heard from anyone opposed meaning the public in general. She added that if the public were opposed, they would be at the hearing. Ms. Leone said that the proposal is just for seven apartments, tastefully done and will need to be handicapped accessible. She continued that there are all types of commercial property in Kingston; if you are going to be on Rte. 125, you have to actually be on Rte. 125. Ms. Leone continued that there "55+ veterans" satisfies the verbiage and clarifies the restrictions. Mr. Coffin questioned the requirements on it being only one person 55 and over or applying to all; Ms. Alessio said that she thought it only had to be one person; Ms. Faulconer noted that the ordinance says all residents had to be 55 and over. Mr. Coffin said there was a definite shortage of affordable housing in Kingston. Mr. Coffin suggested that part of the criteria would be that this would be "affordable housing". Ms. Alessio said that there is nothing restricting this proposal to "affordable housing".

Ms. St. James stated that he respected the Board and the Board members but he is a fair politician who speaks his mind and takes his job seriously and he asked the Board members who had taken any training for their roles on the ZBA. Ms. Alessio stated that the Board members were duly elected officials. Mr. St. James reminded the Board that they must review all five criteria and can only grant a variance if all five are met; the Board can't grant a variance if they just feel it is a good idea. Ms. Alessio noted the majority of the members had been on the Board for a long time. Mr. St. James stated that he appreciates the Board adding that they should have training. Ms. Alessio stated that she can't make Board members go for training. Mr. St. James said that he keeps hearing the words "I feel" in discussing criteria; this decision could have consequences for other properties. Ms. Alessio explained that one decision does not bind the Board; every lot is different and they can provide relief. Mr. Greenbaum said that the five criteria are suggestions. Mr. St. James said that he does not look at them as suggestions; it is required. Mr. Greenbaum said that the Board needs to use their best judgment and the spirit of the ordinance; the Board of Selectmen's issue was that the original approval was "unenforceable" and it was a legitimate gripe; but it is so mixed up in there already. With the condo. docs., the Selectmen can assure that it is properly done. Mr. St. James stated that the voters approved this zone; he pointed out that the training manual for the ZBA specifically states that the fact that no one shows up for the hearing shouldn't not sway the Board. Mr. Cleary and Mr. Zilch had no further comments.

Ms. Alessio distributed the variance forms to the Board members. She read that this was a petition for a variance for Article 110, C-111, 110 – 4. Ms. Alessio clarified that Mr. Hart would not be a voting member. As Ms. Alessio read the five criteria: 1) Diminution of value, 2) granting the variance would be a public benefit, 3) Unnecessary hardship, 4) substantial justice, 5) use contrary to the spirit of the ordinance. The Board members checked off their votes for each of the five criteria and handed them back to the Chair would read off the votes: 1) all voted yes, 5 in favor, none opposed – this passed; 2) 4 yes, 1 no – passes; 3) 3 – no, 2 – yes – this did not pass; 4) 5 yes, passed; 5) 5 no – passed. Ms. Alessio noted that only 4 of the 5 criteria passed.

Mr. Coffin stated that due to the vote he would make the appropriate motion:

MM&S that the petition for variance be denied as all 5 criteria did not pass. Discussion:

Mr. Greenbaum expressed dismay that the motion did not carry and he felt that the discussion seemed to indicate that everyone was in favor of the variance. He suggested that people voted incorrectly and did not understand what they were voting for in the “hardship” section. Ms. Alessio suggested taking another vote. Ms. Faulconer reminded the Board that once a vote has been taken, only those members on the prevailing side of the vote can request a re-vote. Ms. Alessio said that only a prevailing member need make the motion, anyone can second the motion; she noted that she was one of the prevailing members.

MM&S to reconsider the vote. (Motion by Ms. Alessio, second by Mr. Greenbaum) Motion carried 4-1 with Mr. Coffin opposed.

Mr. Greenbaum handed out a different voting sheet for the Board members; Ms. Alessio re-read the variance request and re-read the 5 variance criteria. The previous votes were labeled “1”; the paperwork “ballots” for the second vote were labeled “2”. The Board members handed back their votes for Ms. Alessio to tally. She reviewed the ballots:

Criteria #1: 5 “no” – passes; #2 – 4 “yes”, 1 “no” – passes; #3 – 3 “yes”, 2 “no” – passes; #4 – 5 “yes” – passes; #5 – 5 “no” – passes. Ms. Alessio noted that all five criteria passed on the second vote.

MM&S to grant the variance to the 300’ setback with the conditions being: the occupancy is restricted to veterans, 55 and over as condominiums that must be ADA compliant; the intent is for the Planning Board to work out the details for the condominium docs. as noted in the motion. (Motion by Mr. Greenbaum, second by Mr. Coffin) **PUNA**

Mr. Cleary thanked the Board for realizing that they could vote a second time.

ZBA By-laws and Procedures

Mr. Coffin handed out paperwork regarding “regional impact”; he explained the concept and suggested that a sentence be added to the by-laws to address this possibility. Ms. Alessio opposed specifically adding it and it had never had a specific impact to the ZBA and was superfluous. She stated that in order to get to the ZBA, it had to be denied somewhere else and would have been an issue to another Board or Department before getting to the ZBA. She added that she would not like to delay an applicant to determine regional impact who had already waited to get on the Board’s agenda. Ms. Alessio suggested adding a sentence on the application; Mr. Coffin suggested a checklist for the application.

ACTION ITEM: Ms. Alessio will work with Ms. Faulconer to prepare a draft for upgrading the application that informs applicants of the requirements, including those for regional impact. Mr. Coffin suggested reading the ZBA handbook for suggestions/guidelines for the application.

The Board reviewed the current proposal for updates to the Board’s by-laws and procedures. Ms. Alessio began with the following changes:

Page 2: no change

Page 3 – first paragraph, add “than” after “other” and before “Board”

Page 4 – ZBA in caps – remove all caps

Mr. Greenbaum handed out a proposal to add 4.2 “D”: *“An alternate board member who is designed to serve as a full voting member at the start of a hearing, that is continued to the following meeting, shall if possible, continue to serve as the voting member through the conclusion of said hearings.”* Ms. Faulconer suggested that this section be reviewed by Town Counsel; she stated that she did not believe that the Board could take the rights of serving on the Board from a duly elected official in place of an appointed alternate; the Chair could ask if the full member wanted to sit out, but it would be at their option.

ACTION ITEM: Ms. Alessio stated that she thought that checking with legal would be appropriate. This section would only be added subject to legal counsel’s approval.

Ms. Alessio continued reviewing the proposal.

Page 5 – 10.0 “Selectmen’s office or on the Town’s web site.”

10.2 – “application” should be capitalized

Page 6 – (a) – remove “on that is” before “prohibited”

Page 7 – 12.0 – correct “response”

Mr. Hart asked if the appeal period used to be 20 days; Ms. Alessio answered “no”. Mr. Greenbaum questioned under section 11.2 if “Town Clerk and Town Assessor” was correct; Ms. Alessio answered “yes”.

Last page – ZBA in caps – correct to not all letters in caps.

Mr. Greenbaum handed out a slip of paper with a proposal to add a last paragraph:

“Severability: The unenforceability or invalidity of one or more clauses in these By-laws and Rules shall not have an effect on any other clause in the By-laws and Rules. If it is possible, any unenforceable or invalid clause in these By-laws and/or Rules shall be modified to show the original intent of the ZBA.” The Board agreed to add this paragraph as section 17.0, the last paragraph.

ACTION ITEM: Ms. Faulconer will put these changes together and have a clean document for the Board.

Ms. Alessio suggested posting for the next hearing for a vote to adopt pending review by Attorney Loughlin. It was suggested that the Board could adopt this evening pending review of legal counsel.

ACTION ITEM: Ms. Alessio will have the proposal reviewed by Attorney Loughlin.

MM&S to adopt the By-laws, Rules of Procedure and General Governing Rules pending review of legal counsel. (Motion by Mr. Greenbaum, second by Mr. Johnson) **PUNA**

The Chairperson adjourned the hearing at 8:50 PM.