

**Zoning Board of Adjustment
Town of Kingston, New Hampshire
Final Minutes – February 13, 2020**

PRESENT:

Electra Alessio, Chair; Larry Greenbaum, Vice Chair; Peter Coffin, Member; Charles Hart, Jackie Leone, Alternate Members

Chairman 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 January 9, 2020 as written, with one amendment, changing the list of those present and one vote to reflect that Mr. Donald was not present; Mr. Johnson was.

SECOND: by Mr. Hart

In favor: Alessio, Greenbaum, Coffin, Hart. **Abstain:** Leone

Chairman Alessio announced the date for the annual Planning and Zoning conference, which will be held on May 30th in Concord. Mr. Coffin said that training is to be required for Board members now, so they should sign up early.

PUBLIC HEARINGS

7:05 PM:

OSP Realty LLC
52 Colby Road
Danville, NH 03819

IN RE: 62 Mill Road
Kingston, NH 03848
Tax Map R-22, Lot 26

This is a continuance of a public hearing that began on January 9, 2020, whereby the applicant requests a Variance and/or Special Exception to the terms of Article 104.4, Section J, of the Town of Kingston Zoning Ordinance, and asks that said terms be waived to allow for a third apartment in a two-family Rural Residential Zone.

Applicant Stephen Pascoe was present and asked for one more continuance, due to a date conflict with his attorney. Chairman Alessio cautioned him that this will be the second continuance and only three are allowed.

MOTION: by Mr. Greenbaum, to continue the case of OSP Realty to March 12, 2020.

SECOND: by Mr. Coffin

All in favor.

Kathryn and John Lawler
12 Woodland Street
Amesbury, MA 01913

IN RE: 44 Church Street
Kingston, NH 03848
Tax Map R-33, Lot 3

This is a public hearing whereby the applicant seeks a Variance to the terms of Article 103.2, Section 100, of the Town of Kingston Zoning Ordinance, and asks that terms be waived to permit use of the building, formerly operated as Daignault's Sports, for operation of an owner-operated machine shop, a non-permitted use in a Single Family Residential zone.

The applicants, Kathryn and John Lawler, have written permission from the owners of the property to come to the Board with this request. Mr. Lawler said that he started his own machine shop business in Haverhill three years ago, and presently shares space with an engineering company. He said they would like to be able to live in the house at 44 Church Street and have the business on the property, allowing them to buy a home without also having to pay rent on a shop. Mrs. Lawler said that they have not been through the permitting process yet; it is a condition of the sale that they will have approval from this Board. She said they understand there will also be a 30-day period during which people may object. Mr. Lawler said that noise will not be an issue, and that only he and sometimes his nephew will be working there.

Public Comment:

Chairman Alessio asked if any abutters were present that wished to speak for or against this case. Kurt Baitz, of 46 Church Street, said he is not concerned, and never had a problem with the Daignaults, but wanted to know about lighting and business hours. Mr. Lawler said that he generally starts early, at 7:00 or 8:00 am, and usually ends at 5:00 pm. He said there would be no traffic coming and going as he has no employees.

Questions of the Board:

Mr. Coffin asked about noise, and questioned the types of machinery that will be used. Mr. Lawler said that he uses a lathe, a vertical milling machine. He had given an example of how little noise penetrates a wall, but that had to do with his current location. There would be no other business at this location, and the only traffic would be infrequent deliveries of equipment. Mr. Coffin said that he is here because of the change of use, and because this use is not a permitted use in the Single Family Residential Zone (not prohibited).

Chairman Alessio asked if there is potential for growth in that location. Mr. Lawler said that he is passionate about making things correct and right. He said he may possibly employ one more person in the future, but that he likes to work alone. He said if he grew

beyond that, he would move to a larger location. He said he would not be looking at expanding the footprint of the building at this property.

There was a brief discussion of Planning Board involvement; Mr. Coffin said that they govern hours of operation. It was agreed that this business would only need to go through the normal permitting process. Ms. Lawler said that even if work was done at night, no one would hear the machines.

Mr. Greenbaum asked about another building at the back of the property, if they planned to use it for anything. Mr. Lawler said that he has not thought about it, but it looks like an RV shelter, and he might use it to store a trailer. It will not be used for the business.

The five criteria for granting a Variance criteria were reviewed and voted on:

Will there be a diminution of value of surrounding properties? All 5 voted no; passes

Granting will be of benefit to Public interest? All 5 voted yes; passes

Will literal enforcement of the ordinance result in unnecessary hardship to the applicant? 4 voted yes, one voted no; passes

Will substantial justice be done if granted? All five voted yes; passes

Will the use contemplated, if granted, be contrary to the spirit of the ordinance? 4 voted no, one voted yes, passes

MOTION: by Mr. Coffin to grant a variance to Article 103.2, Section 100, of the Town of Kingston Zoning Ordinance, that terms be waived to permit use of the building, formerly operated as Daignault's Sports, for operation of an owner-operated machine shop in a Single Family Residential zone.

SECOND: by Mr. Greenbaum

All in favor.

Chairman Alessio reminded the applicants that there is a 30- day waiting period during which any objections may be heard. She also advised them that the variance will expire after 2 years if not acted upon.

**Robert Kalil
6 Lakeside Drive
Atkinson, NH 03811**

**IN RE: 19 Page Road
Kingston, NH 03848
Tax Mao R-22, Lot 32**

This is a public hearing whereby the applicant requests an extension of a Special Exception that was granted on July 13, 2017, to the terms of Article 104, Section 4, of the Town of the Town of Kingston Zoning Ordinance, to permit a three (3) family dwelling in a two-family Rural Residential zone. The Special Exception has expired per state statute.

Mr. Kalil and his attorney, Patricia DiMeo, were present.

The Chairman acknowledged that the matter of whether this should be a request for an extension of a Special Exception or a Variance has been debated, but that she does not think it affects the notification. Mr. Coffin said that it was posted as a Special Exception and the applicant is actually requesting a variance. Chairman Alessio said that this can be clarified in the ruling.

Mr. Coffin said that he had obtained a legal opinion from NHMA attorney Stephen Buckley on the matter of extending a Special Exception, that it can only be extended before expiration, not after. He said that also the 2-year period is counted from the date on which the board voted.

Chairman Alessio said that the board had not been informed about this legal opinion. Mr. Coffin said his point is that this Board cannot grant an extension of a Special Exception. He said this needs to be voted on. Ms. Leone said that there is a difference between law and opinion; the law is the law, that there is no gray area.

There was a lengthy discussion about the change in the ordinance which removed the Special Exception option in this instance, about case law and RSAs involving Special Exceptions and extensions, and about what was or was not reflected in minutes of past meetings. In the end, Mr. Greenbaum asked whether there was any objection, on the premise that it was not legal to extend the original Special Exception, that the Board consider this an application for a new variance, and act upon that.

Attorney DiMeo said that whatever the Board chose to do was fine with her.

Ms. Leone agreed with Mr. Greenbaum that is was the best way to go.

MOTION: by Mr. Greenbaum, to deny the extension of the Special Exception granted to Mr. Kalil in July 2017.

SECOND: by Ms. Leone

All in favor

Chairman Alessio said the Board will now take up consideration of a variance to allow a third apartment in a two-unit building, in the Rural Residential zone.

Attorney DiMeo addressed the request for a third apartment. She began by saying that when Mr. Kalil purchased the building it was an illegal 4-apartment building. She said the compromise was to have a third apartment, not a fourth, and that was where the Special Exception came in. Mr. Kalil gave some background on how he planned to eliminate the smallest unit, but ended up with one vacant that needed clearing out. He said the other three are occupied, which was not his plan. Mr. Greenbaum noted that this is a new story, that Mr. Kalil is here for approval for a third legal apartment.

Attorney DiMeo went through the 5 criteria:

Public interest - Atty. DiMeo read from the ordinance and said it was clear to her the Rural Residential District was set up for residential as well as commercial use, but to limit the commercial use in order to not affect the residential component. She said that residential use is clearly allowed. She said a 3-family is a residence, and is in the public

interest as it will add affordable housing to Kingston. She said that as this is a residential as well as commercial district, so it is the lesser of uses.

Will there be a diminution of value of surrounding properties? - Atty. DiMeo, noting that the abutters are a commercial property and an older mobile home, said that there will be no diminution of property value, that if anything, there will be an improvement.

Will literal enforcement of the ordinance result in unnecessary hardship to the applicant? - Atty. DiMeo cited some older legal cases in which it was found the hardship factor was not necessary if the other criteria were met, and also that said that Zoning Board actions cannot be arbitrary or duly oppressive. She said it comes down to Constitutional grounds and if the zoning restriction interferes with reasonable use of the property.

Will substantial justice be done if granted? Going back to purpose of ordinance, Atty. DiMeo said that that it is primarily intended for business, professional and residential use, and concerned with limiting commercial use. She said that substantial justice is done when any loss to an individual is not outweighed by public interest.

Will the use contemplated, if granted, be contrary to the spirit of the ordinance? - Atty. Dimeo said that generally, it is held that if the granting of a variance will not injure the rights of others, and is not contrary to the public interest, then it is in the spirit of the ordinance. She said that this use has already been in place and is adding affordable housing, so is not injuring the rights of others.

Atty. DiMeo said that the purpose of the ordinance is to maintain the neighborhood, and this neighborhood has mixed use. She questioned the relationship between restricting the number of apartments to two or three, and suggested that such restrictions have no fair relation to the ordinance.

Questions of the Board:

Mr. Coffin cited RSA 674:33 and said that the property must be distinguished from others in the area, and that hardship is considered only if it is distinct from other properties and can't be reasonably used without getting a variance. He said that the question he has is what is different about 19 Page Road. Atty. DiMeo answered that it is the only multifamily dwelling in the area, and that it is residential surrounded by commercial property and a state shed, in the area of a state road. She added that the hardship law keeps evolving.

Chairman Alessio asked if she was saying that the reason 19 Page Road should have a 3-family home is because others do not? Ms. DiMeo repeated that it is unique in the area and has the appropriate amount of yard. Mr. Greenbaum said that there are a number of 2-family homes in that area, not next door but included in the zone.

Mr. Hart said he has no questions, but an observance and opinion. He said that after all this back and forth, he is inclined to deny the variance so it can be decided in court. He said it is too much information for him to comprehend, he is not a lawyer.

Mr. Kalil said that he doesn't understand what all the back and forth is about, as the 3rd apartment was already approved once. He said the house looks great and he has siding ready to put on. He said he does not want to have to go to court. After some discussion, Ms. Alessio said that there is no question substantial improvement has been made. She

said that one thing she had not heard up until now is the hardship of having already done so much work and spent money. Mr. Kalil said that the only thing that has changed since the last case was that he spent \$60,000 and made a lot of improvements.

After some further discussion of work done and why there were delays, Ms. Leone moved the question, and Chairman Alessio called for a vote on the criteria to be met for a variance to allow a third apartment in a 2-family zone.

Reads each one.

Will there be a diminution of value of surrounding properties? All 5 voted no; passes

Granting will be of benefit to Public interest? 4 voted yes, one no; passes

Will literal enforcement of the ordinance result in unnecessary hardship to the applicant?

4 voted yes, one voted no; passes

Will substantial justice be done if granted? All five voted yes; passes

Will the use contemplated, if granted, be contrary to the spirit of the ordinance? All 5 voted no; passes

MOTION: by Mr. Coffin, based on all 5 criteria passing, to grant a variance to allow a third apartment in a 2-family Residential Zone at 19 Page Road, Map R22, Lot 32.

SECOND: Greenbaum

All in favor.

Mr. Greenbaum cautioned Mr. Kalil to be aware he has to go to the Planning Board, to be in compliance with all inspectors, regulations and the Fire Department. He said this is not part of the motion, they are not conditions, but all have to be done.

Meeting adjourned at 8:40 PM.

Respectfully submitted,
Susan Ayer