

**TOWN OF NEW HAMPTON  
ZONING BOARD OF ADJUSTMENT  
MEETING MINUTES  
TOWN OFFICES  
NEW HAMPTON, NH 03256**

June 5, 2013

**MEMBERS PRESENT** Mr. Hofling, Mr. Frazier, Mr. Orvis, Mrs. Fraser, Mr. Tierney, Mr. Smith, and Ms. Karnis.

**OTHERS PRESENT** Selectman Irvine, Selectmen Fraser, Town Administrator Mrs. Lucas, Secretary Mrs. Vose, Selectmen's Attorney Laura Spector-Morgan, ZBA's Attorney Mark Puffer, Rossi's Attorney Regina Nadeau., Ron Poirier, Onorio Rossi, Paul Rossi, and paralegal Dennis Lintz.

8:12 pm – Jeremy & Tania Hiltz

**CALL TO ORDER** Mr. Hofling called the meeting to order at 7:00 PM.

Mr. Hofling advised that Mrs. Erler, who is not present, but has served as Chairperson for 16 years, should be commended for the job she had done over the years.

Mr. Hofling appointed Mr. Smith to vote in place of Mrs. Erler. Mr. Tierney advised he was recusing himself from the Rossi's proceedings and moved to sit with the audience. Mr. Hofling appointed Ms. Karnis to vote in place of Mr. Tierney.

**PUBLIC REHEARING** Mr. Hofling advised that the applicant, Paul Rossi, has requested a Public Hearing in accordance with RSA 676:7, for a Variance under Article IV, Section C.4.ii., of the New Hampton Zoning Ordinance for property belonging to Onorio and Filomena Rossi. The applicant's proposal is to use 6,000 sq. ft. of outside area for the display of used autos. The used auto sales business will utilize 660 sq. ft. of space within the existing structure. The applicant is proposing that the outdoor area to be used for business purposes (6,000 sq. ft.) will exceed the 10% limit of the gross floor area of the primary structure. In accordance with RSA 677:2-3, a rehearing was requested by the New Hampton Board of Selectmen and granted by the Zoning Board of Adjustment, to rehear the Public Hearing for Paul Rossi's variance request under Article IV, Section C.4.vii of the New Hampton Zoning Ordinance, which was held on April 3, 2013. The property belongs to Onorio and Filomena Rossi,

*Paul Rossi, 322 NH Route 104, Tax Map R-11, Lot 10, for a Variance, Article IV, Section C.4.ii, of the New Hampton Zoning Ordinance*

d/b/a Rossi's Restaurant and is located at 322 NH Route 104, Tax Map R-11, Lot #10, in the Mixed Use District.

Mrs. Vose advised that all abutters were notified and none were present or heard from.

Attorney Nadeau was present to represent Paul and Reno Rossi. Attorney Nadeau submitted information she would discuss. This information included:

- 1a. *Site plan approved when Dunkin Donuts was in a portion of the Rossi building and it's parking.*
- 1b. *The proposed site plan showing how used vehicles would be parked and where those patrons could park.*

Atty. Nadeau noted that the 2 businesses would not run concurrently. She also advised that the Fire Chief has asked to maintain the immediate area around the building, so the Rossis have agreed those used vehicles would be moved away from the building at the close of the vehicle sales business each day. She advised there would be no vehicle repair, but there would be detailing done in the garage area. Attorney Nadeau advised that as the variance is relative to the 10% limitation, and that the primary structure (the entire building) is 3300 sq. ft. which would allow 330 sq. ft. of outdoor space, though they are seeking more.

Mr. Orvis asked if there would be any additional paving done as the plan shows parking of used vehicles partially off the current edge of pavement and Paul Rossi advised he did not think it would be necessary.

2. *Zoning map in existence at time of Rossi approval to site Dunkin Donuts and the current zoning map.*

- 3a. *Master Plan recommendations*

Attorney Nadeau advised that the change created a more concentrated multi use district, adjacent to the Village district. She said that she looked at the Master Plan recommendations - to create a mixed use district to include affordable housing while encouraging small businesses.

- 3b. *Resulting changes to zoning*

Attorney Nadeau advised this resulted in changes to the ordinance with the creation of the (MU) Mixed Use District (Article IV.C.2. General Purpose and District Characteristics)

- 3c. *Table of Uses for the MU, BC-2 and BC-3 Districts*

The purpose was to show that there are more types of commercial uses allowed in the MU District than what's

allowed in BC-2&3 Districts.

4. *Map showing area north and south of NH Route 104, east of Hwy 93.* The map highlighted the MU district and noted which properties were being used commercially, residentially, or which are vacant.

Attorney Nadeau advised she was showing undeveloped areas that could be used for affordable housing so didn't think the use Mr. Rossi is proposing would deter future housing development. She advised that the vacant land would likely be more valuable if developed commercially.

5. *Photos of Rossi's and nearby businesses with outdoor display of product.*

Attorney Nadeau advised the photos show extensive areas of outdoor display on lots that were previously empty. She stated that these uses were also approved by the ZBA.

Ms. Karnis asked if there would be enough room for restaurant patrons to park and maneuver, on the west side of the building when the used cars are moved away from that side of the building (per the Fire Dept. request). Mr. Paul Rossi advised that there was plenty of room.

Relative to the proposal being in the spirit of the ordinance or being in the public interest, Attorney Nadeau stated the ordinance seeks to limit outdoor display likely to avoid unsightly sprawl. She said the area is being used commercially, and does not see that use being replaced by residential use, and pointed out undeveloped areas that can still be developed as residential. She advised that the current area is being used for parking cars and will continue to be used for parking cars, though much of it will be pushed back further to the edges of the lot. She said no lighting would be added and the structure would not be increased in size.

Attorney Nadeau introduced Russ Poirier, Nash Realty, to speak to whether the variance would impact surrounding property values. Mr. Poirier (broker, associate, realtor) represents many commercial properties. He said this exit was the gateway to the lakes region and gets a lot of traffic. He commented that the nearby Highway Dept/Transfer Station and State DOT shed don't fit in with the zoning, as it's more industrial. He said that this exit is a good location for residential housing, but may not be as desirable for that use as it doesn't have public water or sewer. He advised he didn't see anything negative to the proposed use at Rossi's as the parking area is very large and there is a lot of frontage. He stated it was his opinion that used car sales would not impact nearby properties and would provide a necessary service to local residents. Ms. Karnis

asked Mr. Poirier if he had performed any price, home value, or business comparisons relative to a car lot locating nearby and the effect it would have. Mr. Poirier stated he did not, but was using his professional opinion. Attorney Nadeau advised that used car sales are an allowed use in the district, as it's a commercial retail trade. She said it was not uncommon to see vehicle sales in the vicinity of gas stations, Subways, and Dunkin Donuts.

Attorney Nadeau advised substantial justice would be done as this proposed site plan does not create random expansion and would be more orderly than both the landscape supply or nursery locations. Not granting the variance would mean the Rossis would have to redevelop the site and would have more to lose than the town would have to gain.

Relative to the hardship criteria, Attorney Nadeau pointed out that the use is allowed. The property is unique as it is already developed. She stated that it would not be fair or reasonable to apply this provision to this application, as the Rossis may need to develop the site in a more intense manner, eliminating a restaurant, which is a use the ordinance wants to promote. Attorney Nadeau advised that as it is the vision of the town to locate residences into this commercial area, there is room for that now and encouraging this use will more likely keep people in town.

Mr. Orvis expressed his concern with used vehicle sales having unsightly advertising. Mr. Rossi stated he would not want that.

Attorney Laura Spector-Morgan was present to speak on behalf of the Selectmen. She advised the ZBA of some of the points she had made in her letter to them, dated April 29, 2013. She said the Selectmen's concern was not with the use of the Rossi property – that it should be used residentially, but the concern was with the amount of outside display. She expressed disagreement with the consideration of calculating the entire square footage of the structure (3300 sq. ft.) in the 10% calculation, as the ordinance is applying 10% to the primary structure related to the outdoor storage, which is 660 sq. ft. She said the Selectmen feel the purpose of this regulation is to prevent exit 23 from becoming another exit 20.

Relative to the variance being contrary to the public interest and the spirit of the ordinance, Attorney Spector-Morgan advised that the applicant states the use won't be unsightly and the use is permitted. She explained that the intent of the ordinance was to create a pedestrian friendly area on a village scale and the 10% rule enhances this. The applicant is asking for 90 times the amount of outdoor

display. She asked the board to look at the cumulative impact of granting continued variances in the MU District, as the district will never evolve into what the ordinance intended. Attorney Spector-Morgan advised that at the previous hearing where the ZBA granted Mr. Rossi the variance, there was discussion about the fact that this mixed use area does not currently include residential. She advised this is not a reason to grant a variance. She stated that granting of other variances from the 10% rule is also not a reason to continue to grant these particular variances. She pointed out that one was granted as the applicant was looking for a temporary use and the other was an agricultural use. She said any errors in the past in granting approvals on other properties, does not mean this application should be granted. She said that it is true that it is not uncommon to find car lots near businesses like the ones at exit 23, but this is why the restriction was adopted to avoid car lots and uses where there is a large amount of outdoor display.

She advised substantial justice is not done as this proposed use is not consistent with the area's present use. She pointed out that the used cars are not replacing the parking spaces approved when there was a Dunkin Donuts on the side of Rossi's. The proposal is for 30 cars, which is an increase of 50%. She said that these cars are not patrons who will visit for an hour or so, but will be there 24/7. The gain to the public in denying this variance far outweighs the loss to the individuals in using 660 sq. ft. of a portion of the building. She pointed out that it used to be part of the restaurant.

Relative to the surrounding property values not being affected; Attorney Spector-Morgan advised that the board has raised questions relative to Mr. Poirier's statements and lack of data on whether used vehicle sales coming into an area affect values.

Relative to the unnecessary hardship criteria she advised that the applicant must show something that is unique about the property compared to surrounding properties. This has not been addressed. The hardship is one of the applicants. She said that there is substantial area for parking on the west side of the building which may make it uniquely situated for a used car lot but it does not make the property unique.

Attorney Spector-Morgan advised that granting the variance would allow outdoor display in great excess to what is allowed in the ordinance, frustrating its purpose.

Mr. Orvis asked if a variance can be granted temporarily and asked if it is true that the variance runs with the property, not the applicant. Attorney Spector-Morgan advised the variance is granted to the

property so if one is granted temporarily, it could be challenged.

Attorney Nadeau stated that relative to the statement about the cumulative impact, each property must be looked at differently. She said the board can look at how the site is developed and what the building can be used for. She said that the applicant does not need to show that they cannot use the building for some other use, but that the use they are proposing is reasonable. Relative to a temporary use, she advised that an applicant can offer a time limit as a condition. She stated that this fits in with the neighborhood, will not have an adverse affect on the district, and won't be a visual nightmare.

Attorney Spector-Morgan advised that though the Rossi's may not challenge the time limit a future buyer could.

Mr. Poirier said he thinks that the town's transfer station has negatively impacted the Rossi property.

Mr. Irvine advised that the Selectmen's attorney has presented their case sufficiently but wanted to mention that the town's transfer station was only open 3 days a week.

At 8:12 pm, Mr. Hofling made a motion, seconded by Mr. Orvis, to temporarily adjourn to allow the board members to meet with the ZBA's counsel, Attorney Mark Puffer.

At 8:30 pm the board reconvened.

Mr. Hofling advised that as no one wished to address the board further, they would move into their deliberative session of the hearing.

Mr. Hofling reread Mr. Rossi's application and the answers given on the application.

**The Variance will not be contrary to the public interest because:** *the variance will not be contrary to the public interest because it is the utilization of existing space and does not require any new construction, building addition, or lighting. The proposed area for display of vehicles will be in an organized manner and has no environmental impact or impact to town services.*

Mr. Hofling advised that this criterion can be discussed with the spirit of the ordinance as they could be considered together.

**The spirit of the ordinance is observed because:** *The spirit of the ordinance is observed because the vehicles will be displayed in an organized manner and not scattered around throughout the property. There will not be any unsightly tall stacks or unpleasant packaging.*

Mr. Frazier said that though the car lot would be organized the applicant will have a lot of vehicles on display. Mr. Hofling stated that whether the board considers the entire square footage of the building, or the portion that will be used by the sales office, the amount being asked for is far greater than allowed. Ms. Karnis agreed and said that the spirit of the ordinance was to reduce the amount of display and to preserve the scenic view shed, and the used car lot could be viewed as unsightly. Mr. Smith advised that after listening to everyone he doesn't feel that the proposal meets the spirit of the ordinance. Mr. Orvis advised that as the ordinance is written it is difficult to grant this variance.

**Substantial justice is done because:** *Substantial justice is done because it will allow for vacant business space of 660 sq. ft. to be utilized. It will also assist the business owner to diversify his property use in a difficult economic climate and provide for an adequate selection of used automobiles to be presented to prospective patrons so that the business will be successful.*

Mr. Orvis advised that the board should not consider the economic loss.

**The values of surrounding properties are not diminished because:** *The values of surrounding properties are not diminished because the use is consistent with the zone in which I lies and in line with property uses along the Route 104 strip and abutting properties. Some of the businesses currently exceed the requirements of Article IV, Section C.4ii of the New Hampton Zoning Regulations within this Multi-Use zone.*

Mr. Frazier and Mr. Orvis expressed their opinion that surrounding properties would not be diminished because there are several undeveloped lots where residential housing could be created. Mr. Orvis advised that he did not think the district would become the mixed use that was intended and pointed out the age restricted development nearby that has had no buyers in the last several years. Ms. Karnis stated that this is probably due to the economic climate and also didn't feel that data was submitted to show there wouldn't be an adverse affect on values. She said it was her opinion it would have a negative impact. Mr. Smith said he didn't feel values would be affected.

**Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because Special Conditions of the property distinguish it from other properties in the area:**

**(A)ii. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific application of that provision to the property because:** *The selling of used automobiles requires the ability to display the automobiles outside for potential customers to view which is an industry standard. A large office space is not necessary to operate the business; therefore, making*

*it difficult to be able to display the product makes the 10% rule unreasonable.*

**The proposed use is a reasonable one because:** *The proposed use is a reasonable one because the existing lot and building space allows for the display of vehicles without the need for disturbance and expansion of the existing lot or building. In order to conform to the ordinance the building would need to be increased in size to contain 60,000 sq. ft. of gross floor space. The use is a reasonable one to be conducted in the Multi-use zone.*

Mr. Orvis advised that there are other uses for this portion of the building, as evidenced by its previous uses and therefore is not an unnecessary hardship. Ms. Karnis pointed out that the applicant states what is unique about his proposed use, but not what is unique about the property. She expressed her agreement that there are other uses for that portion of the building.

Mr. Orvis made a motion, seconded by Ms. Karnis, to deny the variance as the applicant failed to meet the following criteria:

- The Variance will not be contrary to the public interest.
- The spirit of the ordinance is observed.
- Substantial justice is done.
- Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because Special Conditions of the property distinguish it from other properties in the area.

Vote was unanimous.

Mr. Orvis advised he would like to see this regulation discussed further and rewritten for better clarification. Mr. Smith agreed.

**PUBLIC HEARING**  
*Hilshar Associates, Inc.,  
NH Route 104, Tax Map  
R-4, Lot 92A for a  
Variance from Article IV,  
Section C.4.vii of the New  
Hampton Zoning  
Ordinance*

Mr. Hofling advised that Mr. Tierney has joined the board as a regular member. Mr. Hofling advised that Mr. Smith was still appointed as a regular member, voting in place of Mrs. Erler.

Mr. Hofling advised that the applicant, Jeremy Hiltz, Hilshar Associates Inc. has requested a Public Hearing in accordance with RSA 676:7, for an Appeal for a Variance under Article IV, Section C, 4, vii., of the New Hampton Zoning Ordinance. The applicant's proposal is to continue operations of a temporary (seasonal) outdoor commercial/retail landscape supply sales center. The applicant is proposing that the outdoor area used for business purposes will exceed the 10% limit of the gross floor area of the primary structure. The applicant received conditional approval on July 7, 2010, for the variance, as proposed above, for a duration of three years from that date. The property is located on NH Route 104, Tax Map R-4, Lot

#92A, in the Mixed Use District.

Mrs. Vose advised that abutters were notified and none were heard from.

Mr. Hiltz was present to represent the application. He advised they wish to continue the use they've been using for 3 years. He said he does not wish this to be the final use. The use of this space pays the taxes and the mortgage. Mr. Hofling asked if the use was seasonal and Mr. Hiltz advised it was. Mr. Hiltz explained that the exception was that leasor, Michael Dion (Dion's Landscaping) stores plow trucks there in the winter, which are used locally.

Mr. Tierney asked Mr. Hiltz to explain the meaning of his word "temporary" on his application. Mr. Hiltz explained that it meant it was not the intended permanent use of that land. He stated that approval was given for a storefront with garage space in the rear to rent to electricians, plumbers, etc. The economic climate has prevented this development at this time. It was clarified that Mr. Hiltz was asking for temporary *and* seasonal use.

Mr. Smith stated he would not like to see another temporary approval when it appears a variance goes with the land. Mr. Hiltz asked if this was the case does that mean his previous approval for this use is still in effect. Mr. Hofling advised that 3 years ago, he as the applicant proposed the requested use be for the duration of three years. Attorney Puffer advised that the board does not have the authority to grant a temporary variance. Mr. Smith added that if there was something in the ordinance that allows for temporary usage having a time limit - that would be enforceable. Mr. Orvis asked if this variance was granted, and it wasn't temporary in duration, could Mr. Hiltz come back later to request the use be changed to that of a storefront with storage in back. Attorney Puffer advised Mr. Hiltz could do that. Mr. Hofling pointed out that if a variance was granted on this application it would not be temporary.

**The Variance will not be contrary to the public interest because:**  
*the sales center has been operating for the last two years benefitting the public without any issues.*

Mr. Orvis stated it was a benefit to the public and there have been no issues with the use. It is low key. Mr. Hofling asked Mr. Hiltz if he had anything further to add and he did not.

Mr. Tierney made a motion, seconded by Mr. Smith to go into the deliberation portion of the hearing. Vote was unanimous.

**The spirit of the ordinance is observed because:** *this is a commercial property being used in a commercial manner.*

Mr. Tierney advised that the applicant's statements for the variance to not be contrary to the public interest and to be in the spirit of the ordinance do not support the request; therefore it does not meet those criteria. Mr. Orvis stated that a garden center is not prohibited in the MU District. Mr. Hofling asked if there was power, or sewer connection to the small building on site and Mr. Hiltz said there wasn't. Mr. Hiltz advised it was 10' X10', on temporary blocks, and allows the employee shelter during inclement weather. The board discussed whether this 10% rule applies to what is a small temporary building. Mr. Tierney pointed out that this building is the primary structure. Mr. Orvis asked how the rule would apply if the building were removed and a tent was put up in its place. Mr. Tierney advised it be up to the board to decide.

Opening the hearing back up to public comment, Mr. Hofling asked how removal of the structure would affect his business and Mr. Hiltz said it would not affect it. Ms. Karnis asked if there was consideration given to whether this continued use would alter the character of the locality or threaten the public safety.

Mr. Hofling advised the board was in deliberative session now.

**Substantial justice is done because:** *the land is being used for commercial use based on the intent of zoning.*

Mr. Tierney asked if the applicant's statement supports the criteria. Mr. Smith said it was his opinion that this fits the commercial, retail, wholesale, or rental trade.

**The values of surrounding properties are not diminished because:** *this sales center has been drawing additional prospective clients to their business. More activity means more business to all.*

Mr. Hofling said it seems that if surrounding properties were diminished the use would not be drawing clients to their businesses. Mr. Smith noted that there were no abutters present with concerns.

**Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because Special Conditions of the property distinguish it from other properties in the area:**  
**(A)ii. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific application of that provision to the property because:** *The applicant entered Not Applicable.*

Mr. Tierney advised that in order for the applicant to meet this criterion

there must be a statement addressing it. He asked what the special conditions of the property are that distinguish it from other properties in the area. Mr. Orvis said the board would have to open the hearing up to public comment again, or make a decision based on the information on the application. Attorney Puffer cautioned the board about entering into public comment after entering into deliberations, especially if a member of the public has left the meeting. Mr. Hofling asked if the applicant has to respond to the criteria. Attorney Puffer advised he should as it *is* applicable to the variance request. He added that general knowledge and common sense can also be used. Mr. Tierney asked if any board member knew of any special conditions of the property. Mr. Orvis said it's a mixed use area, and if there's no permanent structure - does this rule apply.

**The proposed use is a reasonable one because:** *it fits in with other established businesses in the area.*

Mr. Orvis advised that 3 properties away there's another landscape business. Mr. Smith agreed that plants and shrubs go with mulch.

**What are the special conditions of the property that distinguishes it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.** *The applicant entered Not Applicable.*

Mr. Hofling said there is no permanent structure so the 10% rule is 10% of nothing. Mr. Orvis asked if the applicant really needs a variance. Mr. Tierney said if the building was not existing currently on the lot this could be discussed, but he pointed out a building *does* exist on the site so he feels a variance is necessary. The board discussed that a condition could be placed on an approval that the building be removed. Mr. Hofling advised that the board may want Attorney Puffer's advice.

At 9:50 Mr. Hofling made a motion, seconded by Mr. Tierney, to temporarily adjourn to allow the board members to meet with Attorney Mark Puffer.

At 10:15 pm the board reconvened.

Criterion 1 & 2 statements were reread. Mr. Tierney advised that the proposal is not within the basic zoning objective and the spirit of the ordinance is not being observed in the granting of the variance. Mr. Orvis said he believes that the spirit of the ordinance was not to restrict outside display of products such as the applicant is selling. It's not a junkyard or odorous and feels it is in the public interest.

Criterion 3 statement was reread. Mr. Hofling advised it is a mixed use

district and Mr. Orvis said it was similar to a business a short distance away. Mr. Tierney advised that in proving substantial justice is done in granting the variance then there must be an injustice in not granting it. He asked if there was a gain by the public that outweighs the injustice if it's not granted. Mr. Hofling stated he did see a gain to the public as he's providing a service and a product to the public.

Mr. Orvis expressed frustration with the late hour.

**ADJOURNMENT**

Mr. Orvis made a motion, seconded by Mr. Frazier, to continue this hearing to June 26, 2013 at 7:00 pm. in the upstairs meeting room of the Town Office. Vote was unanimous.

Mr. Smith made a motion, seconded by Mr. Tierney, to adjourn at 10:26 pm. Vote was unanimous.

Respectfully Submitted,

Pam Vose  
Secretary

DRAFT