

Town of Newington, NH  
ZONING BOARD OF ADJUSTMENT

Meeting Minutes, Monday, August 1, 2016

**Call to Order:** Chair Matt Morton called the August 1, 2016 meeting at 6:30 p.m.

**Present:** Chair Matt Morton, Vice-Chair Ted Connors, Ralph Estes, John Frink, Jim Weiner; Interim Planner, Gerald Coogan and Jane Kendall, Recorder

**Public Guests:** Scott DeCost, Manager of the Mall at Fox Run; Joseph and Pam Correale proprietors of Koko's, Floyd Rockholt from Presque Isle, Maine; Erin Stone, Simon Property Group

**Public Hearing:** A rehearing for the Mall at Fox Run, 50 Fox Run Road, Suite 128, Tax Map 27, Lot 11 for a variance from Article III, Section 3 of the Zoning Ordinance, in order to allow tattoo services in a Commercial District.

Scott DeCost, Manager of the Mall at Fox Run appeared before the Board on behalf of the mall. Mr. DeCost stated that he had sent in a second application that addressed their reasons for a rehearing request.

Mr. DeCost said he came away from the previous hearing not understanding why their application was denied except that their hardship was quickly discounted despite failing to address the difference between occupancy and financial success of the mall. He stated that many spaces were not leased at their full potential and so they were doing short-term leases to smaller, local businesses while they were waiting for national retailers to open.

Mr. DeCost went on to say that they were trying to lease an awkward location at an angle that didn't have a lot of foot traffic. He said they determined that short-term retailers didn't do well in that location so the mall determined that service businesses would do better. He said they targeted tattoo services as something that the market would be open to.

Mr. DeCost stated that it was the unique, special condition of the location that created the hardship in leasing the space to retailers.

Mr. DeCost pointed out that the Seacoast Media Group recently published a front page article on tattoo services as a more mainstream boom on the Seacoast.

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Mr. DeCost said he had half a dozen signatures from mall employees that were supportive. Ms. Pam Correale, co-owner of Koko's said she also obtained about thirty signatures of patrons walking through the mall. Board member, Jim Weiner asked if the patrons listed their areas of residence and Ms. Correale said she didn't know she wasn't allowed to ask for patron signatures because they didn't live in town.

Ms. Correale said she also brought a friend, stamp and coin store owner, Floyd Rockholt from Presque Isle, Maine, originally from Boston, Massachusetts. Mr. Rockholt said he knew the Correales for eighteen years and they ran a clean and successful operation.

Chair Morton asked what abutters were notified. Interim Planner, Gerald Coogan said the abutting property owners were notified.

Chair Morton said the closest abutters were JCPenny's and they didn't know anything about them. Mr. DeCost said physical abutters to the shop were different than tax parcels, but the mall was not required to notify tenants. Mr. Coogan said the final page of their application listed the abutters who were of separate lot and record. Ms. Correale commented that JCPenny's was an abutter at their Bangor location and they didn't have any issue with them.

Chair Morton said he was under the impression the retail store was open, but none of the managers and clerks he spoke with in the mall knew about the tattoo services coming in. Ms. Correale replied that the store had been set up for a few months, but they couldn't afford personnel until they were fully operational.

Board member, John Frink said JCPenney's and Macy's were business owners in the mall and he thought they would attend if they were concerned. He asked Mr. DeCost if he received any communication from any of the abutters. Mr. DeCost said notices were sent to corporate entities who were not local, but they would notify the mall if concerned.

Mr. Frink asked if it was appropriate for the applicant to get signatures of other retailers. Mr. DeCost said it was not because of solicitation rules and because there could be a variety of reasons to object such as competing merchandisers.

Chair Morton said most people he spoke with had no objections, but one person asked if they would bring in motorcycle gangs. Ms. Correale replied that they would not.

Board member, Ralph Estes commented out that Spencer's Gifts had questionable merchandise and Mr. DeCost replied that questionable merchandise in Spencer's was kept in the back. Ms. Correale commented that Disney owned both Spencer's and Hot Topic.

Chair Morton asked if there would be a flashing light advertising tattoo services on the building. Mr. DeCost replied that the mall standards did not allow flashing neon signs. Ms. Correale added that they didn't have a flashing sign at their other site and most of their service was by appointment except Sunday walk-ins.

Mr. Weiner commented that the case was challenging because he thought tattoos were an art form, but it was in violation of the Ordinance that did not allow tattoo

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services in the Commercial Zone or anywhere in town. He said he met with John Stowell, the Town building inspector and code enforcer who said he told them it was a non-permitted use and yet they went ahead. Co-owner, Joseph Correale said they had already set up the space when they met with the building inspector for their occupancy permit and were then told they couldn't run a tattoo service.

Mr. Weiner commented that it was standard procedure to obtain a license before starting an operation so he thought they created their own financial hardship that didn't apply to the Board's decision. Ms. Correale replied that they were not aware that it was not an allowed use because the mall contacted them and they assumed the mall's leasing person knew whether it was an allowed use or not. She said Mr. Stowell told them they could file for a variance, which they filed immediately.

Chair Morton asked if they were solicited to go. Erin Stone who was in charge of specialty and short term leasing for the Simon Property Group said she did solicit Koko's because she felt a tattoo service would be a good opportunity for the location and did not see any specific language that would dictate that it was not allowed.

Chair Morton asked if there were any other tattoo services in any of their other malls and Ms. Stone said she only managed the all at Fox Run and the Mall of New Hampshire in Manchester where there were none, but she knew other Simon Malls like the Square One Mall in Massachusetts did.

Mr. Weiner stated that the Board received a memo from Mr. Coogan, dated July 28, 2016, outlining the five criteria and the need for special conditions that distinguished the site from surrounding properties that would create a hardship. He said tattooing was not spelled out as an allowed use anywhere in town. Ms. Correale said that was the reason that they were applying for a variance and presented their reasons for meeting the five criteria. Mr. Weiner replied that didn't mean the Board would accept the applicant's reasons as acceptable.

Mr. Weiner said he had considered other possibilities for their tattoo service and they could acquire twenty-five signatures for a petition for a warrant article and go before the Town Meeting for residents to approve it as an allowed use.

Mr. Correale pointed out that a notice on the hearing had been published in the local paper for residents to object if they didn't want the use allowed.

Mr. Coogan commented that the applicants could also go before the Newington Planning Board to request that they sponsor an amendment to the Ordinance so they wouldn't need a warrant. Chair Morton replied that the applicants would still need to wait until the March 2017 Town Meeting before a decision was made.

Vice-Chair Connors commented that Mr. Estes had previously asked if there was anything in writing from Town counsel, Attorney John Ratigan that confirmed that the Zoning Board couldn't approve a request for variance from the Ordinance. Mr. Coogan said he didn't have anything in writing, but he spoke with Attorney Ratigan about the Ordinance to be clear.

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Mr. Estes commented that the only reason it was not allowed was because it was not specifically listed as an approved use, but the ZBA existed to consider granting relief. He said Mr. Coogan's memo sounded as if he was directing the Board to vote against granting a use variance, but they had granted them before on occasion. Mr. Coogan replied that the memo was only to inform the Board of the steps they had to go through.

Mr. Estes asked if there was any reference to an RSA in the Ordinance and Mr. Coogan replied that there was a reference to tattoo services and RSA314:A. Mr. Coogan said RSA 674:33IB on the powers of the Zoning Board was also referred to in the Zoning Ordinance along with reasons for variances. Mr. Estes replied that the State of New Hampshire no longer distinguished between use and variances and Mr. Coogan responded that a request also had to meet the criteria and could not be granted because they liked an applicant or project.

Mr. DeCost explained that one of the hardship criteria in granting a variance was whether denying the use was "unduly oppressive", which he believed it to be. Chair Morton replied that most hardship cases were to do with the conditions of the physical property. Mr. Coogan said the mall was on land, but it was a unique circumstance.

Mr. Frink commented that he believed that the applicants were not aware of the Ordinance when they applied for an occupancy permit. He went on to say that although Mr. Weiner had also stated that he thought there was no hardship because tattoo services were not allowed anywhere in town, he disagreed with Mr. Weiner because he thought the site was unique in that it was in an out of the way location that was not visible to walk by traffic, making it difficult to lease and mall management determined that they needed to lease to a service business. Mr. Frink added that expecting a reasonable return on a commercial property was included in Mr. Coogan's memo and supported this part of the hardship.

Chair Morton commented it might be an easier decision if it was a free standing shop, but he thought the allowed uses of beautification shops that included manicure salons and piercing services were allowed in the mall and were similar to tattoo parlors.

Vice-Chair Connors read the uses permitted in the Zoning Ordinance and agreed that all services were not specifically listed, but that tattoo services could fall under other beautification services and retail. He added that both beauty shops and tattoo services required licensing by the State of New Hampshire. Mr. Weiner replied that the difference was that haircuts, coloring and manicuring could be changed frequently, but tattoos were permanent.

Vice-Chair Connors commented that he had nine grandchildren and tried to be cognizant of what kinds of behaviors did and didn't do harm and he didn't see that this service would harm anyone. He said tattoos were more acceptable in all walks of society and he thought that would suggest that the Ordinance was behind the times. He said the applicant had already invested in the site and there was no guarantee that the

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Planning Board would adopt a new Ordinance or that a warrant article would go through.

Mr. Weiner said he was still struggling because it was not a permitted use. Mr. DeCost said they were not arguing with the Ordinance, but were applying for a variance. Mr. Weiner said he didn't think they met the hardship because the use was not allowed anywhere else in Commercial District or elsewhere in town. Mr. DeCost reiterated that that was the point of the variance request and their hardship was that it wasn't allowed in the Commercial Zone or anywhere else.

Mr. Estes asked Mr. Weiner how he didn't see a hardship in the restriction and yet was a hardship in another application to allow Stoneface Brewing to open a restaurant in the Waterfront Industrial Zone recently. Mr. Weiner replied that Chair Morton had pointed out that the issue with Stoneface was the number of seats because their liquor license had already been issued by the State.

*Ralph Estes moved to accept the request to grant the Mall at Fox Run, 50 Fox Run Road, Suite 128, Tax Map 27, Lot 11 a variance from Article III, Section 3 of the Zoning Ordinance, in order to allow tattoo services in a Commercial District. Ted Connors seconded the motion.*

Mr. Frink recited each items of the five criteria with comments from the Board as follows:

Ted Connors, Ralph Estes, John Frink, Jim Weiner and Chair Morton all agreed that *granting the variance would not be contrary to the public interest.*

Ted Connors, Ralph Estes, John Frink, and Chair Morton all agreed that *the Spirit of the Ordinance would be observed.*

Mr. Estes commented that a tattoo service in the Commercial Zone was similar to other beautification services.

Jim Weiner disagreed that the use was not in the Spirit of the Ordinance because it was not specifically listed.

Ted Connors, Ralph Estes, John Frink, and Chair Morton all agreed that *Substantial Justice would be served by granting the variance* and Jim Weiner disagreed without further comment.

Ted Connors, Ralph Estes, John Frink, and Chair Morton all agreed that *an unnecessary hardship would be incurred by denying the request owing to the special conditions of the site and that the proposed use was reasonable.* Jim Weiner disagreed without further comment.

Ted Connors, Ralph Estes, John Frink, Jim Weiner and Chair Morton all agreed that *granting the variance would not affect the value of surrounding properties.*

Chair Morton called for vote.

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*The motion to approve the variance passed 3-1 with Ted Connors, Ralph Estes and John Frink voting in favor and Jim Weiner voting against the motion.*

**Minutes:** *Ted Connors moved to approve the Minutes for the June 20 and July 18, 2016 meeting with minor corrections to the July 18, 2016 Meeting. Jim Weiner seconded and all were in favor.*

**Correspondence and Discussions:**

Mr. Coogan informed the Board that Shogun Restaurant had applied for a variance at the Board's next meeting.

Mr. Coogan said Shogun would then need to go before the Planning Board for a site review if the variance was granted. Chair Morton commented that the site had already been approved for the lot size and parking so it shouldn't be too complicated. Mr. Coogan commented that they also wanted an outside patio.

Mr. Coogan also informed the Board that John Emery's counsel, Attorney Bernie Pelech had written a letter to the Town requesting that the applicant wanted to appeal the building inspector's decision on Superior Trucking's commercial use and then go forward with a variance request if granted.

Mr. Frink commented that that the home was not in the Residential Zone, but was a non-conforming use in the Office Zone.

Discussion ensued regarding limiting the time an applicant had for the completion of a construction project. Mr. Frink said the Board already set conditions of approval with time limits.

Mr. Coogan stated that State law gave applicants two years from the date of final approval to complete their project, but could request an extension for good cause. Vice-Chair Connors asked if it was possible for boards to be more stringent and Mr. Coogan said he thought they could.

**Adjournment:** *Ted Connors moved to adjourn. Jim Weiner seconded the motion and the meeting adjourned at 7:41 p.m.*

**Next Meeting:** Monday, August 29, 2016 at 6:30 p.m.

**Respectfully  
Submitted by:** Jane K. Kendall, Recording Secretary

*These Minutes were approved and adopted at the August 29, 2016 Zoning Board of Adjustment Meeting.*

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