

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes, Monday, June 20, 2016

- Call to Order:** Chair Matt Morton called the June 20, 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 for the Fox Run Mall; Newington Building Inspector, John Stowell; Lisa Spaulding, Leasing Representative at the Bangor Mall; Martin Leighton; Jay Link; Jack Kim, General Manager of ShoGun Restaurant; Attorney Justin Pastee; Martha Roy, Town Administrator

1) Public Hearings:

- A) Request by the Mall at Fox Run, Tax Map 27, Lot 11 for a variance from Article III, Section 3 of the Zoning Ordinance in order to allow tattoo services in the Commercial District.

Scott DeCost, Manager of the Fox Run Mall for the past 23 years stated that it was one of his duties to rent space to retailers.

Mr. DeCost said he was requesting approval for a tattoo parlor in the mall. He stated that the proprietors, Joseph and Pam Correale had another store in the Bangor Mall that also sold clothing and leather goods along with their tattoo services.

Chair Morton asked what kind of leather goods they sold and Mr. Correale said they sold leather jackets and Harley Davidson nicnacs.

Mr. DeCost said the Fox Run Mall's financial health was reliant on offering unique, experiential services, unlike online shopping in order to remain competitive to other retail stores in downtown Portsmouth, Kittery, Maine and Dover that also had tattoo services.

Mr. DeCost relayed his own experience waiting two hours for a family member to obtain a tattoo in downtown Portsmouth and suggested having a parlor in the mall would allow people to do other things while waiting for someone. Board member, John Frink asked how often parents went with someone. Mr. DeCost said he thought it was common for parents who were cautious.

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Mr. Frink asked if any blood would be involved and Ms. Correale said they used disposable needles and all had college degrees in graphic arts. She said the stigma attached to tattoos was no longer the same as it once was and many people, including her mother got tattoos, some for medical reasons such as mastectomy patients whose insurance did not cover reconstruction, and even patients that tattooed "Do Not Resuscitate" instructions.

Chair Morton asked if they also did piercing and Mr. Correale said they did, but Ms. Ms. Correale said they only pierced from the waist up. Chair Morton asked if they also pierced tongues and Ms. Correale said they did but they had to be eighteen years old, just as they had to be eighteen for tattoos.

Chair Morton asked if they were licensed from the State and Mr. Correale said they were required to carry a license similar to other services like eyebrow threading haircare, manicures and pedicures.

Mr. Frink said he understood that the primary use of the mall was retail sales, but it also included service shops. He asked Interim Planner, Gerald Coogan why it wasn't a permitted use. Mr. Coogan said he had the same thought, but said RSA314:A that governs tattoo parlors states that it requires a license. He said he spoke with Planning Department's counsel, Attorney John Ratigan who researched the use and gave the opinion that he thought the use was different than other services like beauty salons because there was such a wide variety of qualities to tattoo parlor settings and also because tattoos were permanent.

Ms. Correale commented that eyebrow threading was allowed and Chair Morton replied that it was considered part of beauty service.

Board member, Jim Weiner asked if there were any issues in the Bangor location. Lisa Spaulding, Leasing Representative at the Bangor Mall stated that she had leased to the Correales for the last three and a half years and never had any complaints or problems. She added that she had also worked in cosmetology and complications with chemicals were also a possibility so it was necessary to be educated, meet state requirements and be licensed.

Mr. Weiner asked if other mall tenants had any issue with a potential tattoo parlor. Mr. DeCost said the only negative feedback would be over drug paraphernalia, He said although anything with a marijuana leaf emblem was allowed for sale, it was not allowed for public display from the common area.

Chair Morton asked if the mall had many vacancies. Mr. DeCost said they were currently occupied at 90%, but they were always desperate for tenants. He said it was a lean time for national or regional tenants and so they often supplemented with local tenants. He said they were considered a "B" level, rather than an "A" level mall so they were more desperate to find unique locals.

Chair Morton asked if they signed long term leases with tenants and Mr. DeCost replied that they had two kinds of leases – one for five to ten years and then another that was for trial that could be from a day to a year.

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Board member, Ralph Estes asked Mr. Estes asked how often the State inspected their operation and Mr. Correale said they were inspected once or twice a year.

Mr. Estes asked Mr. Coogan if the abutting medical facility that also drew blood required a variance. Mr. Coogan he said didn't know.

Jay Link of Fox Point Road commented that his wife ran a hair salon that also required a license by the State and he didn't see what right the Town had to restrict a State regulated business.

Martin Leighton of Little Bay Road commented that good points had been made that blood was drawn at nearby Seacoast Cardiology, and there were optometrists piercings, chemical and dye treatments in the mall, all requiring licenses so he didn't think a tattoo parlor would be that different. He asked Mr. Coogan if it was just legal counsel's opinion that a tattoo parlor was not allowed. Mr. Coogan replied that it was Attorney Ratigan's opinion that it was not.

Chair Morton asked Newington Building Inspector, John Stowell if he gave them a certificate of occupancy. Mr. Stowell said he had dealt with tattoo businesses before, but not in Newington and that was why he inquired if it was a permitted use. He said Attorney Ratigan informed him that tattoo parlors were regulated differently than beauty parlors and nail salons.

Mr. Estes asked if there was any other place in Newington that allowed tattoo parlors. Mr. Stowell stated that Newington was organized by zoning like many towns and Newington's Zoning Ordinance was strict and if a use was not listed, then it was not permitted, whether it was a good business or product or not. He added that medical offices were listed as allowed.

Ms. Spaulding asked how old Newington's ordinances were. Mr. Coogan said zoning was adopted in 1952. Mr. Frink added that substantial changes were passed at the last Town Meeting in March.

Mr. Leighton asked if the Board could make a decision to allow as an exception and Mr. Frink replied that the Board had to establish that the application met the five criteria before they could grant a variance and proving that denying the proposal would create a hardship was the hardest. Chair Morton added that the Zoning Board of Adjustment was a governing board and was governing board that had decision making power, but still had to follow rules to grant relief.

Mr. DeCost stated that Mr. Correale had submitted the application with a response to each criteria. Chair Morton replied that each Board member received a copy for consideration.

Mr. Frink commented that he thought it would be in Mr. DeCost's best interest to keep the highest level of activity in the mall and if a business was objectionable, he would make a business decision not to allow it; however, a tattoo parlor was not listed as a permitted use so the decision hung on the five criteria.

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Chair Morton stated that the applicants seemed like nice business people and anyone's personal feelings on tattoos or piercing would have nothing to do with denying or approving the variance for a use that was listed in the Zoning Ordinance as allowed.

Ralph Estes moved to deny the request by the Mall at Fox Run, Tax Map 27, Lot 11 for a variance from Article III, Section 3 of the Zoning Ordinance in order to allow tattoo services in the Commercial District. John Frink seconded the motion and read through the five criteria as follows with discussion from the Board.

- *Granting the variance would not be contrary to the public interest, who were people inside mall.*

Mr. Weiner said the public interest was not only the tenants and the patrons of the mall, but also the Planning Board members and towns people that approved the ordinance.

Mr. Estes commented that no abutters or citizens were present to complain.

Mr. Frink asked about the other tenants and Mr. Coogan said the mall manager gave him a list of property abutters that were separate lots of record for notification, but the tenants were not required to be notified. Both Mr. Weiner and Mr. Estes agreed that it would be anyone's guess whether they would be for or against the variance.

Mr. Frink continued with his review of the criteria.

- *Granting the variance would not be in the spirit and intent of the Ordinance if the Town did not include the use.*

Mr. Weiner added that the building inspector and Town counsel expressed opinions on the Zoning Ordinance. Mr. Estes replied that he thought Attorney Ratigan should have provided a written opinion. Mr. Weiner asked Mr. Coogan if he asked for a verbal or written opinion and Mr. Coogan said he asked for a verbal. Vice-Chair Connors commented that he could have invited counsel to the meeting.

Mr. Frink continued with the next item.

- *Substantial justice would be served to the Fox Run Mall and the applicants by granting the variance, but it was not certain if it would serve the adjacent tenants or the towns people the towns people who did not list tattoo parlors as an accepted use.*
- *Surrounding property values would not be diminished so long as the applicant was cloaking their service and sales items that might offend other tenants or mall patrons.*

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- *Literal enforcement would not result in an unnecessary hardship for the mall because it would imply the space could not be leased by any other business but a tattoo parlor.*

Mr. Coogan noted that the old definition of hardship had to do with the characteristics of the property, but recently the court has accepted economic hardships and reasonable use. Chair Morton replied that mall management wanted to fill vacancies as soon as possible, but he agreed with Mr. Frink that it really was not a hardship because they could rent to someone else. Mr. Weiner added that the manager had stated that the mall had 98% occupancy so they were not suffering from an economic hardship.

The motion to deny passed 3-1 with Ted Connors opposing.

Mr. DeCost asked how he could proceed with an appeal and Mr. Coogan said he could appeal to Superior Court within 30 days. Chair Morton commented that an appeal would be and the court would render a final decision.

- B) Appeal by Shogun Restaurant of the Code Enforcement Officer's Administrative Decision of the Zoning Ordinance regarding property located at 347 Shattuck Way, Tax Map 13, Lot 1A.

Jack Kim, General Manager of Shogun Restaurant appeared before the Board, stating that Shogun had invested over three million dollars on renovating the restaurant and menu that was formerly the Asia and Mama D's restaurants.

Mr. Kim said they were looking to continue their business plan, but were faced with being unable to utilize the function room, He said they had originally proposed using the space for weddings, but although it sounded like a good money maker, after 25 years of experience managing the Boston Harbor Hotel, he did not think it was a wise choice because it was not always possible to control the outcome of 350 people when high emotions and drinking were combined. He said for that reason they decided to limit the use to special events and special gatherings serving the same food and drink that was on the menu.

Mr. Kim said they had booked a wrestling match, but respected the building inspector's cease and desist; however, he thought they should be allowed to serve food and drink in the function room just as they did in the non-conforming restaurant was allowed.

He said they ran a tight ship and paid for security every Thursday and weekend. He said they were considering an occasional comedy night, special dinners and events that might include a band, DJ or karaoke in a controlled environment.

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Vice-Chair Connors asked what kind of security they used and Mr. Kim said they used Barton Security. He said he also spoke with the Newington with police chief and would ask for his assistance if they expected more than one hundred people.

Mr. Estes asked if they were proposing to keep the function room open every day and Mr. Kim replied that they were only proposing special events that would not be every day.

Mr. Weiner asked if any Board members had ever attended any functions at the former Asia or Mama D's. Chair Morton said he had been to the restaurant when they had karaoke before. Mr. Kim said the Asia ran busloads of students from the University of New Hampshire in Durham, but this was not the same business and they had no intention of hosting UNH students. He said they wanted to run a respectful business for older patrons in a safe environment.

Mr. Frink asked if a special assembly permit would be issued to the restaurant. Mr. Stowell replied that they would require a separate permit from the Fire Department if they were going to have a nightclub act with over 50 people in the function room.

Mr. Kim stated that the Fire Chief issued an occupancy permit prior to approval. Mr. Estes asked if he had anything in writing from the Fire Department and Mr. Kim replied that he did not have it on him, but that he could provide it.

Mr. Estes asked they would have to add an extra officer and Mr. Stowell said he didn't believe so because the police would expect extra activity.

Mr. Estes asked what their hours of operation would be. Mr. Kim stated that they were currently open until 10 p.m. and proposing that they might stay open until midnight for some nights, but not all. He said private banquets would not be open to the public, but they would also like to host some comedy nights or other types of entertainment that they could advertise on social media with ticket sales.

Mr. Weiner said closed banquet events were already allowed as were weddings, but public ticket sales for functions open until midnight sounded different. Mr. Stowell said that was one of the issues in that many different scenarios were proposed and some were allowed while others not and it would be hard to determine how to schedule police coverage. Mr. Kim said last call was allowed at the Asia until 1 a.m., but they wanted to be respectful of the community and close by midnight.

Vice-Chair Connors asked if any abutters were present, but there were none. Mr. Coogan stated that abutters had been notified.

Mr. Frink commented that the location was off the beaten track and he didn't believe the extra patronage would affect anyone.

Mr. Estes asked if their parking facilities could accommodate additional patronage of the facility room. Mr. Kim said their parking was approved for an occupancy of 275 and the extended parking could accommodate another 125. Mr. Stowell agreed that the parking and bathrooms appeared to be adequate for the occupancy.

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Mr. Weiner said he would like to see a more definitive list of what they kinds of events they were proposing. Mr. Kim replied that they were proposing banquets for local groups, bands, comedians, DJ's and karaoke. and exclude other events. Vice-Chair Connors commented that it would be more successful to advertise consistent events rather than hopscotch. Mr. Kim replied that they were still trying to determine what the community would allow and be interested in before they locked themselves into one kind of event. Chair Morton acknowledged that many of the restaurants in Portsmouth had some kind of entertainment.

Mr. Stowell said several letters had been written back and forth in March 2016 regarding wrestling and late night entertainment that could include comedians, music and dancing. He said at first he thought the use might be legal because the former restaurants had approval for the last 30 years, but he couldn't find anything to back up night club use in the Office District. He went on to say that Town counsel, Attorney Ratigan then provided him with an analysis of the Zoning Ordinance.

Attorney Justin Pastee, who works with Attorney Ratigan was present and said in this case the use was permitted for the Asia restaurant that opened in that location in 1985, and later grandfathered for Mama D's that closed in 2013 after being open for only eight months. Attorney Pastee stated that if a non-conforming use did not continue for over a year, then it ceased to exist.

Vice-Chair Connors asked why a new restaurant in the same non-conforming location could not continue to provide entertainment, but they could still serve meals in a restaurant. Mr. Stowell replied that the restaurant and equipment remained so they were allowed to continue the use as a restaurant only.

Vice-Chair Connors commented that Attorney Ratigan, the Interim Planner, the Planning Board and the Board of Selectmen were all providing opinions to Mr. Stowell and the Board without being present. He said the Zoning Board had more authority in these decisions than the Board of Selectmen and yet they were being treated like a stepchild by the Town. Chair Morton agreed that he had never had the Board of Selectmen making recommendations to them before.

Chair Morton commented that Shogun had invested a lot into a very nice establishment with excellent food in a location that turned into a challenge for them because of the highway construction berm and a change in the grandfathered use. Mr. Estes noted that the request was for an appeal to overturn the building inspector's decision, but they were not asking for a variance when they should be. Mr. Coogan replied that Mr. Stowell was following proper procedure and he advised Mr. Kim that he could appeal and then file for variance, but Mr. Kim said he would follow up at a later date after the appeal decision. He added that if the Board granted the appeal, the applicant would probably have to go back to the Planning Board for approval of expanded use and they would get involved in questions of hours of operation, parking and signage.

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Chair Morton agreed and asked Mr. Stowell if he could accept the use if they narrowed them down to the activities that they had discussed. Mr. Stowell said he guessed he could. Mr. Frink pointed out that they were currently discussing the request for an appeal.

Mr. Estes said it would be difficult to overrule Mr. Stowell's decision because of current zoning restrictions. Chair Morton agreed that it used to be simpler and now zoning had become more complicated.

Martin Leighton of Little Bay Road commented that he had visited comedy and karaoke nights at the Asia restaurant for many years, adding that Shogun was very clean and he would welcome dancing and music there.

Mr. Leighton went on to say that the restriction was costing the business as well as the town in legal costs and wondered why the Town was micromanaging a business in that manner.

Mr. Frink acknowledged that it seemed backwards, but because of the Ordinance, which required many applicants to "lawyer up", the applicant had to request a variance, only they had challenged the building inspector's decision first. Chair Morton replied that he did not think an attorney would be necessary. Mr. Kim commented that he had been quoted a price of \$12,000 by a well-known attorney and they wanted to avoid the expense.

Chair Morton acknowledged that the business was reputable, but that the building inspector was correct in following the Ordinance and the Board probably had to support his decision.

Chair Morton asked Mr. Weiner if he had voted in regards to the business in his position as a Planning Board member and Mr. Weiner replied that he had not.

Ted Connors made a motion to deny the appeal by Shogun Restaurant of the Code Enforcement Officer's Administrative Decision of the Zoning Ordinance regarding property located at 347 Shattuck Way, Tax Map 13, Lot 1A and to uphold Code Enforcer's decision. Mr. Weiner seconded the motion and all were in favor.

Mr. Weiner encouraged the applicant to return with for a variance to allow banquets, bands, comedians, DJ's and karaoke as discussed. the five activities that had been discussed.

- C) Appeal by John Emery c/o David Emery of the Code Enforcement Officer's Administrative Decision of the Zoning Ordinance regarding the property located at 148 Old Dover Road, Tax Map 19, Lot 6.

The applicant did not appear before the Board. Chair Morton said the Board could not vote without the applicant present. Mr. Coogan suggested continuing the hearing to

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a date certain. Chair Morton suggested the hearing be continued to the next scheduled meeting to be determined.

- D) Request by John Emery c/o David Emery, 148 Old Dover Road, Tax Map 19, Lot 6 for a variance from Article III, Section 2 of the Zoning Ordinance in order to allow parking of commercial tow trucks in the Office District with an office use.

The applicant did not appear before the Board on this item. Chair Morton said the Board could not vote without the applicant present. Mr. Coogan suggested continuing the hearing to a date certain. Chair Morton suggested the hearing be continued to the next scheduled meeting to be determined.

Minutes:

Chair Morton announced that the Town Administrator, Martha Roy had sent a memorandum that brought it to his attention that said the Public Notice for the May 9, 2016 Meeting was published in the paper correctly and not at 7 p.m. as was stated in the Minutes. Mr. Frink and Mr. Estes said they were not present at the meeting.

Jim Weiner moved to approve the May 9, 2016 Minutes. Ted Connors seconded the motion and all were in favor.

Correspondence and Discussions:

Mr. Stowell commented that he used to consult with Tom Morgan when he was the Town Planner, but there had been procedural changes since Town Meeting and now he had to make more decisions on his own and sometimes needed to consult with Town counsel. Vice-Chair Connors said it was important for the Board to know whether opinions were coming from him, the planner or the Board of Selectmen.

Mr. Coogan said it would also be helpful if applicants called first to determine if a use was allowed to avoid violations from Code Enforcement.

Mr. Stowell noted that the old Zoning Ordinance books were outdated. Mr. Coogan said he was working on getting everyone a new book with the updated Ordinance and Regulation changes. Chair Morton stated that he had argued over Ordinances in error because he still had an old book and then the Town Secretary, Eleanor Boy had recently provided him with an updated book.

Mr. Coogan informed the Board that the Planning Board would be looking at zoning in the next month and encouraged the Zoning Board to make suggestions. Mr. Frink said he would love to see a list of uses that were prohibited. Mr. Weiner said there were so many that they couldn't list them all so instead they only listed permitted uses.

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Vice-Chair Connors said he would have like the ZBA to have received prior notification of the Zoning Ordinance changes before they went to Town Meeting for vote. Mr. Weiner said an explanation was mailed out to residents a week before and Mr. Estes said it was also included in the Newington Neighbor. Vice-Chair Connors replied that the notices were not provided until the last minute after the die was cast and the ZBA never had any official invite for any input. Mr. Coogan agreed with Vice-Chair Connors that they could have done a better job to keeping the ZBA informed and that he was now doing memos and sharing them with all boards including the Board of Selectmen to keep everyone in the loop.

Mr. Frink commented that the ZBA decisions were supposed to be independent from the decisions of other boards and wondered if there would be conflicts when receiving memorandums and letters from the Board of Selectmen and the Planning Board. Mr. Coogan clarified that his memorandums would only be sharing information and not providing recommendations. Chair Morton added that information was good, but receiving letters of recommendation from other boards was inappropriate. Mr. Coogan agreed that the Planning Board might ask for opinions, but the ZBA should only consider the facts and his job was to keep everyone out of trouble.

Adjournment: *Ted Connors moved to adjourn the meeting. Jim Weiner seconded the motion and the meeting adjourned at 8:40 p.m.*

Next Meeting: TBD

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