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Amended

October 7, 2021

VIA HAND DELIVERED

Barrington Zoning Board of Adjustment
Ray Demarais, Vice Chairman
333 Calef Highway
Barrington, NH 03825

Re: Robert & Allison Russell Request for Variance Relief & Request for Determination that no Variance is Required
Case No: 2020-54-16-GR-21-ZBA Var

Dear Vice-Chairman and Members of the Zoning Board of Adjustment:

At this Board's September 15, 2021 hearing on this matter, the Board continued the hearing on Robert and Allison Russell's variance application. The Board instructed us to resubmit the variance application without identifying the requested variance as being temporary, so new notice could be sent to abutters.

In accordance with the Board's instructions, please find attached a supplemental variance application form and variance narrative. Additionally, enclosed are new notice fees for the Town's legal notice and abutter notices.

Following the September 15, 2021 hearing on this matter, Mr. Russell reached out to Barrington Fire Department Chief Walker and Code Enforcement Officer John Huckins regarding Zoning Ordinance Section 7.3(6). We are still waiting on a final letter from Chief Walker, and we will provide a supplemental letter to this Board once we receive that determination.

Thank you, and please let me know if you have any questions,

Brendan A. O'Donnell
Brendan A. O'Donnell, Esq. **RECEIVED**

Enclosures

cc: Heidi Barrett-Kitchen, Esq.

DONAHUE, TUCKER & CIANDELLA, PLLC
16 Acadia Lane, P.O. Box 630, Exeter, NH 03833
111 Maplewood Avenue, Suite D, Portsmouth, NH 03801
Towle House, Unit 2, 164 NH Route 25, Meredith, NH 03253
83 Clinton Street, Concord, NH 03301

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Barrington Zoning Board of Adjustment Zoning Ordinance Variance and Special Exception Application Checklist

Please schedule a meeting with staff before submitting your application.

This checklist has been prepared to assist you in submitting a complete application to the Town of Barrington. At the Pre-Application meeting, staff will check off the items on this list that are required with your submission.

This document constitutes a public disclosure under RSA Chapter 91 – A, Access to Governmental Records and Meetings.

Date 08/09/2021 Case No. 220-54.16-GR-21- Amend ZBA Var
 Owner Robert & Allison Russell
 Mailing Address 99 Tolend Road
 Phone 603-948-1519 Email robertwrussell@metrocast.net

PART I – GENERAL REQUIREMENTS

All Graphics shall be to Scale and Dimensioned

Description of Documents Required for Complete Application. No application shall be accepted without all items marked below.

Req.	Rec.
------	------

- | | | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | 1. Zoning Board of Adjustment Application Checklist (<i>this form</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | 2. ZBA General Information (Article(s) and Section(s) of Ordinance) |
| <input type="checkbox"/> | <input type="checkbox"/> | 3. Appeal and Decision |
| <input type="checkbox"/> | <input type="checkbox"/> | 4. Fees - \$150.00 Application <input type="checkbox"/>
\$ 75.00 Legal Notice <input type="checkbox"/>
\$ 7.00 per US Post Office Certified Letter <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> | 5. Completed Project Application Form
<input type="checkbox"/> Variance <input type="checkbox"/> Special Exception <input type="checkbox"/> Appeal |
| <input type="checkbox"/> | <input type="checkbox"/> | 6. Notarized Letter of Authorization (from property owner(s) if property owner did not sign the application form) |
| <input type="checkbox"/> | <input type="checkbox"/> | 7. Project Narrative |

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- 8. HOA Approval (*if applicable*)
- 9. Context or Locus Map (Show Surrounding Zoning Districts)
- 10. Existing Conditions Site Plan or Recorded Subdivision Plan to include well and septic location (may be found at Strafford County Registry of Deeds).
- 11. Existing Conditions Photo Exhibit (*See instruction page for submitting photos*)
Up to four photos may be shown per 8 1/2" X 11" page size
 - a. Show all existing structures on site
- 12. List of Certified Abutters (Include Applicant and all licensed professionals, i.e., engineer, architect, land surveyor, or soil scientist, whose seals are affixed to the plan, as well as any holder of a conservation or agricultural easement)
- 13. Mailing Labels (4 sets)

PART II – REQUIRED PLANS AND RELATED DATA
All Graphics and Plans Shall be to Scale and Dimensioned

- 1. Site Plan - ***Drawn and Stamped by Registered Land Surveyor***
 - a. 24" X 36" – 2 Copies
 - b. 11' X 17" – 6 Copy
 - c. 8 1/2 " X 11" – 1 Copy
- 2. Elevations: Show all sides of building and indicate building heights
 - a. 24" X 36" – 2 Copies
 - b. 11' X 17" – 6 Copy
 - c. 8 1/2 " X 11" – 1 Copy
- 3. Floor Plans
 - a. 24" X 36" – 2 Copies
 - b. 11' X 17" – 6 Copy
 - c. 8 1/2 " X 11" – 1 Copy
- 4. All drawings and any revised drawings must be submitted in PDF format
- 5. OTHER: _____
- 6. Your Appointment Date and Time for Submitting the Complete Application is: _____

Barbara Arvine
Staff Signature

10/7/2021
Date

Land Use Department
Town of Barrington; 333 Calef Highway; Barrington, NH 03825
mgasses@barrington.nh.gov Phone: 603.664.5798

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PART III – PROJECT DESCRIPTION/VARIANCE DETAILS

Case No. 220-54,16-OR-21-Amend 2BA Var

Project Name Robert Russell-2A Tactical Use Variance Re-submittal

Location Address 99 Tolend Road

Map and Lot 220-54-16

Zoning District (Include Overlay District if Applicable) general/residential

Property Details:

- Single Family Residential Multifamily Residential Manufactured Housing
 Commercial Mixed Use Agricultural Other

Use: Single Family Residential & Home Occupation

Number of Buildings: 1 Height: Two Story

Setbacks: Front 40' Back 30' Side 30' Side 30'

Description of Request

Cite the Section of the Zoning Ordinance you are requesting a Variance or Special Exception for. If this is an Appeal from an Administrative Enforcement Order, Planning Board Decision, or Zoning Board of Adjustment Decision, please attach pertinent documentation:

See attached.

Project Narrative: *(Please type and attach a separate sheet of paper)*

See attached.

Barrington Zoning Ordinance Requirements:

See attached.

Request: *(You may type and attach a separate sheet of paper)*

See attached.

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PART IV – If this is a JUSTIFICATION FOR VARIANCE

The Zoning Board of Adjustment may not authorize a zoning ordinance variation unless ALL of the following criteria are met. Please provide evidence that the requested Variance complies by addressing the issues below.

- 1. Special conditions exist such that literal enforcement of the Ordinance will result in unnecessary hardship to the applicant as defined under applicable law.

See attached.

- 2. Granting the variance would be consistent with the spirit of the Ordinance.

See attached.

- 3. Granting the variance will not result in diminution of surrounding property values.

See attached.

- 4. Granting of the variance would do substantial justice.

See attached.

- 5. Granting of the variance would not be contrary to the public interest.

See attached.

PART V – If this is a JUSTIFICATION FOR SPECIAL EXCEPTION

Please provide evidence that the requested Special Exception complies by addressing the issues below.

- 1. No detriment to property values in the vicinity of the proposed development will result on account of: the location or scale of buildings, structures, parking areas, or other access ways; the emission of odors, smoke, gas, dust, noise, glare, heat, vibration, or other pollutants; or unsightly outdoor storage of equipment, vehicles, or other materials.
-
-

- 2. No hazard will be caused to the public or adjacent property on account of potential fire, explosion, or release of toxic materials.
-
-

- 3. No creation of a traffic safety hazard or substantial traffic congestion will result in the vicinity of the proposed development.

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4. No excessive demand on municipal services and facilities, including, but not limited to waste disposal, police and fire protection, and schools.

5. The proposed use will not result in the degradation of existing surface and groundwater quality standards, nor will it have adverse effects on the natural functions of wetlands on the site that would result in the loss of significant habitat or flood control protection.

In addition to the guiding principles specified above, the ZBA may condition the granting of a special exception upon more stringent standards if the Board determines that such conditions are necessary to protect the health and welfare of the town and its residents. Such conditions may include the following and should be addressed in the Narrative:

- 1. Front, side, or rear yards in excess of the minimum requirements of this Ordinance.
- 2. Screening of the premises from the street or adjacent property by walls, fences, or other devices.
- 3. Limitations on the size of buildings and other structures more stringent than minimum or maximum requirements of this Ordinance.
- 4. Limitations on the number of occupants and methods and times of operation.
- 5. Regulation of the design and location of access drives, sidewalks, and other traffic features.
- 6. Location and amount of parking and loading spaces in excess of existing standards.
- 7. Regulation of the number, size, and lighting of signs in excess of existing standards.

Signature of Applicant Date

See prior Application submitted on 8/9/2021 for Owner's original signature.

Signature of Owner Date

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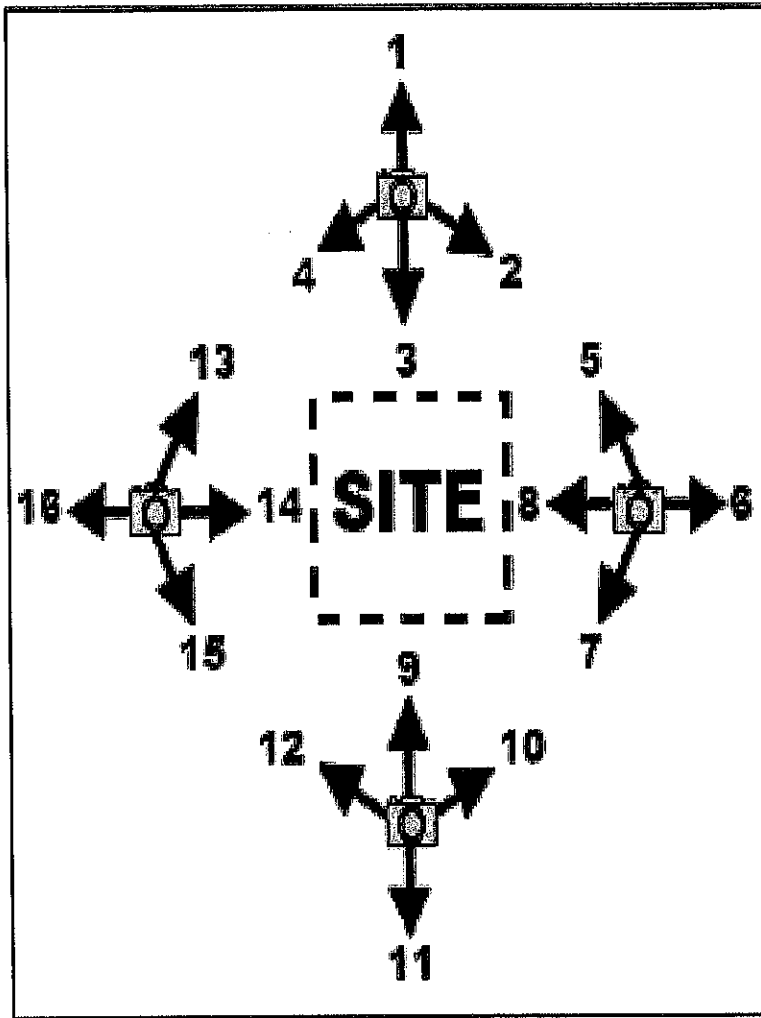
SITE / CONTEXT PHOTOS

Using Guidelines Below

Provide color photographs showing the site and surrounding buildings/properties in order to provide staff, boards and commissions with a visual impression of the current site conditions.

1. Photos are to be taken looking toward the site and adjacent to the site.
2. Photos should show adjacent improvements and existing on-site conditions.
3. Number the photographs according to view.

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NARRATIVE FOR APPLICATION FOR VARIANCE
99 TOLEND ROAD, BARRINGTON, NH

I. Introduction & Summary:

Robert Russell seeks variance relief for the continued operation of his business, 2A Tactical, LLC, from the basement of his residence located at 99 Tolend Road, Map 220, Lot 54-16 (the “Tolend Road Property”). Mr. Russell is constructing a new state-of-the art facility located at Map 251, Lot 63 on Calef Highway in Barrington (the “Calef Highway Property”), and he will relocate his retail business to the Calef Highway Property as soon as he is able.

On September 10, 2018, the Town granted Mr. Russell a Home Occupation Permit to operate 2A Tactical as a home occupation. In or around November of 2020, the Town informed Mr. Russell that it believed the business had outgrown the limits of the Home Occupation Permit, and the Town asked Mr. Russell to relocate his business from 99 Tolend Road to a more suitable district in Town. Since that Time, Mr. Russell has taken every effort to relocate his retail business to a new facility in Town as quickly as possible, including:

- 2A Tactical investigated the suitability of vacant Town-owned lots proposed by the Town;
- 2A Tactical found and purchased the Calef Highway Property, which is in the Town Commercial Zoning District;
- 2A Tactical hired Unified Builders, Inc., another local Barrington business, to construct a new facility on the Calef Highway Property;
- 2A Tactical hired N.H. Land Consultants to prepare a full Site Plan Application for the Calef Highway Property;
- 2A Tactical hired Team Engineering to develop structural and architectural plans for the proposed facility on the Calef Highway Property;
- 2A Tactical hired a fire protection engineer to engineer the fire safety and alarm plans for the proposed facility;
- 2A Tactical hired a mechanical and electrical engineering firm to develop mechanical, electrical, and plumbing for the proposed Calef Highway facility;
- 2A Tactical hired a geo tech firm to perform all geo technical surveys and data

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- reports;
- 2A Tactical hired a landscape designer to develop the landscape plans for the proposed Calef Highway facility;
 - 2A Tactical hired a civil engineer to perform drainage analysis, design, and grading;
 - 2A Tactical met with the Town of Barrington Planning Board on August 4, 2021, for preliminary site plan review for the Calef Highway Property and proposed new facility;
 - 2A Tactical is finalizing the final Site Plan Application for the Planning Board based on the August 4 meeting with the Planning Board; and
 - 2A Tactical and Unified Builders are prepared to start construction on the new facility immediately upon receiving Site Plan Approval and building permits.

Despite all of this progress, the Town has taken the position that 2A Tactical must cease its operations or obtain a variance to continue operating while the new facility is constructed. If 2A Tactical is forced to stop operating its business prior to completion of the new facility, 2A Tactical will not have enough money to complete the project and will go out of business. Likewise, 2A Tactical employees—most of whom are veterans and disabled veterans—will lose their jobs.

Therefore, Mr. Russell seeks a variance from this Board to continue operating his business. Mr. Russell will continue to diligently obtain site plan approval and building permits, and to construct the new facility and relocate retail operations to the Calef Highway Property.

II. Background:

The Tolend Road Property is located on a 2.119-acre parcel. The Tolend Road Property is located in the General Residential Zoning District and abuts the Regional Commercial District, which is directly across the road from the Property. The Applicant lives in a residence on the Property with his family. The Town's tax card for the Tolend Road Property shows that the residence has 8,056 square feet of space, inclusive of the basement, garage, and attic.

Mr. Russell is a disabled veteran who has been a resident of Barrington for nearly 20 years. In 2015, Mr. Russell obtained a Home Occupation Permit to operate a gunsmithing business from his residence. Mr. Russell's business has since grown, and he has hired other veterans and disabled veterans to work for him. Based on Mr. Russell's background, he has made it a priority to hire other veterans as employees of 2A Tactical. Transitioning back from military service to civilian life can be difficult, and the opportunity to work for and with other veterans makes that transition easier.

Mr. Russell operates the business from the basement of his residence, which includes gunsmithing and retail sales. Mr. Russell also has some temporary structures toward the rear of his property where products are stored.

Mr. Russell has maintained a good relationship with his abutters and many other community members and businesses, who have expressed their support for Mr. Russell's continued operation of his business while the new facility is built. See Attached Letters. Mr.

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Russell had also maintained a good relationship with the Town, and he has even donated firearms to support the Town's Police Department.

In approximately July of 2020, the Town told Mr. Russell that there had been "concerns" regarding cars being parked on the shoulder of Tolend Road outside Mr. Russell's business. From the records we have obtained from the Town, the only person the Town could identify as having raised these concerns was Town Treasurer Peter Royce, who was inappropriately using his Town e-mail to complain about 2A Tactical to the Town and to other Town residents.

Regardless, Mr. Russell met with Town officials regarding parking, and he has since taken steps to ensure that customers appropriately park in the Tolend Road Property's driveway area or off the paved portion of Tolend Road, which is allowed under the Town's parking rules. Please see attached letter from Town of Barrington Chief of Police George Joy confirming there have been no parking citations related to Mr. Russell's business or his customers since July of 2015.

In approximately November of 2020, Town officials spoke with Mr. Russell about the need to relocate his growing business from its current location on Tolend Road. Since that time, Mr. Russell has worked diligently to find a new location from which to operate. It was important to Mr. Russell to continue to be a taxpayer, employer, and contributing member to the Town's community. To that end, Mr. Russell wanted to avoid having to take his business to another town, and he worked to find a new location in the Town. Mr. Huckins and Mr. MacIver wanted Mr. Russell to relocate within six months, and they supported the relocation of Mr. Russell's business to a new facility, even suggested certain town-owned vacant lots as places where Mr. Russell could build a new facility to relocate. Even at that time, Mr. Russell informed them that purchasing a property, permitting a facility, and constructing the facility would likely not be possible within six months, particularly given the ongoing Covid pandemic.

Since that time, Mr. Russell has worked diligently to locate and purchase property in Barrington. Mr. Russell initially investigated the Town's suggested Town-owned lots, but those lots ultimately were not feasible locations.

Mr. Russell subsequently located and entered into an agreement to purchase the Calef Highway Property. The Calef Highway Property is an 8.9-acre lot located at the intersection of Calef Highway and Bumford Road. The Calef Highway Property is located in the Town's Commercial District, making it an appropriate location for 2A Tactical to relocate.

Mr. Russell hired Unified Builders, Inc., another local business, to design and construct the proposed facility. Mr. Russell also hired NH Land Consultants to assist with obtaining Site Plan Approval from the Barrington Planning Board for the proposed facility on the Calef Highway Property. NH Land Consultants and Unified Builders have prepared site plans, building plans, and other documents to submit to the Planning Board.

Mr. Russell, NH Land Consultants, and Unified Builders met with the Planning Board for preliminary site plan review on August 4, 2021. Based on the Planning Board's feedback, Mr. Russell is finalizing a site plan application and expects to be heard by the Planning Board at their September meeting. Mr. Russell and Unified Builders remain ready to promptly obtain building

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permits and to begin construction as soon as they receive Site Plan Approval from the Planning Board. Unified Builders estimates that they can complete the proposed facility within a year of starting construction.

Mr. Russell has communicated with the Town Board of Selectmen and Town Administrator numerous times over the past few months, explaining that Mr. Russell is diligently working to relocate his retail business, as the Town requested, to the proposed facility on the Calef Highway Property. Mr. Russell has only asked for a temporary reprieve from any further enforcement actions while he completes that relocation process. Mr. Russell has further explained that if he is forced to cease operation of his business prior to being able to relocate, he will go out of business, he will not have enough money to complete the proposed facility, and Mr. Russell and his veteran and disabled veteran employees will all lose their jobs.

Nevertheless, the Town, through the Town Administrator's Office, has taken the position that Mr. Russell must immediately cease operating. That would be a disastrous outcome for Mr. Russell and his employees, and it is simply not necessary when all Mr. Russell needs is a little more time to complete the original course of action that the Town suggested—relocate to a new facility constructed in Town.

Even though Mr. Russell has requested on numerous occasions to meet directly with the Board of Selectmen to discuss this matter, the Town Administrator has refused to place Mr. Russell on the Agenda, depriving Mr. Russell of the opportunity to speak with the Board responsible for code enforcement actions. The Town suggested that Mr. Russell's only avenue of relief lay through a variance from this Board. Despite this pending variance application, the Town moved forward with filing a lawsuit against Mr. Russell, seeking more than \$40,000 in unnecessary and unwarranted penalties.

Therefore, Mr. Russell now seeks from this Board a variance to continue operating his business at the Tolend Road Property. Mr. Russell will continue to diligently work toward getting approvals for and constructing the new facility on the Calef Highway Property. I want to stress that Mr. Russell is committed to relocating to the Calef Highway Property and has already sunk a lot of money into making that happen—all he needs is permission to operate his retail business, which will ensure he continues to have the income necessary to construct and relocate to the new facility on Calef Highway.

III. Variance Request:

Mr. Russell respectfully requests a variance for the alleged expansion of his home occupation to be an allowable use of the Property.

The Tolend Road Property is located in the General Residential District and abuts the Regional Commercial District. The purpose of the General Residential District is to allow for residential development in addition to small-scale business uses or establishments that are operated in conjunction with residential uses. Zoning Ordinance, Section 2.2.1. The purpose of the abutting Regional Commercial District is to promote commercial and industrial uses while limiting residential development. Many commercial uses are permitted in the General

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Residential District as a matter of right or by a conditional use permit. As relevant here, permitted uses include home occupation, and permitted uses can include home business, retail, and light manufacturing uses by conditional use permit. Zoning Ordinance, Article 19, Table 1 (Table of Uses). Similarly, the abutting Regional Commercial District allows most commercial uses as a matter of right.

The Zoning Ordinance sets a few limits on the scope of Home Occupations:

- 7.3(1) A home occupation may only be conducted within a detached single-family dwelling;
- 7.3(2) Not more than one (1) home occupation may be carried on in a dwelling.
- 7.3(3) No more than thirty percent (30%) of the dwelling's net living area shall be devoted to such use;
- 7.3(4) there shall be no display of goods or wares visible from the street;
- 7.3(5) Not more than one (1) commercial vehicle related to said home occupation shall be stored on the premises;
- 7.3(6) the building or premises containing said home occupation shall not be rendered objectionable or detrimental to the residential character of the neighborhood because of exterior appearance, traffic, emission of odor, smoke, dust, noise, on-site storage of hazardous materials as determined by the Barrington Fire Department;
- 7.3(7) A certificate of occupancy for the proposed use shall be issued by the Building Inspector once verification with all the preceding standards is confirmed.

The Town has taken the position that 2A Tactical exceeded the limits of a Home Occupation by allowing retail sales, by using more of the Property's basement for the business, and by having Conex storage trailers on the property. Please see attached letter from Attorney Spector-Morgan, dated May 13, 2021.

Therefore, Mr. Russell respectfully requests that this Board either determine that his existing use complies with the definition of Home Occupation or grant a variance from Article 19 Table of Uses and Zoning Ordinance, Section 7.3's Home Occupation requirements sufficient to allow Mr. Russell to continue operating his business as it presently operates and without expansion. See Bartlett v. City of Manchester, 164 N.H. 634, 640-41 (2013) (The determination of whether to grant a variance includes the question of whether a variance is necessary at all). Mr. Russell submits that reasonable conditions for this variance can include:

- (1) Mr. Russell will continue to diligently pursue all necessary permits and approval to construct and occupy the proposed facility on the Calef Highway Property;
- (2) Mr. Russell shall not expand the existing operation of his business in any manner;
- (3) The variance will terminate should the proposed use of the Property cease; and/or
- (4) Mr. Russell shall promptly relocate his retail business from Tolend Road Property to the Calef Highway Property upon receiving a certificate of occupancy.

A. Standard for Granting Variance Relief

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To grant a variance under RSA 674:33, the ZBA must find that the following criteria have been satisfied: (1) the variance will not be contrary to the public interest; (2) the spirit of the ordinance is observed by the issuance of the variance; (3) substantial justice is done by the issuance of the variance; (4) the variance will not cause the values of surrounding properties to be diminished, and (5) the literal enforcement of the provisions of the ordinance would result in unnecessary hardship.

The variance relief the Applicants' seek satisfies each of these criterion.

B. The issuance of a variance is not contrary to the public interest and the spirit of the Zoning Ordinance is observed by issuance of the variance.

The requirement that the variance not be contrary to the public interest is related to the requirement that it be consistent with the spirit of the ordinance. To determine whether granting a variance is not contrary to the public interest and is consistent with the spirit of an ordinance, the New Hampshire Supreme Court has said that ZBA's should "determine whether to grant the variance would unduly and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives."¹ Thus for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance's basic zoning objectives.² Mere conflict with the terms of the ordinance is insufficient.³

There are two methods to determine whether a variance violates the Zoning Ordinance's basic objectives. The first is to "examine whether granting the variance would alter the essential character of the neighborhood," and the second is to "examine whether granting the variance would threaten the public health, safety or welfare."

The General Residential District allows business uses that are operated in conjunction with residential uses. See Zoning Ordinance, Section 2.2.1; Table of Uses. These uses can include home occupations, home businesses, hardware stores; hotels; packaging and delivery services; repair services, restaurants; retail uses; contractor storage and equipment yards; light manufacturing facilities; machine shops; and warehouse operations, among numerous other commercial uses. Furthermore, the Tolend Road Property abuts the Regional Commercial District, which allows those same uses as a matter of right.

Bearing in mind all of these allowed commercial uses, Mr. Russell's existing home occupation of performing gunsmithing work and selling firearms and ammunition has not and will not alter the essential character of the neighborhood or threaten public health, safety, or welfare. Gunsmithing and selling firearms as a home occupation is substantially similar to operating a hardware store, machine shop, light manufacturing facility, or other retail uses. Storing parts and product is substantially similar to operating contractor storage and equipment yard or a warehouse operation.

¹ Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 514 (2011).

² Id.

³ Id.

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Mr. Russell operates his business out of his residence's basement, and he has incidental storage of merchandise and office supplies in Conex containers located behind the shed on the Property. This ensures that his business activities are not readily discernible by the public from the street. Moreover, Mr. Russell's abutters support his continued operation of his business.

Mr. Russell acknowledges that the Town has expressed concern over how customers have parked. However, since the Town initially raised that concern, Mr. Russell has taken steps to prevent parking issues. Mr. Russell tells customers to park in acceptable areas. Mr. Russell has purchased and uses folding signs that direct customers where to park and where not to park. On the few occasions when Mr. Russell has had larger sales, he obtains waivers from the Barrington Police Department related to parking on the paved portion of the street and pays for a police detail to handle potential traffic issues.

Taken together, Mr. Russell's continued operation of his home occupation will not alter the essential character of the neighborhood or threaten public health, safety, or welfare.

For these reasons, the application satisfies the criteria that the issuance of a variance is consistent with the Spirit of the Zoning Ordinance and is not contrary to the public interest.

C. Substantial justice is done by the issuance of the variance

The Supreme Court has said of the substantial justice criteria, "the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice."⁴ To apply the standard, it is necessary for the ZBA to determine whether the general public would realize an appreciable gain from the denial of the variance that outweighs the benefits that would be gained by the applicant by the issuance of the variance.⁵

Substantial justice is done by the issuance of this variance here. The loss to Mr. Russell of not granting the variance cannot be understated. Mr. Russell's means of earning living—his business—will go out of business and end. Mr. Russell will be left with all of the debt he incurred to date in purchasing the Calef Highway Property, in engaging Unified Builders to design and build the facility; in engaging NH Land Consultants to prepare and submit the Site Plan Application before the Planning Board; in engaging this Firm to prepare and file this variance application. Furthermore, the veterans and disabled veterans that Mr. Russell employs will all lose their jobs.

Conversely, allowing the alleged expansion of the business to temporarily continue to operate does not substantially harm the Town or its residents. The storage trailers are in the rear of the Property. Mr. Russell has taken steps to address the parking issues, as evidenced by Chief Joy's letter. The issue with the number of employees does not harm the public, and that requirement is neither stated in the Home Occupation requirements nor inconsistent with the other allowed uses in the General Residential District. In sum, the general public is not greatly harmed by Mr. Russell's continued operation. This conclusion is reinforced by the fact that Mr. Russell's

⁴ Harborside, 162 N.H. at 515

⁵ Id.

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abutters—the people who would be most affected if Mr. Russell’s business was harmful—generally support Mr. Russell’s continued operation.

Finally, to the extent the public does experience some harm, that harm is not outweighed by the harm to Mr. Russell and his employees. For these reasons, this Application satisfies the requirement that substantial justice be done by the issuance of the variance.

D. The variance will not cause the values of surrounding properties to be diminished.

As discussed above, Mr. Russell has been operating his current home occupation for three years, and his prior home occupation for three years prior to that. There is no evidence that the value of surrounding properties have been diminished. To the contrary, the support of Mr. Russell’s abutters demonstrates that the existing operation of his business does not harm surrounding property values.

Furthermore, the Town’s existing zoning scheme allows as a matter of right commercial operations to be located on Tolend Road. Directly across the road from Mr. Russell’s property is the Regional Commercial District. In other words, the Town’s zoning scheme contemplates that Tolend Road could provide access to commercial operations, and therefore the traffic that would be expected from a commercial operation could not cause the value of surrounding properties to be diminished.

For these reasons, the impact of the proposed use has not and will not cause the value of surrounding properties to be diminished.

E. Literal enforcement of the provisions of the ordinance will result in unnecessary hardship to the Applicants.

RSA 674:33, I(b)(5) states that the ZBA may issue a variance if “Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.” “Unnecessary hardship” means that “owing to special conditions of the property that distinguish it from other properties in the area: (i) no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and (ii) the proposed use is a reasonable one.”⁶ In the event that criteria (i) and (ii) cannot be established, “an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish 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.”⁷

Here, the Property is distinguishable from other properties in the area primarily because it has a Home Occupancy Permit that allows or substantially allows all of Mr. Russell’s existing business use of the Property. Put differently, unlike other properties in the area, the Tolend Road Property has the right to operate Mr. Russell’s home occupation, up to the limits asserted by the

⁶ RSA 674:33, I(b)(5)(A).

⁷ RSA 674:33, I(b)(5)(B).

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Town. Additionally, the Property abuts the Regional Commercial District, where the proposed commercial use would be allowed as a matter of right. The large size of the Property's residence easily accommodates the residential use of the upper floors and the business use in the basement. Finally, the Property's larger than average 2-acre size, and narrow, long lot shape allow the Property to accommodate the storage trailers to the rear of the Property where they are shielded from public view from the Road.

No fair and substantial relationship exists between the general public purposes of the Zoning Ordinance provisions and the specific applications of those provisions to the Property. As described above, the General Residential District allows numerous commercial uses, including uses that would be more intensive than Mr. Russell's home occupation. The Town agreed that Mr. Russell's home occupation was allowed prior to the purported expansion, and the Zoning Ordinance's public purposes do not support prohibiting the current use of the Property to continue.

The proposed use is a reasonable one and the relief sought herein is necessary to allow for that reasonable use. It bears repeating that Mr. Russell is a community member in this Town. He started a small business, and he dedicated himself to hiring other veterans to work for him. Mr. Russell has the support of his abutters and many residents and local businesses in Town, and he has worked diligently with other local businesses to relocate his business to a more suitable location in Town. There is simply no fair and substantial relationship between denying him the variance relief to continue operating his business, particularly where the Property is located on directly across from the Regional Commercial District and is accessed by Tolend Road, which provides access to Regional Commercial zoned properties.

For similar reasons, even if this Board does not find that there is no fair and substantial relationship between the Ordinance's general public purposes and the application of those provisions to the Property, the Board should still grant the variance because strict application of the zoning ordinance will cause a clear, unnecessary hardship to Mr. Russell, his business and livelihood, and his employees who depend on him for their livelihoods.

As such, the Application satisfies the "undue hardship" criteria necessary for the issuance of a variance.

F. Variance Conditions: As described above, Mr. Russell is willing to agree to a variance condition that limits the operation of a gunsmithing business at the Property. For example, Mr. Russell would agree to any one of the following conditions:

- i. A condition that the variance terminates if Property's existing commercial use ceases;
- ii. A condition that the variance terminates after a set amount of time;
- iii. A condition that the variance terminates upon relocation of Mr. Russell's retail operations to Calef Highway.

Counsel for the ZBA has argued that a variance cannot be "temporary." With respect, that is not the law in New Hampshire. The ZBA has broad authority to impose conditions when granting variance relief. This includes conditions which may cause a variance to terminate. See, e.g.,

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Garrison v. Town of Henniker, 154 N.H. 26, 28 (2006) (involving a conditional variance that would terminate if the proposed use of the Property was discontinued). Finally, it is absurd to suggest that a ZBA cannot impose a condition that an applicant specifically requests. If both an applicant and a ZBA agree that a certain variance condition is reasonable, then it is both reasonable and appropriate for a ZBA to impose that condition.

IV. Conclusion:

For the reasons set forth above, Mr. Russell requests variance relief if the Board determines that his home occupation exceeds the requirements of the Zoning Ordinance. Mr. Russell is doing everything in his power to relocate his retail business from Tolend Road to Calef Highway. Without variance relief, Mr. Russell will be deprived of a reasonable use of his Property, and Mr. Russell and his employees will lose their livelihoods in the middle of a pandemic. This is precisely the type of undue hardship that the variance process was designed to address. I urge the Board to help in that regard, and I appreciate the ZBA's careful consideration of this matter.

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ABUTTERS LIST
APPLICATION FOR TEMPORARY VARIANCE
99 TOLEND ROAD, BARRINGTON, NH

<u>Tax Map/Lot</u>	<u>Name</u>	<u>Mailing Address</u>
220/54-16	Robert & Allison Russell	99 Tolend Road, Barrington, NH 03825
220/54-13	Gary J. & Kristine A. Imbrie Revocable Living Trust	20 Mills Falls Road, Barrington, NH 03825
220/54-15	Tory T. Bianchi	93 Tolend Road, Barrington, NH 03825
220/54-17	Randal & Pamela Heller Family Revocable Trust	113 Tolend Road, Barrington, NH 03825
220/56	Bjorn & Margaret Olsen	110 Tolend Road, Barrington, NH 03825
220/57-14	Linda E. Cole Revocable Trust	98 Tolend Road, Barrington, NH 03825
220/57-15	Michael Steven Miller	95 Blackwater Road, Rochester, NH 03867
N/A	Brendan A. O'Donnell, Esq. DTC Lawyers	164 NH Rte 25, Towle House, Unit 2, Meredith, NH 03253

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