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VIA E-MAIL to Zoning Board of Adjustment at birvine@barrington.nh.gov

October 13, 2021

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:

This Board held a hearing on September 15, 2021 on Robert and Allison Russell’s (the “Applicants”) request for variance relief and request for this Board to determine that no variance is required. During that hearing, the Board considered whether the Applicants were in compliance with the Home Occupation requirements in the Town’s Zoning Ordinance. However, the Board noted that Section 7.3(6) of the Zoning Ordinance required a determination by the Barrington Fire Department, and the Board requested that the Applicants obtain a letter from the Fire Department on this issue in advance of the continued hearing on this matter scheduled for October 20, 2021.

In accordance with the Board’s request, the Applicants promptly requested an inspection from the Barrington Fire Department regarding whether the Applicants’ Property was rendered objectionable or detrimental to the residential character of the neighborhood because of exterior appearance, traffic, emission of odor, smoke, dust, noise, or on-site storage of hazardous materials.

DONAHUE, TUCKER & CIANDELLA, PLLC
16 Acadia Lane, P.O. Box 630, Exeter, NH 03833
111 Maplewood Avenue, Suite D, Portsmouth, NH 03801
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83 Clinton Street, Concord, NH 03301

I. The Applicants conform with Zoning Ordinance, Section 7.3(6)

Fire Department Chief Walker and a representative of the State Fire Marshall's office inspected the premises on September 29, 2021. Please find attached to this letter a copy of Barrington Fire Chief Rick Walker's letter regarding his inspection of the premises. As you will see, the Fire Chief confirmed that there were no "hazardous materials of concern" on the premises. Therefore, Chief Walker's letter demonstrates that the premises are not rendered objectionable or detrimental to the residential character of the neighborhood because of on-site storage of hazardous materials.

However, Chief Walker stated that, based on his reading of Section 7.3(6) of the Zoning Ordinance, the Fire Department could only make a determination regarding hazardous materials. Chief Walker explained that, while the fire codes address hazardous materials, there are no provisions addressing exterior appearance, traffic, odor, smoke, dust, or noise. Accordingly, Chief Walker insisted that he could not make a determination regarding whether those factors rendered the premises objectionable or detrimental to the residential character of the neighborhood. Rather, Chief Walker stated that the Applicants should seek a determination on those factors from the Town's Building Inspector.

The Applicants promptly reached out to Mr. Huckins requesting an exterior inspection to confirm that the Property was not objectionable or detrimental to the residential character of the neighborhood based on exterior appearance, traffic, odor, smoke, dust, or noise. Mr. Huckins inspected the Property on October 2, 2021. Mr. Huckins's report is attached to this letter. As you will see in the letter, Mr. Huckins did not determine that the Property was "objectionable or detrimental to the residential character of the neighborhood" because of exterior appearance, traffic, odor, smoke, dust, or noise.

Mr. Huckins did not identify any loud sounds, dust, smoke, or odor of any kind. Although Mr. Huckins noted that there were two vehicles parked on the side of the road and vehicles on the Property, he did not identify any parking violations and he did not identify any traffic that rendered the Property objectionable or detrimental to the residential character of the neighborhood. Similarly, although Mr. Huckins noted that Conex boxes and a tent were "not consistent with the residential character," he did not determine that the boxes or tent rendered the Property objectionable or detrimental to the residential character of the neighborhood. As the photos submitted to the Board on September 15, 2021 show, the Conex boxes from multiple angles are either not visible or barely visible from the road.

Therefore, the inspections of the Fire Department and the Building Inspector demonstrate that the Property is not rendered objectionable or detrimental to the residential character of the neighborhood because of exterior appearance, traffic, emission of odor, smoke, dust, noise, or on-site storage of hazardous materials. Zoning Ordinance, Section 7.3(6)

II. **The Applicants additionally conform to the other Home Occupation requirements in the Zoning Ordinance:**

- a. 7.3(1) A home occupation may only be conducted within a detached single-family dwelling.

Here, the Applicants conduct 2A Tactical solely within their detached single-family dwelling. 2A Tactical conducts its operations from a portion of the basement in the Property's residence. That is where Mr. Russell and his employees work, and that is where customers can patronize the business.

During the September 15 hearing, there were questions regarding whether the Conex containers constitute "conducting" a home occupation outside of the dwelling. The Zoning Ordinance does not define what it means to "conduct" a business. Undefined terms in zoning ordinances are interpreted based on the plain and ordinary meaning of those terms. See Boyle v. City of Portsmouth, 154 N.H. 390, 391 (2006) (interpreting an undefined zoning ordinance term based on the Webster's Dictionary definition of that term).

Webster defines "conduct" to mean "to direct or take part in the operation or management of" as in "conduct a business." "Manage," in turn, is defined as "to exercise executive, administrative, and supervisory direction of" or "to direct or carry on business or affairs."

Taken together, the Zoning Ordinance's restriction that a business must be "conducted within a detached single family dwelling" requires that a home occupation be managed or directed from within a property's single family dwelling. In other words, the 2A Tactical home occupation is conducted from the Property's basement because that is where Mr. Russell oversees his business, that is where Mr. Russell and his employees work, and that is where customers can patronize the business.

The mere storage of merchandise and office supplies does not constitute "conducting" a business outside the dwelling. No employees work in the Conex containers. Gunsmithing and manufacturing does not occur in the Conex containers. No customers set foot in the Conex containers. In sum, Mr. Russell is not managing, directing, or conducting his home occupation in the Conex containers—the business is conducted in a portion of the residence's basement.

When interpreting statutes and ordinances, the New Hampshire Supreme Court additionally requires that such laws be interpreted based on the language of those laws, and the Court does not consider what a rulemaker might have said or add language that the rulemaker did not see fit to include. See Town of Atkinson v. Malborn Realty Trust, 164 N.H. 62, 67 (2012). Significantly, here the Zoning Ordinance used the language "conducted within a detached single family dwelling," which as described above refers to the management and direction of a business. However, if the Zoning Ordinance had intended to restrict any aspect of a home occupation from being located outside of the dwelling, it could have easily done so by

using the word “located” instead of “conducted.” The fact that the Ordinance used the less restrictive word “conducted” rather than the more restrictive word “located” indicates a clear intent that the Zoning Ordinance not restrict incidental use of areas of a property outside of the dwelling on a property.

Finally, the meaning of laws must be interpreted from those laws “considered as a whole.” Malborn Realty Trust, 164 N.H. at 67. Read as a whole, the Home Occupation ordinance reinforces that incidental business storage is not “conducting” a business. For example, Section 7.3(5) prohibits a home occupation from “storing” more than one commercial vehicle on the premises. In other words, Section 7.3(5) recognizes that storage may occur outside of the dwelling. Similarly, 7.3(6) ensures that the “exterior appearance” of the home occupation does not render the premises objectionable or detrimental to the residential character of the neighborhood.

The Applicants’ limited use of the Conex containers for storage of merchandise and office supplies complies with Section 7.3 of the Zoning Ordinance, read as a whole. Similarly, the limited use of the Conex containers complies with the spirit of the Zoning Ordinance. The Conex containers are tidy and located behind a shed to shield view from the road, ensuring the Property’s exterior appearance is not objectionable or detrimental to the neighborhood. The home occupation operations are conducted in the basement of the dwelling, consistent with Section 7.3(1).

- b. Section 7.3(2) Not more than one (1) home occupation may be carried on in a dwelling.

2A Tactical is the only home occupation carried on in the Property’s dwelling.

- c. Section 7.3(3) No more than 30% of the dwelling’s net living area shall be devoted to such use.

Thirty percent of the dwelling’s net living area is not used for the Home Occupation because the Home Occupation is conducted in part of the basement, which is not living area.

The Tax Card for the Property identifies the floor plan of the dwelling and includes codes for whether those areas are living space, attic, basement, garage, or porch. In particular, for areas that are not traditionally considered living space, such as basements and attics, the Tax Card identifies whether those areas are finished or unfinished. For example, the Tax Card reflects that the dwelling has 672 square feet of unfinished attic, designated as “ATU,” and 1,120 square feet of finished attic, designated as “ATF.” For the basement area, the Tax Card identifies 1,544 square feet of “BMU,” meaning unfinished basement.

Even if all of the areas of the dwelling were considered living area, the basement makes up only 19.2% of total dwelling square footage (1,544 square feet out of 8,056 square feet total).

- d. Section 7.3(4) There shall be no display of goods or wares visible from the street.

There are no goods or wares visible from the street. The Applicants submitted two photographs at the September 15 Hearing that demonstrate visibility from the street, and no goods or wares are visible.

- e. Section 7.3(5) Not more than one (1) commercial vehicle related to said home occupation shall be stored on the premises.

No commercial vehicles related to 2A Tactical are stored on the Property. The only vehicles stored on the Property are the personal vehicles of Mr. and Mrs. Russell.

III. Attorney Spector-Morgan's October 5, 2021 Letter to the ZBA:

We received a copy of Attorney Spector-Morgan's October 5, 2021 letter to this Board, which she sent on behalf of the Board of Selectmen. Much of Attorney Spector-Morgan's letter just repeats the same arguments that were laid out in her May 17, 2021 letter, which was previously provided to this Board in the variance application materials.

The Board's arguments generally ignore the Zoning Ordinance's Home Occupation requirements, which Mr. Russell's business complies with as described above. The Town has been and continues to be unyielding on these issues, often alleging violations that are either unsupported or have no basis in the Zoning Ordinance.

I think it is important to step back and take a big picture look at the alleged "harm" that the Town is fighting tooth and nail to stop: effectively, the Town is seeking more than \$40,000 in damages based on an allegation that Mr. Russell is using a larger portion of his basement and that some customer cars have been legally parking off the pavement on Tolend Road. The Town's allegations frequently and arbitrarily change; the Town has still produced no evidence of the alleged detrimental traffic; and the town has still not produced any evidence of "complaints of parking in the road," other than Treasurer Peter Royce's inappropriate use of his position to complain. There is simply no explanation for why the Town continues to act in this manner while denying Mr. Russell access to speak to the Board of Selectmen.

Notably, the letter from the Select Board to this Board references some of the newly identified fire code violations (addressed below), including "unpermitted electrical work." The Applicants hired a licensed, professional electrician firm—Saccocia Electric, owned by Barrington Select Board member James Saccocia—to perform the electrical work in question. Electricians are expected to pull the permits required to perform the work they are hired to do. Although the Applicants recognize that ultimately the failure of a contractor to pull required permits is imputed to the property owner, it is frustrating and reeks of bad faith that the Select Board would criticize the Applicants for unpermitted electrical work that is the fault of a business owned by a member of that very Select Board.

IV. Identified Fire Code Violations:

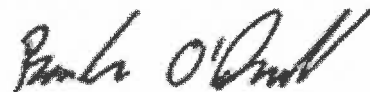
I want to touch briefly on the previously unknown fire code violations that Chief Walker and John Huckins identified in their recent inspections. At the outset, I want to make it clear that Mr. Russell takes those identified code violations seriously. Mr. Russell has already corrected some of the identified violations, and he will continue to diligently work with the Fire Department to correct all of the identified violations.

That being said, none of those identified code violations are relevant to Zoning Ordinance Section 7.3(6) because they do not render the Applicants' Property objectionable or detrimental to the residential character of the neighborhood because of exterior appearance, traffic, emission of odor, smoke, dust, noise, or on-site storage of hazardous materials. Therefore, the ZBA can properly determine that no variance is required because the Applicants' home occupation meets the enumerated zoning requirements for a home occupation.

However, I want to be clear that such a determination from the ZBA will have no impact on Mr. Russell's independent obligation to keep the portion of his property used for his home occupation up to code, and Mr. Russell will and must work with the Fire Department to correct those identified violations.

In sum, Mr. Russell is working and will continue to work diligently to correct every identified Fire Code Violation. However, those violations have no bearing on the question before this Board, which is whether the 2A Tactical home occupation is an allowed home occupation use under Section 7.3 of the Zoning Ordinance, or whether a variance is required to allow that use. Regardless of the ZBA's determination regarding that question, Mr. Russell will remain obligated to correct the Fire Code violations.

I welcome the opportunity to answer the Board's questions and concerns at the upcoming hearing on October 20, 2021.



Brendan A. O'Donnell, Esq.

Enclosures: (2)

CC: Attorney Puffer
Attorney Spector-Morgan
Client



Barrington Fire Department

TEL (603) 664-2241 • FAX (603) 664-5417

Incorporated in 1944

Mr. Robert Russell
99 Tolend Rd.
Barrington NH 03825
DBA 2A Tactical

October 5, 2021

Dear Mr. Russell

On Wednesday September 29th you invited Inspector Plante of the NH Fire Marshal's Office and I onto your property located at 99 Tolend Road Barrington where you operate your business, 2A Tactical. You requested a hazardous material inspection based on the Home Occupation provisions of the zoning ordinance. We did not encounter any hazardous materials of concern while we were there.

I did notice several potential fire code violations while we were conducting our hazardous materials inspection.

Some of my concerns include:

- Unprotected temporary wiring between your storage containers.
- The tent being used as part of your business and its use as part of the ingress/egress for your business.
- The use of temporary wiring in multiple locations throughout the business.
- I question if there is adequate ventilation for your test fire area.
- Secondary exits for employees and customers from all areas of the business.
- The occupant load for the business must be determined, I am concerned that with the current layout of your business your occupant load will be an issue.

These are just some of my observations, there may be other issues that will arise during a full Life Safety Code inspection. If you plan to continue operating your business at 99 Tolend Road, a full inspection and compliance with the Fire Code is required. Please let me know your intentions by October 25th.

Respectfully

Rick Walker, Fire Chief
Barrington Fire & Rescue

Cc: Barrington Zoning Board of Adjustment
Conner MacIver, Town Administrator
Laura Spector-Morgan, Esquire
Brendan O'Donnell, Esquire



Town of Barrington
Code Enforcement/Building Department

P.O. Box 660
Barrington, NH 03825
603-664-5183

October 4, 2021

Robert Russell
2A Tactical
99 Tolend Road
Barrington NH 03825

Dear Mr. Russell:

At your request, on October 2, 2021, I met you on your property at 99 Tolend Road at 11:00 am to do an assessment of your compliance with Section 7.3.6 of the Zoning Ordinance.

At that time, you only permitted me to inspect the exterior of the property, though you did show me the inside of 1 Conex box that was used for storage. I did not view uses of the other boxes, the attached garage or the basement that you stated were being used as part of your Home Occupation.

Upon arrival I did see 2 vehicles parked beside the road, 4 in the parking area by the garage and 6 behind the home.

A total of 5 Conex boxes.

A 20 X 30 tent setup as an entry to the basement.

With regard to Section 7.3.6

Exterior appearance

The home itself looks like the other homes in the area, however, the tent and the Conex boxes are not consistent with the residential character of the neighborhood

Traffic

As noted above there was parking on the side of the road

Emission of odor

I did not smell anything out of the ordinary from a residential home

Smoke

I did not see or smell any smoke

Dust

I did not see any dust

Noise

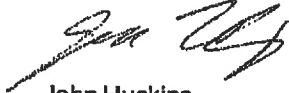
There were no loud sounds

I know you asked me to inspect for compliance with Section 7.3.6, but the Zoning Ordinance contains other requirements for Home Occupations as well, and it did not appear to me that you are in compliance with some of them. Specifically, the Home Occupation is not being conducted within the single family home, as required by Section 7.3.1. Also, your operations are not consistent with the certificate of occupancy I issued under Section 7.3.7.

I observed that electrical service has been run to the Conex boxes without a permit. We agreed that a

permit will be applied for and an inspection will be done to ensure that all work complies to the Electrical Code. Please submit that application within 15 days.

Sincerely,

A handwritten signature in black ink, appearing to read "John Huckins", written in a cursive style.

John Huckins
Zoning Administrator

Cc: Conner MacIver, Town Administrator
Laura Spector-Morgan, Esquire
Brendan O'Donnell, Esquire
Barrington Zoning Board