

**ATKINSON ZONING BOARD OF ADJUSTMENT
21 Academy Avenue
Atkinson, New Hampshire 03811
Public Hearing Meeting Town Hall
Wednesday, November 14, 2018**

Members Present

Glenn Saba, Chair
David Farris
Kevin Wade
Vice Chair Sam Zannini
Bob Connors

Others Present

Joanne Fiore
Steve Fiore
James Kirsch, Code Enforcement Officer

Work Shop 7:00 PM

Call to Order: Chair Glenn Saba called the meeting to order at 7:10 PM.

Other Business: none

Correspondence: not reviewed

Approval of Minutes: October 10, 2018

The Atkinson Zoning Board of Adjustment reviewed the minutes of the October 10, 2018 meeting.

Vice Chair Zannini made a motion to approve the minutes of the October 10, 2018 meeting as amended. The motion was seconded by Member Farris. All members of the Atkinson Zoning Board of Adjustment present at the October 10, 2018 voted in favor. Vote: 4/0/0.

Public Hearing – 7:30 P.M. - Chair Saba opened the public hearing at 7:30 PM, October 10, 2018. Chair Saba, Member David Farris, Vice Chair Zannini, Member Bob Connors and Member Kevin Wade were present.

- 1. Application for Appeal from an Administration Decision – Zoning, submitted by Joanne Fiore owner of Atkinson Farmhouse which is located at 3 Main St, Map 5 Lot 3, property owned by Northeast Realty Trust. She appeals the Code Enforcement decision, dated October 26, 2018 regarding violations of Atkinson Zoning Ordinance Article V, Section 510 – permitted uses in a Commercial Zone.**

Abutters: J&M LLC, Haley Realty Trust, Frontier Development Corp. Northeast Realty Trust, Atkinson Town, Atkinson Town Community Center and Steve and Joanne Fiore (present)

The applicant appeared before the Board. Chair Saba explained to her that this hearing is to appeal a decision by the Code Enforcement Officer. It is up to the applicant to explain why she does not agree with the decision. He also explained that the Board can agree with the applicant, overrule the administrative decision or partly or totally agree with the administrative

decision. The applicant gave each member a packet summarizing how the applicant has proceeded. The packet includes a copy of the business registration to the Town of Atkinson. The line stating materials stored on site lists was plants and flowers. She believes that everything she had planned is allowed and sale of plants and flowers were permitted because agriculture is permitted in the commercial zone.

Chair Saba read the letter dated October 26, 2018 from Mr. James Kirsch, Code Enforcement Officer to the applicant into the record.

This letter is to confirm our discussions and your understanding that conducting any portion of your retail business outside of your rental retail space is a violation of Atkinson Zoning Ordinance Article 5, Section 510 - Permitted Uses in A Commercial District. In addition, the storage and display of your plants, flowers, pumpkins and similar products outside is not listed as a permitted use in Section 510. Please be advised that you may appeal my decision to the Atkinson Zoning Board of Adjustment.

Chair Saba pointed out that the issue is not what is in the application but that the plants and flowers were displayed outside. Chair Saba also informed the applicant that he personally believes that the display is beautiful but what is before the Board is if it is according to Atkinson Zoning Regulations.

Mr. Fiore stated that plants and flowers were in the application. Mrs. Fiore cited the definition of agriculture in NH RSA 21:34a. She has been in touch with Gail McWilliam Jellie, Director of the New Hampshire Division of Agriculture Development. She has highlighted how her business can be considered agriculture. The definition includes production, cultivation, growing and sale of floriculture crops including flowering plants. She states that floriculture is different from horticulture and includes the marketing on site and off site of floriculture. She believes that this is agriculture in a small town, retail spot and a beautiful welcome to Town.

Chair Saba asked the applicant if she grows some of the plants on site. She replies that she grows some of the plants on site and some of it at her house. She also was informed by Ms. McWilliam Jellie that if she is growing it, it doesn't matter if she sells it at her house or at the store, she is still growing it and it is still agriculture. There is a percentage and the percentage of what the applicant grows will increase next year because they will have more time. There are about ten tables outside. Member Wade asked if the amount grown would reach 35% in the future and the applicant explained that it certainly would. The applicant explained that this business opened August 30, 2018. She also explained that she and her husband are professional growers and had a country store at a previous location.

The applicant included some pictures of her display in the packet. It is small scale. She wants to preserve the rural character of Atkinson and she understands the zoning. Chair Saba asked if the applicant had grown the mums shown. The applicant explained that they grew some of the mums prefinished, that is they get smaller plants and grow them to a larger size.

The applicant included the Code Enforcement letter and the permitted uses regulations in the application packet. She stated that when Mr. Kirsch visited her, she was surprised to hear that she was in violation because she thought she had gone through the proper channels. When she was told to remove the plants, she had them out in 12 hours. By doing that, more than half of her income was lost. The agriculture portion is more than 50% of her business. Another issue is, all her Christmas goods were supposed to arrive this week: wreaths, ropes

and trees. If she does not get approval, she will not be able to sell them. The applicant stated that the other business on the site also does business outdoors. Chair Saba informed her that the issue for her business is the display. The applicant stated that customers go into the store to pay.

Chair Saba requested that the applicant focus on the agricultural issue. If it is agricultural, then the Board can allow it. He has done research, there are other stands on the street, but they are not in the commercial zone. The commercial zone is the sticking point. Under the classification of agriculture, the Board can look at another paragraph in the rules and regulations.

Chair Saba asked the Board members if they had any questions. Vice Chair Zannini asked about the village store at the Town Center. Mr. Kirsch explained that it is his understanding from the Selectmen that it is a preexisting, nonconforming use.

Chair Saba asked Mr. Kirsch how the applicants could be allowed to display plants outside. Mr. Kirsch explained that it is not allowed in the commercial zone and according to the chart of permitted uses, note 3 states that business must be conducted inside. The regulation was enacted in 1991. When the applicant registered with the Fire Department, they stated they had retail sales.

Chair Saba asked about Article III, Section 300:A. Mr. Kirsch explained that he believes that the definition which matches Article III, Section 300:A – Agriculture and Forest use does not apply to the applicant's business. Also, in Chapter 21, on the top of the section page it states "where not prohibited by local regulations" which to him makes the entire agricultural argument moot because the proposed use is prohibited by local regulations. Also, in the permitted use section, there is no category for outside storage. The application of regulations state that "any use not specifically permitted by the regulations shall be deemed prohibited". This also ties into the limos.

Member Wade asked if there were any other businesses in the commercial zone that are selling flowers, Christmas trees or anything else outside. Mr. Kirsch replied no. The Commercial Zone is the portion of Main Street on both sides up to Robie Land and Lewis Lane.

Chair Saba read the definition for agriculture and forestry on page Z3, Article III, Section 300:A(3). The applicant's argument is based on RSA 21:34. Vice Chair Zannini stated that Mr. Kirsch's argument would not apply under that definition.

Member Connors read from RSA 21:34 which states "that a farm roadside stand shall remain an agricultural operation and not be considered commercial use, provided that at least 35 percent of the product sales in dollar volume is attributable to products produced on the farm or farms of the stand owner and stated that it sounds like what the applicant is doing, but it happens to be in the commercial district.

Chair Saba asked to go back to Article III, Section 300:A to see if it is agricultural by Atkinson Zoning Regulations definition. Member Connors stated that the applicant's business sounds like a farm roadside stand. Member Wade agreed.

Mr. Kirsch stated he believes it isn't really agriculture, it is retail, and that it is not allowed in the commercial zone. Chair Saba stated that agriculture is. Mr. Kirsch believes the application does not fit the definition of agriculture. He has been dealing with the business as a retail

enterprise. In a retail enterprise, doing business outside is not permitted. Chair Saba stated that if it is agricultural, it is allowed. Mr. Kirsch responded that it is allowed unless not permitted by local ordinances as stated in Chapter 21. Chair Saba stated that under permitted uses, Article III, Section 300:A(3), it is allowed in the commercial zone.

Mr. Kirsch stated that he does not believe that Article III, Section 300:A(3) applies to the applicant's business. Chair Saba stated that the Board has to look at the definition Article III, Section 300:A(3), interpret it, go to permitted uses and decide. Member Connors stated that if it is Commercial Agricultural, it is allowed, if it is Commercial Retail it is not allowed.

Mr. Kirsch stated that you cannot say that Commercial Agricultural is allowed because it states in the Agricultural ordinance "unless prohibited by local regulations". The only thing being prohibited is doing business outside in a commercial zone. As to the ice cream stand, it is made inside, people purchase it and walk away.

Vice Chair Zannini asked if the language stating that everything has to be done inside applies to agriculture.

Mr. Connors asked about the spirit of the ordinance and for example, other businesses could not sell Christmas Trees because it is not their principal business, but the principal business in this application is the sale of agricultural products.

Chair Saba stated that the Community Center does the Farmers Market and the Mr. Kirsch stated that it is a government building allowed by the Town.

Chair Saba is looking at Article III, Section 300:A(3) and under Article V, Section 510:(a), it is allowed in the commercial zone under the regulation. He interprets the regulation as stating that in the commercial zone, outdoor retail is not permitted unless it falls under agricultural retail. ... Agriculture and forestry shall be such uses generally associated with agriculture and forestry endeavors.

Under 21:34aiii, the word farm means any land, buildings or structures on or in where agricultural and farming activities are carried out or conducted and shall include residence or residences of owners, occupants or employees located on such land. It shall apply to all farm and outbuildings...

Member Connors stated that the key regulation is 21:34aiii which defines Farm Roadside Stand. Vice Chair Zannini asked if it pertained to a residence. Member Wade stated that if it were a residential property, this would not be an issue.

Mr. Kirsch stated that 21:34(a)iii talks about what is produced on the farm or the farm of the stand owner and the applicant does not own a farm. Chair Saba stated that the applicant claims she grows over 35% of the products she is displaying outdoors.

Member Connors stated that the Board is discussing the definition of farm, agricultural farming and 21:34(a)iii talks about a farm road side stand and does not say if it is residential or where it is located. Then if applied to the commercial definition which states that agriculture is allowed in the commercial zone, it should be allowed.

Mr. Kirsch stated it should not be considered commercial, but the farm stand is in the commercial zone.

Chair Saba stated that if Article V, Section 510(a) did not exist, the business would not be allowed. Going to Permitted Uses Article V, Section 510(a) - agriculture, the business is allowed in the commercial zone. He is aware that outdoor displays are not allowed in the commercial zone, so a display of lawnmowers would not be allowed, but after reading Article V, Section 500, he believes that agricultural sales are allowed outside.

Mr. Kirsch disagreed stating that all the above is true except for the section stating that Note 3 under the Commercial Zone states that outside storage and sales are not permitted.

Chair Saba read the definition of the Commercial Zone. Under Section 3 it states that business must be conducted in the interior of the building only. He then returned to the definition of the Commercial Zone. Then he returned to permitted uses and agriculture is permitted, then went to the definition of agriculture, under permitted uses (a). Then he went to Farm Agriculture, farming and the definition and read it again.

Chair Saba then returned to RSA 21:34 and the definition of the word farm:

RSA 21:34-a defines farm as "any land, buildings, or structures on or in which agriculture and farming activities are carried out or conducted and shall include the residence or residences of owners, occupants, or employees located on such land. Structures shall include all farm outbuildings used in the care of livestock, and in the production and storage of fruit, vegetables, or nursery stock; in the production of maple syrup; greenhouses for the production of annual or perennial plants."

Chair Saba also read the definition of the words agriculture and farming:

"As further provided in RSA 21:34-a, the words "agriculture" and "farming" mean all operations of a farm, including: ... (11) production, cultivation, growing, harvesting, and sale of any agricultural, floricultural, vinicultural, forestry, or horticultural crops and any practice on the farm incident to, or in conjunction with, such farming operations".

Mr. Kirsch disagreed stating that these activities are not taking place on a farm, they are taking place in a commercial zone, the RSA talks about doing these activities on a farm, not in a store. Also, all agricultural uses are permitted except where prohibited by local regulations.

Chair Saba stated that Mr. Kirsch is not looking at Article III, Section 300- Permitted Uses (a) which states it is allowed.

Mr. Kirsch asked the Board to look at the definition of Agriculture and Forest Uses and stated that he does not believe that the business of the applicant does not fit the regulation. If you look at permitted uses in a commercial zone and it states "unless prohibited by local regulations". All the storage, shopping and display must be done inside.

When the applicant spoke to Ms. McWilliam Jellie, she was informed that what she does is agriculture whether she grows the product at her home or at her stand, and it does not matter whether she sells the product at her home or at her stand. She grows the product, there are several stages to growing floriculture. This summer the applicant just did the pre-finish stage. But in the future, she is planning to do more stages of floriculture.

Member Connors stated that he believes the Board agrees with the applicant concerning the agricultural part, the issue is, the regulations allow agriculture in the commercial zone, but is it allowed in that particular area.

Member Connors stated that the question is, the regulation that states agriculture is allowed in the commercial zone, then what does that mean. The Board agrees that it is an agricultural business.

Vice Chair Zannini stated that Mr. Kirsch is stating all agriculture has to be inside.

Mr. Kirsch stated that agriculture as the Board is defining it fits a retail store, which is what the applicant's business is. They could sell the product inside of the store, but cannot display it outside.

Vice Chair Zannini asked if all agriculture and forest use have to be inside, and Mr. Kirsch stated yes, in the commercial zone.

Chair Saba stated that that it is Mr. Kirsch's interpretation and the Board has to decide if it is correct.

Chair Saba opened the discussion to the public. There were no comments.

Vice Chair Zannini asked about what forest uses might be and if those things could be done all inside. Chair Saba asked what the intent of including agriculture and forest uses in the commercial zone if it is only allowed inside and requested comments from the Board. Member Connors agreed that agriculture cannot be done inside. The Board agreed that the intent of the ordinance is to prohibit sale of equipment and cars or of allowing other business occasional sale of plants.

Chair Saba reread the definition of the commercial zone, Article V, Section 500:5(c) and asked if the sale of mums is pleasant and New England culture.

Member Connors asked what the zone is for Freshwater Farms. The applicant stated that she has it in her notes. Mr. Kirsch stated that it is Commercial Industrial. Member Wade stated that Freshwater Farms does not grow their own Christmas Trees.

The Board discussed Forest Uses and whether they could be conducted inside.

Mr. Kirsch stated that goods cannot be stored outside, it is not listed in the permitted uses and Atkinson has exclusionary zoning. The pumpkins and plants are stored and displayed outside.

Vice Chair Zannini asked if growing Christmas Trees is forestry use and if it could be done inside and the Board agreed it could not.

Chair Saba stated that it is not the intent of the regulation to prohibit the display of plants outside. It is his belief why agricultural uses are listed as an allowable use in the commercial zone. Member Wade confirmed with the applicant that all business transactions are conducted inside, the product is displayed outside. The applicant reaffirmed.

Member Connors stated that in reviewing commercial agricultural forest uses, he does not believe those uses can be conducted inside.

Chair Saba asked Mr. Kirsch if he knows the intent of the writers of the definition of the commercial zone when they wrote it in 1991 and he replied no.

Vice Chair Zannini remarked that all the buildings in the Commercial Zone are small and there is no room for inside display of goods. Chair Saba looked at the definition which is concerned

with maintaining the character of New England and having a pleasant view. Member Connors stated that the intent was directed at storing pallets of fertilizer and equipment outside.

Chair Saba asked if the Board agrees that under Article III, Section 300:A - Permitted Uses, agriculture and forestry is an allowable use in the Commercial Zone and if the applicant's business is agricultural then the applicant would be able to conduct their business in the present manner. The Board all agreed.

Chair Saba asked the Board if the business can be considered agricultural. The Board agreed.

Chair Saba asked how the Board would know, the applicant has informed them that more than 35% of the plants will be grown by the applicant and how can the Board confirm that RSA 21:34 is met. Chair Saba reread the regulation that states marketing and sale of agricultural products is allowed anywhere. Mr. Kirsch states that the use is not permitted by local regulations and Chair Saba is arguing that it is.

There was no more discussion. Chair Saba requested a motion.

Member Wade made a motion to go to a vote. Member Connors seconded the motion. All in favor. Vote: 5/0/0.

Vice Chair Zannini made a motion not to uphold the code enforcement decision dated October 26, 2018 regarding violations of Atkinson Zoning Ordinance Article V, Section 510 – permitted uses in a Commercial Zone because the Board has decided that it is a permitted use, agriculture and forest uses are permitted uses in the commercial zone. Member Connors seconded the motion.

Discussion: Chair Saba stated that based on permitted uses, Article V, Section 510A, agricultural and forest uses are allowed in the commercial zone and based on RSA 21:34 which defines agriculture and farming, he agrees with Vice Chair Zannini. Member Connors agreed that the applicant's proposed use is in the intent and the spirit of the ordinance as interpreted by the Board.

All members of the Atkinson Board of Adjustment voted in favor. Vote: 5/0/0.

Chair Saba informed the applicant that there is a 30-day appeal period, the Code Enforcement Officer's ruling has been overturned and the applicant can conduct business as usual unless someone appeals the decision of the Board within the 30-day period.

There was no more discussion.

Vice Chair Zannini made a motion to close the public hearing. Member Connors seconded the motion. All members of the Atkinson Zoning Board of Adjustment voted in favor. Vote: 5/0/0.

Vice Chair Zannini made a motion to adjourn. Member Farris seconded the motion. All members present voted in favor. Vote: 5/0/0.

The Board continued to review the minutes of the October meeting.