

**TOWN OF EPSOM
ZONING BOARD OF ADJUSTMENT MEETING
Epsom Central School, Epsom, New Hampshire
July 5, 2023, 7:00 PM**

PRESENT

Glenn Horner, Chair
Ryan Kehoe, Vice Chair
Gary Kitson, Member
Alan Quimby, Member
Lisa Thorne, Member
Prescott Towle, Alternate Member
Andrew Ramsdell, Alternate Member

Jason Johnson, Alternate Member- excused absence

ALSO PRESENT

Jennifer Riel, Recording Secretary
Virginia Drew, Board of Selectman
Representative
Mariam Cahill-Yeaton, resident
Norman Yeaton, resident
Chery Gilpatrick, resident
Ricky Harrison, resident
Rob Topik, applicant
David Kilian, applicant
Keith Brown, applicant
Steven Rhodes, resident
Patricia Rhodes, resident
Meadow Wysocki, resident
David Goulet, resident
Karen Goulet, resident
Shania Heath, resident
Shawn Dunphy, Esq.
John Bisson, Esq.

Barbara Lezon
Millie Harrison
Ricky Harrison, applicant
Kristen Tomarchio, resident
Philip Tomarchio, resident
Bill Acheson, resident
Lisa Acheson, resident
Roger Leroux, resident
Trish Leroux, resident
Hugh Curley, resident
Deb Sargent, resident
April Ross, resident
Don Fuller, resident
Karen Keeler, resident
Mike Keeler, resident
Joyce Heck, resident
Kim Gillis, resident
Linda Sampson, resident

CALL TO ORDER

Chair Horner called the meeting to order at 7:00 PM.

Introductions were made of the Board members present.

APPROVAL OF MINUTES

Meeting of June 21, 2023 – Edits were made.

MOTION: To approve the minutes as amended. Motion by Mr. Kitson. Second by Ms. Thorne. Motion passed, 5-0-0.

PUBLIC HEARING - Case 2023-06 (Topik - AA) – Robert Topik et al. have applied for an Administrative Appeal seeking to overturn the Planning Board's May 10, 2023 decision that a proposed Federal Firearms Licensed gun and sporting goods business was permitted as a home occupation in the Residential/Agricultural Zone in accordance with the Epsom Zoning Ordinances. The subject property is located on Lena Lane within the Residential/Agricultural Zone and is identified on Epsom Tax Map R01 as Lot 30-26.

Chair Horner confirmed public notices were posted at the Town Offices, Post Office, and published in *The Concord Monitor*; all abutters were notified by certified letters. The only return receipt not received was from abutters Tomas and Sarah Skafidis.

The public notice was read into the record.

Chair Horner opened the public hearing at 7:08 PM.

David Kilian, applicant, stated he lives on the corner of Lena Lane and Spring Lane; he stated the problem is that people will be coming to the residents to fill out paperwork to buy a handgun; which makes the business commercial. Mr. Kilian stated per the covenants of the subdivision, fences, and farm animals are not permitted; the area is used for walking and the speed limit is 25 miles per hour. He stated he is not opposed to firearms; the Planning Board approval allows retail sales in the home business and other places that can have a commercial business. Chair Horner asked if internet sales are identified in the Zoning Ordinances. Mr. Kilian stated in the discussion by the Planning Board that the ordinances are outdated and that it is the spirit of the law to allow internet sales; he stated he disagrees and that is something that should be put in front of the Town for a vote.

David Goulet, applicant, referenced the Zoning Ordinance regarding home occupations; he stated he doesn't agree that selling guns in a residential area fits the definition of a home occupation. He stated the business is not permitted; he stated he is also concerned about the increase in traffic, noting there have already been problems with people selling guns in another neighborhood where guns were left unattended on porches. Mr. Goulet stated he is concerned property values will be diminished if buyers know there is a home occupation selling guns. Chair Horner asked if a gun could be considered a "small ware" per the ordinance. Mr. Goulet agreed it could and it's clear that is not permitted. He stated the ordinance is clear that the home occupations listed are services as opposed to retail items. Mr. Quimby stated the list is not exhaustive and only examples.

Keith Brown, applicant, stated he agrees there is no place for this business in the neighborhood; he stated he doesn't believe any kind of sales should be permitted.

Robert Topik, applicant, stated if guns were considered "small wares", it would not be permitted; he stated there are limited exceptions per the ordinance. He stated some services are permitted, however, general service business is not permitted; he stated the Federal Firearms License is for retail sales transfers, so it is a service; he stated the license also covers manufacturing and that is not permitted per the Retail Table of Uses. Chair Horner clarified it is permitted with Special

Exception. Mr. Topik stated if the ordinance was intended to expand the uses, it could have included the language “not limited to”. Mr. Topik presented a sample decision to the Board. He stated he doesn’t believe the idea of gun sales was even considered when the ordinance was written.

Chair Horner opened the public hearing to abutters in favor of the administrative appeal.

Mike Keeler, resident on Spring Street, stated the area has always been quiet. He stated he has been in real estate for 30 years and agrees that values could be diminished with a gun sale business in a neighborhood. Mr. Keeler stated this case is opening the door for commercial operations in a residential area and is favor of the appeal as it will change the neighborhood. Chair Horner stated a variance and special exception has been mentioned however that is not the subject of this hearing.

Mariam Cahill-Yeaton, resident, stated she is not in opposition to firearms however she disagrees with the Planning Board, noting she voted in the minority. She stated she believes that people that purchase property in a cluster development expect the area to remain residential. She stated the Rhodes signed a document in February 2023 which indicates they intend to manufacture components and conduct sales of firearms. Ms. Cahill-Yeaton reiterated the ordinance clearly indicates any manufacturing is prohibited in the residential/agricultural zone.

Shania Heath, resident, stated she agrees with Ms. Cahill-Yeaton.

Chair Horner opened the public hearing to abutters in opposition of the Administrative Appeal.

Deb Sargent, resident, stated there were special conditions for the Planning Board approval; she stated there have been concerns voiced about property values and traffic however the conditions address the number of customers and deliveries with most of the work being done online. Ms. Sargent stated she lives in an area in which businesses were permitted and residential properties were not negatively affected. She stated she doesn’t agree values will be diminished by the existence of a business. Chair Horner stated the issue of property values needs written evidence to support that argument.

Kim Gillis, resident, stated the nature of the risk of the business is of concern as guns can be a danger in society.

Roger LaRue, resident, stated he is a neighbor of the Rhoades on Lena Lane; he stated they lived there before Lena Lane was developed and it is a quiet neighborhood and thinks a firearms service is not the right business for the neighborhood.

Cheryl Gilpatrick, resident, gave a statement indicating her comments are as a resident, in opposition to the Administrative Appeal and in support of the Rhoades’ home occupation; she stated per the ordinance the proposed use fits in the definition of a home occupation, noting there are many occupations being run in residential homes of New Hampshire. She stated nearly all occupations require clients, and delivery vehicles. Ms. Gilpatrick stated the items listed in the ordinance are not limited to only those listed. She stated the home occupation as presented is less

intrusive than nearly all the occupations listed in the “such as” list in the Table of Uses. Ms. Gilpatrick stated the home occupation does not disrupt the residential character of the home and neighborhood.

John Bisson, Esq., a representative for the Rhodes, stated the focus needs to be on the appeal of the Planning Board decision of May 10 and outlined the conditions of the approval by the Planning Board:

- *Customer pickup/delivery of firearms may occur only by appointment, Monday through Friday, 9:00 AM to 3:00 PM.*
- *Only one customer pick-up may be scheduled per week.*
- *Customer Firearms cannot be loaded at any time during the transfer.*
- *No discharging of customers’ weapons on the property except in the case of self-defense.*
- *The Epsom Police Department shall perform all necessary inspections.*
- *No business signage is permitted on-site.*
- *No firearms packages may be delivered on-site without the recipient’s signature.*
- *The manufacture or sale of ammunition is prohibited.*

Attorney Bisson stated the decision of the Zoning Board is only to determine if the decision of the Planning Board was appropriate. He stated many residents voiced concerns and they have stated it is not about guns, however, it is in fact about guns because if it was another item, the home occupation application would not be an issue. Attorney Bisson stated guns are in fact legal items and a home occupation is permitted in this zone. He stated the ordinance clearly indicates the list of occupations is not exhaustive; he stated the issue is not retail or manufacturing and the Federal License transfer is a service; he stated there is a process for transferring ownership of firearms and that is the service being done. Attorney Bisson stated there will be no retail sales of firearms; there will be no manufacturing of firearms, and it is a customary home occupation because the list is not exhaustive. Attorney Bisson stated if this home occupation is prohibited under the ambiguities of the ordinance, anything else can be prohibited. He stated typically an administrative appeal comes when a Zoning Compliance Officer finds a violation, but the Rhoades have been following the legal process for establishing a home occupation and that was the decision of the Planning Board. Attorney Bisson stated the issues of traffic and property values are not the topic of this hearing; he stated it is only for the Zoning Board to determine whether the ordinances are being adhered to. Attorney Bisson stated the primary use of the property is a home for the Rhoades; no more than two persons will be employed; there is reasonable lighting to accommodate this operation because no lighting is needed. He stated there won’t be any noise or odors emitted that will affect the neighborhood; he stated there won’t be any outdoor store. Attorney Bisson stated if a dressmaker, as referenced in the Table of Uses, can bring in raw materials, it is no different from the case at hand; he stated just because the subject of the home occupation is guns, which are legal, doesn’t mean it is a home occupation that is not allowed.

Steven Rhoades, explained the term “manufacturing” with firearms can include something as simple as attaching a flashlight and confirmed he will not be manufacturing items; he clarified they personally made the decision to not accept any items which have been altered. He confirmed no firearms will be sold from the residence; he explained the firearms will not be stored on the property; he will be the service provider for the transfer from manufacturers to the

buyers. Chair Horner stated internet sales are similar to retail sales, although the ordinance has not been updated to include internet sales.

Ms. Gilpatrick stated it was mentioned at the beginning of the hearing, that applicants would be coming to the home to fill out applications. Mr. Rhoades stated in the process of the transfer of a firearm, a firearm cannot be directly transferred between the seller and the buyer but has to be handled by a Federal Firearms License holder and explained the detailed background check and identity verification that is done. Mr. Rhoades stated there is no exchange of funds through this process between the FFL holder and the firearms purchaser. He stated the entire process is overseen by the State of New Hampshire State Police and the Alcohol Tobacco and Firearms Agency. Mr. Rhoades stated a firearm will be stored in a locked safe until the process is complete and they have the right at any point to terminate a request.

Patricia Rhoades, stated the FFL transfers are not a sale but a service for which they may collect a small fee; she clarified at the May 10 public hearing with the Planning Board, the hours of operation to have one person per week do a transfer, with hours being approved through ATF being between 9:00 AM to noon, Monday through Thursday; there is no sale at any point on the property. She stated there would be no signage, and no listing anywhere for the business other than through the ATF and FFL directory. Ms. Rhoades stated the majority of items purchased through their website will be shipped directly from the manufacturer to the FFL dealer of the customer's choice.

Mr. Goulet stated per the ordinance, which has been referenced, the definition is clear for a home occupation and this proposal is not in the definition.

Mr. Kilian stated he is in favor of gun rights but if a firearm is shipped to this residence, a fee is collected and there is a transfer, then it is a retail sale. He stated until ordinances are changed, they need to follow them and believes there is a difference between this business and other businesses.

Mr. Topik stated there is no set of facts where a gun dealer can be permitted under the Table of Uses. He stated the ordinance lists home occupations for off-site contractors. He stated he submitted evidence from an online firearms attorney which indicates it is not a customary home business. Mr. Topik stated he doesn't agree this is a recognized profession.

Chair Horner closed the public hearing at 8:31 PM.

Chair Horner stated the definition needs to govern and believes the Planning Board decision was wrong; he referenced the common items which are listed in the Table of Uses, none of which is retail sales. He stated gun sales are not a home occupation.

Mr. Kehoe stated many examples are given for a home occupation, but this doesn't fit in the definitions, and agrees it is retail sales and not a service. He stated the intention is to keep a residential area, for residential use.

Mr. Kitson stated he believes the ordinances may be antiquated but decisions by the Planning Board can't alter the ordinance and he doesn't believe the ordinance allows retail sales.

Ms. Thorne stated she agrees that retail sales are occurring within the residential home, even if it is through the internet but internet sales are not defined in the ordinance so shouldn't be permitted.

Mr. Quimby stated he isn't opposed to firearms but in this area, it is not permitted within the ordinance.

Chair Horner presented a motion of approval for the Administrative Appeal for review by the Board.

A resident interjected and asked why a decision was written ahead of time. Ms. Thorne stated Chair Horner always writes two decisions before a meeting. Chair Horner explained he writes decisions both for and against a case ahead of time because he isn't good at "wordsmithing on the spot. Attorney Bisson requested copies of both decisions. Only one decision was provided by Chair Horner to Mr. Bisson.

MOTION: To overturn the Epsom Planning Board decision of May 10, 2023 based on the definition of home occupation as listed in the ordinance's glossary:

"Home Occupation: *Use of a dwelling by the resident owner or tenant for a customary home occupation such as dressmaking, hairdressing, home daycare, teaching, or the offices for real estate, insurance, engineer, doctor (other than veterinarian), dentist, architect, lawyer, or other recognized profession similar in scope and impact."*

Taken collectively, home occupations are technical and professional services commonly offered to the general public and in no way relate to the retail sale of a specific item.

Alternatively, retail sales of guns are objectively captured in the description provided in Article II.C (Table of Uses), Retail and Service Use #2:

"Retail establishment selling and/or renting general merchandise, including, but not limited to, dry goods, apparel and accessories, furniture and home furnishings, home equipment, small wares, and hardware, and including discount and limited price variety stores."

Wares are defined as a "manufactured item of a specific type" or "items offered for sale". As such, guns meet the definition of a ware. Hardware is defined as "tools, machinery, and other durable equipment". Guns are durable equipment and commonly used as a tool for hunting. In both instances, this use is consistent with a Retail and Service Use #2.

Gun sales are considered a Retail and Service Use #2 and not a home occupation. Per the Table of Uses, gun sales are not permitted in the Residential/Agricultural Zone. In

order to establish a Federal Firearms Licensed gun and sporting goods business in this zone, variance approval from the Zoning Board of Adjustment is required.

Motion by Mr. Kehoe. Second by Mr. Kitson. Motion passed, 5-0-0.

Mr. Ramsdell joined the meeting.

PUBLIC HEARING - Case 2023-07 (Harrison – Var.) - *Ricky Harrison has applied for a Variance to Article II, Section C (Table of Uses) #27 (Construction industry and suppliers) to establish a paving business in the Residential/Light Commercial Zone. Construction businesses are not permitted in the Residential/Light Commercial Zone. The property is located on Dover Road within the Residential/Light Commercial Zoning District and is identified on Epsom Tax Map U5 as Lot 83.*

Chair Horner confirmed public notices were posted at the Town Offices, Post Office, and published in *The Concord Monitor*; all abutters were notified by certified letters.

The public notice was read into the record.

Chair Horner opened the public hearing at 8:54 PM.

Ricky Harrison, applicant, stated he has received the NH DOT permit for the driveway and the access for the trucks has been completed with gravel; he stated he moved the trucks off the property as requested. He stated he has obtained estimates for having white blockade fencing to provide privacy for their property and abutters. He stated everything required for the permitting has been completed.

Mr. Harrison stated he is looking to store trucks and equipment on the property; he stated he will not store or mix materials on site; trucks are clean from debris when returning to the site so nothing will leach into the ground. He explained no customers will be coming to the property as everything is done online and via telephone. Mr. Harrison stated there is a pavement distributor ½ mile from his property and is in the same zoning. He outlined other businesses in the area, with the same zoning, and explained his business will be less intrusive than those including a concrete mixing company and landscape material sales. Mr. Harrison explained there is a washout system at the pavement plant where he takes the trucks and equipment for cleaning prior to bringing them back to the property to park at night; he confirmed his trucks do not leak in the parking area. Mr. Harrison explained his oldest vehicle is 3 years old and all the trucks are very quiet and can't be heard when starting up. He explained prior to purchasing the property, he discussed his business with the Zoning Compliance Officer, Scott Lacroix, and it was indicated at that time there would be no problems with utilizing the property for parking his paving trucks as well as a residential home. He stated he would not have purchased the property if he had not been assured it would suit his needs. Mr. Harrison stated he asked Mr. Lacroix at the time for something in writing confirming the advice he was given but nothing was ever received.

Mr. Towle asked if the water on the property has been tested. Mr. Harrison stated there is no well on the property yet.

Mr. Kitson explained the area of Route 4 was redone in 1986 with drainage and culverts; he stated the culvert has not been cleaned since that time, but the State Department of Transportation has been notified of the problem.

Chair Horner stated they need to look at the future impact if this variance is granted for a paving business on the lot and doesn't want to see another paving company that isn't as conscientious of keeping the lot clean. Mr. Harrison stated they are looking to make this their forever home and have no intentions of selling the business.

Joyce Heck, resident, asked if any business besides paperwork will be done on-site. Mr. Harrison confirmed the only business operations conducted on site are paperwork, emails and phone calls. It was clarified the variance is needed to establish the business at the address. Mr. Harrison confirmed no maintenance work is done on the equipment on the site. He stated hand tools are stored in a sealed and secure box truck.

Ms. Gilpatrick asked if the Board is aware of any variances for the antique shop and the karate school businesses.

Philip Tomarchio, stated he is the owner of the karate school and explained no variance was needed as the use was specifically permitted in the ordinance. Chair Horner stated the antique shop is likely grandfathered.

Chair Horner opened the hearing to input from the public in favor of the variance.

Don Fuller, abutter, stated they have no problems with this application, noting they have always observed the equipment returning to the site clean and the Harrisons have been good neighbors.

Chair Horner opened the hearing to input from the public in opposition to the variance.

Mr. Tomarchio, abutter, stated everything Mr. Harrison says is a lie and he has pictures of the trucks being cleaned by Mr. Harrison on the lot. He presented MSDS sheets for asphalt materials and stated the chemicals are all terrible and toxic. Mr. Tomarchio stated he has a video of the trucks being dumped on the property. He stated it is a light commercial property and is not permitted; he stated he has concerns that the aquifer is being contaminated. Mr. Tomarchio stated he has observed 18 employees coming and going at all hours and explained instances where the workers have been rude to him and his wife.

Kristen Tomarchio, abutter, stated the left-hand side of the property is clean; however, there are 15-foot piles of dirt dumped right at their property line. She stated they brought their property to restore the building and have been following the ordinances; she stated the Harrisons have been doing numerous things without permits and the business has been operating without permits. Ms. Tomarchio stated this business does not fit within the ordinance as it's a commercial business.

Chair Horner asked if its tar spots that are shown on the pictures presented by the Tomachios. Ms. Tomachios confirmed that is correct. Mr. Harrison stated he talked to his builders about the

project fencing that was placed on the property line; he explained the piles of fill are from the excavation by the contractors and he asked the contractor to move the piles. Mr. Harrison stated the statement about 18 employees is not accurate as he does not have that many employees and can provide proof in payroll records.

Mr. Harrison explained the dark images in the photos are not tar; it is loam and due to the heavy rains recently, is now running across the proper. Ms. Tomachio confirmed she did not test the spots. Mr. Tomachio stated there are photos of the trucks being cleaned with a pressure washer. Mr. Harrison reiterated the inside of the dump trucks and equipment are cleaned offsite; he has occasionally washed the body of vehicles but didn't know it was illegal as it is no different than washing any other vehicle. He stated asphalt cannot be power washed off the ground and so the dark spots indicated in the photos are not asphalt.

Ms. Heck stated this construction-related business is not permitted in the light commercial zone. She stated she doesn't believe it is consistent with the ordinance and there is no justice for the public with this proposal; she stated she believes property values will be diminished. Chair Horner asked if she is opposed even if it is just storing and parking trucks. Ms. Heck stated she is; she doesn't see a reason to approve this variance based on the five criteria.

Mr. Ramsdell asked if there are any plans for an outbuilding for storage. Mr. Harrison stated they haven't got that far as they are currently in the process of building the home.

Ms. Heck stated she thinks traffic turning in and out of the property will also be a problem. Mr. Kitson stated the driveway permit was reviewed and obtained from the State.

Chair Horner closed the public hearing at 9:41 PM.

The Board discussed instances throughout Town where variances are granted with conditions, but the problems come with a lack of enforcement. The Board agreed there is significant concern about potential contamination of the aquifer and Town well due to the asphalt business-related equipment.

Chair Horner presented proposed denial and approval motions for discussion.

Mr. Kitson suggested the plans could be changed to include housing, drains and maintenance plans for containing contaminants. Chair Horner agreed the applicant could come back with plans that address the concerns.

The Board moved to the Variance Discussion worksheet.

Discussion - Variance to Article II, Section C (Table of Uses) #27

*A: The variance will not be contrary to the public interest. **NO***

*B. The variance is consistent with the spirit of the ordinance. **NO***

C. By granting the variance, substantial justice is done. NO

D. The proposed use will not diminish the value of surrounding properties. NO

E. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. For purposes of this criteria, "unnecessary hardship" means that, either: NO

Either: F.(1) Owing to special conditions of the property that distinguish it from other properties in the area: • 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 • The proposed use is a reasonable one. NO

Or: F.(2) 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. NO

MOTION: To deny the request for a variance submitted by Ricky Harrison for a Variance to Article II, Section C (Table of Uses) #27 (Construction industry and suppliers) to establish a paving business in the Residential/Light Commercial Zone. Construction businesses are not permitted in the Residential/Light Commercial Zone. The property is located on Dover Road within the Residential/Light Commercial Zoning District and is identified on Epsom Tax Map U5 as Lot 83, based on the criteria as discussed and for the following reasons:

1. *Establishing a paving business in the Residential/Light Commercial Zone is contrary to the public interest and inconsistent with the spirit of the ordinance that specifically intends to create a "business center" with permitted businesses such as retail shops and restaurants.*

2. *Approval of the variance does not provide any justice for the town. Where the applicant gains a business location on the same lot as a new residential dwelling, the town faces the consequence of setting a precedent for others to follow which would be detrimental to the express purpose and intent of the Residential/Light Commercial zone.*

3. *Based on the testimony of a long term abutter, the property values in the area will be diminished.*

4. *No special conditions of the property were found to distinguish it from other properties in the neighborhood, making the ordinance an unnecessary hardship. On the contrary, the most noteworthy special condition of this property is that it is located in the vicinity of a town water supply which would be threatened by accidental or other unintentional release of paving materials nearby.*

Further relief from hardship considerations is that this property has rights to $\frac{3}{4}$ of the existing business uses currently allowed for by the ordinances either by being permitted outright or by special exception.

Finally, it should be noted that the property owner recently received Special Exception approval for an ADU being built in conjunction with a new home on this property. This new residential development should help to mitigate any perceived

hardship associated with the inability to also establish a paving business on the same lot.

Motion by Mr. Kehoe. Second by Mr. Quimby. Motion passed, 5-0-0.

ADJOURN

Chair Horner adjourned the meeting at 10:25 PM.

Respectfully Submitted,

Jennifer Riel

Jennifer Riel, Recording Secretary