

**TOWN OF NEW HAMPTON
ZONING BOARD OF ADJUSTMENT
MEETING MINUTES
TOWN OFFICES
NEW HAMPTON, NH 03256**

April 6, 2022

MEMBERS PRESENT Regular members: Mr. Tierney, Mrs. Arsenault, Mr. Livernois, & Mr. Newman.

OTHERS PRESENT Administrative Assistant Mrs. Vose & Town Administrator Mr. Irvine

CALL TO ORDER Mr. Tierney called the meeting to order at 7:04 PM.

CORRESPONDENCE There was none.

PUBLIC HEARING
*HEG NH Route 104 LLC,
Appeal from an
Administrative Decision*

NH Signs Peter March & Don Booth and Haffners Energy North Tammy Fisk were present.

Mr. Tierney confirmed Peter March would represent the application, who was designated by the owners.

Mrs. Vose advised that the applicants, HEG NH Route 104 LLC, has requested a Public Hearing in accordance with RSA 676:7, for an Appeal from an Administrative Decision under Article X, Section D.4 (formerly Section E.4), of the New Hampton Zoning Ordinance. The applicants are appealing the Board of Selectmen decision, made at their meeting on 2/17/22, that a recently updated sign, is animated, flashing or with intermittent illuminations. The Zoning Ordinance states that signs which are animated, flashing or with intermittent illumination are prohibited. The property is located at 309 NH Route 104, Tax Map R-4, Lot #92, in the Mixed Use (MU) District.

Mrs. Vose advised that all abutters were notified and heard from none.

Mr. Tierney advised that a full board consists of 5 members, and there are only 4 members present, asking if he wishes to move forward with just four. Mr. March agreed. Mr. Tierney advised that lack of a full board would not be a reason to request a rehearing.

Mr. Tierney confirmed with the Board that they had read the documents sent to them relative to this hearing. He gave guidance to the Board that they were to consider whether the decision made by the Selectmen was correct, as the applicant is stating it was the wrong decision, when the Selectmen determined to prohibit a recently installed sign. Mr. Tierney said the Board will hear the reason why the applicant feels this ruling was incorrect and hear from Mr. Irvine on behalf of the Board of Selectmen on why they felt this was the correct decision. Mr. Tierney asked if the Board had any questions on a document he had provided ahead of the meeting

that was an excerpt from NH Dept. of Business & Economic Affairs “The Zoning Board of Adjustment in New Hampshire.” Updated 2021 relative to an Appeal From an Administrative Decision. The Board had no questions.

Mr. Tierney explained the process for everyone present – testimony from Mr. March with questions from the Board, testimony from Mr. Irvine with questions from the Board, followed by closing statements from Mr. March and Mr. Irvine, with any remaining Board questions and then he would close the meeting and the Board would go into deliberations.

Mr. March said they are appealing the decision made by the Permitting Assistant Mr. Pollock and a subsequent decision by the Selectmen on 2/17/22. Mr. March said they were hired to change the pylon and building signage at the Mobil Station and a NH Signs employee met with Mr. Pollock to discuss it in Sept & Oct, 2021 providing extensive renderings. Mr. Pollock had advised that no permit was necessary for a change to the road sign as long as the square footage of the sign didn't change. Relative to the roadside sign, Mr. March said they changed the digits and added a toggle unit which displays “wash”, “no wash” and the gas prices (regular & diesel) change at the same time, which reflects a \$.20/gallon reduction in price with a wash, which is also shown at the pumps. He said they are not message centers, are red, and are illuminated at a constant level with a message, then a change to another message with no animation or movement with the gas prices changing in correspondence. He said message centers have clusters of LED's and are not able to show pictures, graphics or movement, therefore a distinction between this new sign and message centers. This portion of the sign only shows words and numbers, no graphics. He said a letter dated 2/7 from the permitting assistant was received by the property owner, but owners learned there was a previous letter they did not see, as it was just provided to the store employee. That letter advised them that the sign was in violation due it being “animated, flashing or with intermittent illumination”, which is prohibited. They contacted Mr. Irvine who confirmed that the terms “animated, flashing or with intermittent illumination” were not defined in the ordinance but that it had been the Town's practice to use animated or flashing as one change every 24 hours. Mr. March said this is the assertion that they are challenging. He said if this was the case all signs would be prohibited as they turn on or off, at least once, within a 24-hour period. As the code is not defined, he said per the 2020 NH OSI Zoning Handbook “*in determining the intent and meaning of a provision of the ordinance and map, the board is restricted to a fairly literal interpretation. The intent of the law is an important consideration, but must be spelled out in terms specific enough to be understood.*” Mr. March said he reviewed years of minutes from the Planning Board and ZBA on the Town website and found nothing relative to the intent of this code. In absence of a definition, he said how would an ordinary person interpret “flashing” and provided some definitions. He did the same with “animated”. He said this sign is not able to be animated and argued this sign does not flash nor is it animated. He referred to definitions of “flashing” in other ordinances (Nashua, Rochester, NHDOT Manual on Uniform Traffic Control devices,

NH General Code 265:12, and others). He referred to definitions of “animated” in other ordinances (Ashland, Pembroke, Concord, Hillsborough, Law Insider, and others). Mr. March said the ordinance gives no intent from 2012 to present on what the town felt these meant. He said the signs change instantly, can’t contain graphics, and its light output doesn’t change but it does respond to ambient light.

Mr. March reviewed the importance of this change in the sign was based on several items: the decreased demand for gas due to the increase in electric cars and improved fuel efficiency, while credit card fees have remained constant. Cumberland Farms introduced cash discounts and other suppliers followed, but the cash price was shown at the road, with motorists being frustrated with a different price/gallon at the pumps if they used a credit card. This is new technology in the signage and is a fair way to advertise a discount. Mr. March showed a photo of what the sign looked like before vs what it looks like now. He said the current sign is now slowed to a change of every 20 seconds, but they would prefer it to be every 10 seconds.

Mr. Tierney confirmed that when the sign changes between “wash”, “no wash”, the price for both the regular and diesel gas - changes. He asked if there was discussion when the meeting took place between NH Signs and Mr. Pollock on the fact that this sign would be changing. Mr. March said he wasn’t present; it was one of his employees. The comment had been if you’re not changing the size of the sign, which we didn’t, then a permit isn’t needed. He said if they weren’t able to create this type of sign in order to show the reduced price it would have meant making the digits smaller to keep within the same size, making it more difficult for motorists to read.

Mr. Newman asked how often on an average day, does the price of gas change. Ms. Fisk said when the market is stable it remains the same for many days, but currently it’s changing more often. Mr. March said the roadside sign, changes like the pump signage, which is accurately reflected within the POS and can all be changed at the main office.

Mr. Tierney said there was submission of an Executive Summary, which includes a graph, and relates to sight distance, asking what was the source the document came from. Mr. March provided a copy of the source being titled “Statistical Analysis of the Relationship between On-premise Digital Signage and Traffic Safety”. (by H. Gene Hawkins, PH.D., P.O., Pei-Fen Ku and Dominique Lord, Ph.D., Texas A&M University)

Mrs. Arsenault confirmed that the main source of the sign pricing is at the main office and asked who is the point of contact if there were an issue on the sign and Ms. Fisk said it would be the Mobil station in New Hampton. Mr. March confirmed that only the regular and diesel prices were shown on the sign before this sign change. Mrs. Arsenault asked if the brightness level of the new sign changed and Mr. March said they follow the ambient light but the store can change that.

Mr. Irvine advised that the suggestion that Mr. Pollock erred in his review of the proposed signage, stating no permit would be needed for the roadside sign, is incorrect. Mr. Pollock had been presented with a mock-up for a static sign, going from 3 price points to 2, and adding the new logo for Sal's Pizza. As this is content, no further review was needed as the sign remained the same size. There had been no discussion on the functionality of the sign therefore the recommendation was appropriate. Mr. Irvine pointed out that once the Mobil Station's main office did get the letter advising them the sign was prohibited, Haffner's did contact him right away to discuss the issue and have always been very responsive to the Town. Mr. Irvine did not provide a definition of "animated, flashing or intermittent illumination" but shared with Mr. March the Town's application of this regulation to other signage. Mr. Irvine said he provided to the ZBA, material to document the intent of the Planning Board when this regulation was put forth and approved by the voters, beginning in 2005. In 2005 the ordinance was amended to include: *Signs which are animated, flashing, or with intermittent illumination are prohibited, with the exception of time and temperature signs.* Mr. Irvine said after that was created it was determined that if you allowed time and temperature, you had to allow all other content. For this reason, in 2006, the words "*with the exception of time and temperature*" were struck, as approved by the voters. (Planning Board minutes of 11/29/05 and 2006 Town Warrant results.) He said the Town then allowed a change of the signage once a day. He said a sign going on and off is not changing the message. Mr. Irvine said the Town has applied a fair and equitable application of this regulation that has existed since 2006. He said the town didn't want signage that changes and is a distraction to motorists as discussed by the Planning Board when the regulation was adopted. Mr. Irvine said it isn't just the "wash", "no wash" that changes, it is also the gas pricing, which together is the majority of the square footage of the sign, bringing about the distraction the community wants to avoid.

Mr. Irvine said functionality was never discussed with Mr. Pollock, with only content being discussed and the mock-up was static. Mr. Irvine said as a comparison, if Subway were to change their colors from yellow and green to red, white and blue, it wouldn't need a sign permit as it is only changing the content. He said a sign changing to a new business would need a sign permit.

Mrs. Arsenault asked if the issue the Town had was with the lack of a permit or the illumination and Mr. Irvine said it was due to the changing message, which initially was taking place every 5 seconds. After Mr. March met with the Selectmen in February, they agreed to slow down the change in the message - to every 20 seconds, while providing them the chance to appeal to the ZBA. It is the functionality that is the issue.

Mr. Newman asked Mr. March what he would define as intermittent because intermittent could be once every 10 seconds or once every 3 hours. Mr. Irvine said that is why the board has allowed for a change once each day, which they've applied to Live Free Home Health Care signage.

Mr. Tierney asked for closing arguments from Mr. March. Mr. March said he would prefer a continuance as he didn't have an opportunity to see Mr. Irvine's documentation on the Planning Board history of this regulation. Mr. Irvine said it was fairly short. Mr. Tierney suggested a 15-minute recess to allow the applicant time to read the documentation, which Mr. March agreed to.

RECESS

At 7:53pm Mr. Newman made a motion, seconded by Mr. Livernois to allow a 15-minute recess. Vote was unanimous.

RECONVENE

At 7:58 pm Mr. Tierney called the meeting to order, noting that all the same people were present.

Mr. March said he read the Planning Board minutes in 2005 leading up to the point that the language read "no animated, flashing or with intermittent illumination", but there was no mention of allowing a change every 24 hours, or any limitation on the timing.

Mr. Irvine advised that the Town ordinance is a permissive ordinance which states the things that are allowed, so everything else is considered prohibited, and cannot anticipate every technological advance. When this language was adopted, Mr. Irvine said the type of signage being used by Mobil today, may not have existed in 2005-06, but time and temperature signage did. The Town said they didn't want that so the ordinance was changed to prohibit time & temperature, because of rulings on 1st amendment rights and the desire was to control functionality, not content. The ordinance states what is permitted with no language that allows for this type of sign.

Mr. March said this is a prohibitive statement and is ill-defined, even in the 2006 minutes. This is new technology and is for the good of the public allowing them to see the gas pricing and to save money.

Mr. Irvine stated that he had nothing further to say.

Mr. Tierney advised the Board was closing the hearing and would go into deliberations. Mr. Tierney reminded the Board that any decision that is made must be supported by findings of fact.

Mr. Livernois advised the Board must determine the meaning of this language and the intent of the people who drafted this language. When you take all the language together in conjunction with the legislative history, it seems the town wanted to prohibit signs that change over time, as it might distract drivers. He said the fact that the Planning Board removed the allowance for time & temperature spoke to their intent at the time. Mr. Tierney said he had been serving on the Planning Board at the time this language was adopted and the Board at that time felt time & temperature was a value to the motorists. Mr. Newman confirmed with Mr. Tierney that due to court cases and content, the Board determined to strike time & temperature, barring all messages that change. Mr. Livernois said there is a lot of time between 5 seconds and 24 hours because if a sign

changed every hour, it wouldn't be much of a distraction to motorists. Mrs. Arsenault said it is confusing if you are seeing the "wash" price comparing it to the regular price of gas across the street, then you get to the pump to learn it is a different price.

Mr. Tierney reviewed RSA 674:33 Powers of the Zoning Board. Mr. Tierney said the allowance for a sign change once a day was an interpretation by the Town on how to apply the ordinance. Mrs. Arsenault said it is her opinion that it's difficult for the ZBA to change the intent of the ordinance. Whether this sign is animated, flashing or with intermittent illumination, Mr. Livernois said in his opinion - it is. The other members expressed their agreement. Mr. Livernois said he understood why 24 hours was chosen as it was easy to administer and creates no wiggle room and if the Town allowed a change every hour it would then set a precedent. Mr. Newman agreed that other sign owners could then want to change their sign every hour. He said the Planning Board could amend the current language and bring it to the voters. Mr. Newman said in reading the language of the ordinance that says "animated, flashing, or with intermittent illumination", this sign goes against that. Mr. Tierney said it is his opinion that the applicant must shut off the toggle that switches the sign from changing "wash" to "no wash" and corresponding price changes, in order to be compliant with the ordinance.

Mr. Livernois said the application states it is appealing the town's assertion that an animated, flashing, or intermittent illuminating sign can change once in 24 hours with that being the basis for their appeal. Mr. Newman said the final line in the application states they are appealing the Permitting Assistant's determination and revert to common sense interpretation, allowing a change the sign every 10 seconds.

The board reviewed the Selectmen's minutes of 2/17/22 where Mr. Harvey said that allowing this changing message in the sign could set a precedent, as other signs in town could install the same. It was noted that the Selectmen decided at that meeting, to allow the change every 20 seconds until the applicant could appeal the decision to the ZBA. Mr. Newman said the issue of how often the sign changes, is not for the ZBA to decide, and that the Town needs to decide on the definition of this regulation. Based on the way the language is written and understood by the Town, based on previous statements made, Mr. Newman said this sign does not comply. Mr. Tierney asked Mr. Newman if he is saying that the sign - as installed, as in use now, is in violation and the Selectmen were correct in their interpretation and Mr. Newman said yes. Mr. Livernois said he agrees that the interpretation that this sign is prohibited, based on it being animated, flashing, or with intermittent illumination, whereas the applicant wants it to mean that it can change more frequently than every 10 seconds. Where the applicant is appealing the definition Mr. Newman said, technically, intermittent is "stopping and starting at regular intervals", which could be every 5 seconds to every 5 days. Mr. Livernois advised the Board should go back to why this regulation was put in place, or what was the town concerned about - to prohibit this type of sign. Mrs. Arsenault said to avoid distraction. Mr. Livernois said so the town

wouldn't have a lot of flashing signs, or driver inattention so the Selectmen interpreted it to mean every 24 hours, whereas the applicant wants it to mean once every 9.9 seconds. Mr. Newman pointed out, that if the ZBA set a precedent, any other sign such as Live Free Home Health Care, could then change their message every so many seconds. Mr. Livernois said if the Planning Board feels the Town got this decision wrong, they could propose an amendment for the voters to consider. Mrs. Arsenault pointed out that if the ZBA disagreed with the Selectmen's decision on this sign, it would allow any other sign in town to change every so many seconds, until such time the voters have the ability to make a change to this regulation. Mr. Newman said he thinks the term "intermittent" is the key. Mrs. Arsenault said she would not feel comfortable with changing what the already determined their interpretation to be and Mr. Tierney agreed.

There was some discussion on whether a reasonable amount of time would be for a sign to change was every 24 hours. Mr. Livernois said he didn't think it was reasonable and Mr. Newman said his opinion was - that it was reasonable. Mr. Tierney pointed out this regulation came to be in 2005 and technology has changed a lot since then but said he thinks the 24-hour decision was reasonable. Mr. Newman said based on the Town's interpretation of no change less than 24 hours being reasonable, this sign should be prohibited based on the literal wording of the ordinance without having perfect definitions, unlike other towns that do have specific definitions for this. He said it may have been the Planning Board's intention not to have it specifically defined and agrees with the opinion to restrict the sign change to once every 24-hours and prohibit this sign based on the current regulation. Mr. Livernois said his opinion is that 24 hours is too long, but that 10 seconds is too fast to avoid distracting drivers, or for aesthetics. He said every 5 or 10 minutes, or every half hour, would be more reasonable and would avoid the problems the Planning Board was looking to prevent, but would uphold the Selectmen's decision on this sign. Mrs. Arsenault said this does hurt the business, which the other members agreed with.

Mr. Livernois said his reason for denial is due to the intent of the voters in 2006 and the striking of the words "time and temperature" and looking at the purpose to try to limit driver distraction and the aesthetics. Mr. Newman said in the Miriam Webster dictionary intermittent means "coming and going at intervals" and didn't see this sign as animated or flashing, but that it is intermittent.

Mr. Livernois made a motion, seconded by Mrs. Arsenault to deny the appeal based on the reasons discussed during deliberations. Vote was unanimous.

Mr. Tierney advised Mr. March they could request a re-hearing if there was new information which, if denied, would provide them an appeal to Superior Court.

Mr. Booth commended the Board for their serious thought and input on

their decision.

CORRESPONDENCE

There was none.

MINUTES

Mr. Livernois made a motion, seconded by Mr. Newman to approve 3/2/22 meeting minutes as written. Vote was unanimous.

ADJOURNMENT

Mr. Newman made a motion, seconded by Mrs. Arsenault, to adjourn at 8:50 pm. Vote was unanimous.

Respectfully Submitted,

Pam Vose, Land Use Administrator

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