

**TOWN OF EAST KINGSTON, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT MEETING MINUTES
January 18, 2006**

AGENDA

**7:30 Daniel F. Musso
71 Main Street
MBL# 14-2-3**

Members attending: Chairman John V. Daly, David A. Ciardelli, Norman J. Freeman

Alternate members: Catherine Belcher, Paul Falman

Others attending: Peter Loughlin representing Daniel F. Musso

Chairman Daly opened the meeting of the East Kingston Zoning Board of Adjustment at the East Kingston Town hall on January 18, 2006, at 7:30PM to consider an application seeking an appeal from an administrative decision by the Board of Selectmen in relation to Article XX of the Zoning Ordinance denying him a home occupation permit.

Mr. Daly recused himself and Mr. Ciardelli acted as Chairman.

Mr. Ciardelli explained that the appeal is from an administrative decision by the Board of Selectmen and the Board has to decide if the Selectmen's decision was an error.

Attorney Peter Loughlin appeared for the applicant. He referred to Section 674.33, "I. The zoning board of adjustment shall have the power to: (a) Hear and decide appeals if it is alleged there is an error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16; and (b) Authorize upon appeal in specific cases such variance from the terms of the zoning ordinance as will not be contrary to the public interest..."

Mr. Loughlin asked the Board to find that there was an error in the determination made by the Board of Selectmen and referred to the letter he sent to the Selectmen, which gave some history into this matter.

Mr. Loughlin introduced some exhibits for the record. He stated that in 1975, Marshall Merrill purchased the property at 71 Main Street. In the mid-70's, he began operating an automotive repair facility and inspection station at the location. In 1980, he expanded the garage on the site to approximately 50X50' and continued to operate until the 1990's. In 1989, the Town adopted a Home Occupations ordinance and at that point, Mr. Merrill obtained a Home Occupation permit from the Selectmen. He operated as "ME Merrill & Sons" and in 1997, Merrill and Marjorie Damon bought the property. The Damons obtained a Home Occupation permit and operated the business until 2003. In the Fall of

2003, Daniel Musso purchased the property with the intention of continuing to operate a repair facility. Mr. Loughlin stated that he thought there was an error in the Selectmen's letter stating that the Damons had only operated a welding facility. He noted the certificate issued to the Damons which states the type of business is "welding, repair".

After Mr. Musso purchased the property, he was directed to apply for a Home Occupation permit and the Planning Board by a two to two vote, had no definitive recommendation to the Board of Selectmen. The Selectmen denied the application in May of 2004.

Mr. Loughlin stated that it is their position that the property enjoys a non-conforming use status and it was established as such back in 1970's and '80's. He added that the Selectmen's letter stated that it pre-dated the Home Occupation ordinance and it was grandfathered prior to that time. He added that it was never abandoned.

Mr. Loughlin stated that it is also their position that it takes two things to have abandonment: 1) an overt act, and 2) an intent to abandon is required. He cited the case of Lawler v. Town of Salem where the Court said there has to be an overt act and an intent to abandon. He stated that the Damons never had any intent to abandon the repair business at that location.

Mr. Loughlin noted the exhibits he submitted: the deed from Marshall & Ann Merrill to Merrill & Marjorie Damon; home occupation permit issued to MED Welding for "welding, repair"; deed from Merrill & Marjorie Damon to Daniel Musso; home occupation application filed by Daniel Musso; memo from Planning Board Chair to Selectmen cautioning them against issuing a permit; the findings of the Planning Board; minutes of the May 24, 2004 Selectmen's meeting; tax card for the subject property; and the Notice of Decision of the Board of Selectmen denying the request for an inspection station.

Mr. Loughlin made a correction to the Timeline he submitted for 11/18/04, it should read that the Selectmen issued a denial of a request for an inspection station. He stated that he felt that the non-conforming use has been established and it was never abandoned and a permit should be granted.

Mr. Ciardelli asked for public comment.

Nancy Reiss, 76 Main Street. Ms. Reese stated that she and her husband run an "invisible" home occupation of a landscaping design business. She added that she attended the Selectmen's meeting where they made the distinction that a home occupation permit goes with the owner, not the property and that a new owner would have to apply for a new permit.

Mr. Ciardelli read from the permit that the applicant signs: "I/We declare we understand that any permit issued under Article X may not be transferred to another, and that upon cessation of the business activities for which this permit is issued, that I/we shall

immediately surrender such permit.” He stated that the permit is only good for as long as the business is in effect and it is renewed yearly.

Mr. Loughlin stated that this particular business pre-dated the home occupation ordinance, which came into existence in 1989. The business goes back to 1976 and the business is grandfathered at that location and enjoys more protections than it would if it was just dependent upon the home occupation permit. The request is to continue to operate a repair business at the location.

Roberta Converse, 74 Main Street. Ms. Converse stated that back in 1976 or 1978 when Mr. Merrill owned the property, he petitioned for a variance for an established garage and the variance was denied and the Town of East Kingston had to put up a bond and the case went to court. The Exeter Superior Court issued a cease and desist order. Mr. Merrill was supposed to close the business, but he never did. The Board of Selectmen never enforced the cease and desist order.

Roby Day stated that he is a member of the Planning Board. He stated that Mr. Loughlin’s point is valid in that he is arguing from the position that there is a vested right here, which would survive a change in an ordinance. He stated that Ms. Converse is also right in that there was a cease and desist order issued. The question to be answered is whether or not Mr. Merrill had been directed to cease and desist. In 1989, the home occupation ordinance was an act of desperation by the Town to control all the different types of businesses that were being conducted.

Mr. Day stated that Mr. Merrill sold the property to the Damons and they came to the Planning Board in 1997 and there was never any mention made of a garage operation. The Damons explicitly described the work they would be doing as welding repair of equipment off-site. He added that Mrs. Damon was careful to indicate that the home occupation was a bookkeeping office. The Planning Board decided that it fell into the home occupation ordinance parameters.

Mr. Day stated that there was never any mention in the Minutes or the Notice of Decision or any of the correspondence of a garage operation. He stated there was a conscious decision not to have a garage operation. He added that unfortunately the property attributes were misrepresented to Mr. Musso.

Mr. Day stated that when the Planning Board heard Mr. Musso’s request, the Board was sharply divided on the question of whether the original grandfathered use as a garage by Mr. Merrill remained in tact by Mr. Damon’s welding shop business for Mr. Musso’s proposal to run a garage.

Marshall Merrill, former owner of 71 Main Street. Mr. Merrill stated he was never served with a cease and desist order. He stated when he applied for a home occupation permit, it was granted. When he sold the property to Merrill Damon, Mr. Damon did welding and repairs because Mr. Merrill sublet repairs to him. He added that there has been no change of venue and no abandonment on the property.

Ms. Converse reiterated that the Town has never enforced the original cease and desist order.

Mr. Ciardelli stated that he also has a timeline from all the paperwork. He stated that he has seen writing that the cease and desist order did exist. He added that there is a non-conforming use of the property and once that was established, every year a permit was issued. Before Merrill Damon purchased the property from Marshall Merrill, he did a heavy duty investigation of the premises discovering that it had somewhat of a jaded past knowing that it was a non-conforming use. Mr. Damon wanted to make sure he had approval from the Town to conduct his business before he purchased the property.

Mr. Ciardelli stated that the Damons sent out letters to the abutters describing the type of business they were going to conduct. The welding was chiefly to be conducted off-site, but occasionally there would be welding done at the site.

Don Grover, 45 Muddy Pond Road, Kensington. Mr. Grover stated that he took all his equipment to Mr. Merrill for repair when he was running the garage. When Mr. Damon purchased the property, he continued to take his equipment there for repair.

Mrs. Belcher stated that the application looks as though it is for an appeal of a decision from November 2004. She stated that it is her understanding that decision had to do with the inspection approval, which is different from the home occupation permit denial issued in May 2004.

Mrs. Belcher stated that it looks as though they are trying to use the date of correspondence after the denial of the home occupation as the starting date for the appeal. She stated that the decision that they are appealing is the Selectmen's decision.

Mrs. Belcher stated that it was clear on May 24, 2004, at a meeting Mr. Musso attended, that the Board of Selectmen rendered their decision to deny a home occupation permit. She added that it has to be made clear if they are appealing the Selectmen's decision or subsequent correspondence.

Mr. Loughlin stated that the decision in May 2004 was not appealed. The time to appeal that decision has passed. His letter to the Selectmen was based on the fact that he felt there was a non-conforming use that preceded and was above and beyond the Home Occupation ordinance coming into existence since there was already a business in that location. His point to the Selectmen was that there was an established non-conforming use, which was never abandoned. He added that his letter to the Selectmen expressed his feeling that there was a non-conforming use issue. He stated that in Selectmen correspondence, they recognized that the use predated the home occupation requirement in 1989. He read from a letter from the Board of Selectmen dated December 1, 2005, "1. Musso had the right to appeal his denial of a home occupation permit by the Board of Selectmen, based on the Planning Board's recommendation, to the Zoning Board of Adjustment within 30 days, which was rendered on May 24, 2004." Mr. Loughlin agreed that the Board was correct in their interpretation of that. He added that his appeal is to

the sentence in that letter stating, "The non-conforming use of the property as a motor vehicle repair facility was abandoned before Mr. Musso purchased the property and sought to raise the permit issue." He is appealing their determination that there was no non-conforming use.

Mrs. Belcher stated that she wasn't sure if the Zoning Board of Adjustment has jurisdiction to act on an appeal of an administrative decision from 2004.

Mr. Loughlin stated that the 2004 decision was a denial of a home occupation permit. He added that the use was grandfathered.

Mrs. Belcher stated she felt their time to appeal has expired even though new information may have been revealed at a later date.

Mr. Loughlin stated that when Mr. Musso went to the Board in May, 2004 it was for a home occupation permit, and he never raised the issue of a non-conforming use.

Mrs. Belcher stated that if the Zoning Board starts appealing written correspondence subsequent to Notices of Decision, then it makes the timeline arbitrary as there will never be a final date if someone asks for explanations of a decision.

Mrs. Belcher stated that the home occupation permit for Merrill Damon states "welding, repair". She stated that she has to presume that it is a typographical error. She noted the Minutes from 1997, where it was clear that it was "welding repair" as it was on the Notice of Decision. She added that she doesn't think the comma between "welding" and "repair" was supposed to be there. She stated that she was the Planning Board secretary at that time and it was her job to do the Minutes.

Mrs. Belcher added that it is her understanding that Mr. Loughlin is proposing that the automotive repair business, regardless of the ownership of the property, has been in continuing existence since the 1970's and so is grandfathered. Mr. Loughlin stated that was correct.

Mrs. Belcher stated that the Minutes in 1997 when Mr. Merrill Damon went for his welding repair business, there is no mention at all of automotive repair. She added that during that meeting, Mrs. Damon very clearly said more than once, including in the letter sent to abutters, they were operating a small welding repair business, the majority of which would be conducted off-site. Mr. Damon had a portable welding unit attached to his truck and the residence would be used for a bookkeeping office. She added that if Mr. Damon did, in fact, conduct an automotive repair business at the residence, it was not with the Town's knowledge. She stated that she didn't think an illegal use of the property has any vesting rights whatsoever.

Mrs. Belcher stated that at the time Mr. Damon could have asked to have an automotive repair business, which he did not. Instead, when offered the opportunity to continue the automotive repair operation, he refused stating it was just a small welding business. He

stated he was retiring and was going out of business. She added that this clearly shows an abandonment of the business.

As to the argument by Mr. M. Merrill that welding is a part of automotive repair, Mrs. Belcher stated that according to the Office of State Planning, an accessory use of one business cannot be turned into the primary use of a business and call it continued grandfathered. She added that new business operations relinquish all rights of grandfathering.

Mrs. Belcher stated that she felt the realtor misrepresented the property to Mr. Musso.

Mr. Loughlin stated he disagreed with Mrs. Belcher's conclusion. His point is that it was always an automotive repair facility.

Mr. Falman asked Mr. Merrill if he had an official state inspection station when he ran the business, to which Mr. Merrill answered that he did. Mr. Falman asked if anyone knew if Mr. Damon had an official state inspection station. Mr. Day stated that Mr. Damon did not have an official state inspection station. Mr. Falman stated that in reading the minutes and the way the application for a home occupation is written, it did not state that it was an automotive repair facility. In his opinion, any automotive repair business was not authorized by a home occupation permit.

Mr. Day stated he was on the Planning Board in 1997 when the Damons came for their home occupation permit and the Board never considered an auto repair business or garage to be a permitted use under the Home Occupations ordinance. The Damons would never have been granted a home occupation permit for a garage. He added that it is clearly a case of abandonment.

Ms. Reiss stated that she was at the hearing for the Damons and it was her perception that the business at the residence was for bookkeeping only and the welding was to be done off-site.

Mr. Ciardelli stated that in reading all the paperwork associated with this matter, it is clear to him that whatever business was going on was going to be of a lesser nature than what had been there before.

Mr. Freeman stated that according to Exhibit 6, the Planning Board in May 2004 did not make a decision one way or the other, it was a split decision. Everyone agreed that it was not a unanimous decision. Mr. Day stated that there were two "yeses", two "no's" and one abstention, but the Selectmen's vote was unanimous to deny the application.

Mr. Curtis Jakes, Jakes Trust, former owner of 17 North Road. Mr. Jakes stated that he lived at 17 North Road from 1976 to 1995 and he didn't think an automotive repair shop should be in a residential area and there has to be some way to end the grandfathering.

Mrs. Belcher stated if Mr. Musso bought the property directly from Mr. Merrill, there would be no problem with continuing the auto repair business. She stated that the use, regardless of the ownership, is grandfathered until the use changes. When Mr. Damon applied for and received a permit for a welding repair business, which was a different and new use, he relinquished his grandfathered rights. Mr. Musso cannot piggyback on Mr. Marshall Merrill's business.

Mr. Ciardelli stated that this is an appeal from an administrative decision, which was made on May 24, 2004 and the applicant had 30 days to appeal that decision, which has passed. He added that part of the administrative decision included a reference to the non-conforming use where the facility was abandoned before Mr. Musso purchased the property.

Mr. Ciardelli asked for a motion to approve or disapprove the applicant's appeal. He stated that approval of the appeal would reverse the decision of the Selectmen, while disapproval of the appeal would affirm the decision of the Selectmen. He asked that the reasons be stated in the motion for the record.

MOTION: Mrs. Belcher **MOVED** that the Board deny the applicant the appeal from an administrative decision which would affirm the Board of Selectmen's decision to deny a home occupation permit for Mr. Musso based on the applicant's failure to provide an argument that the automotive repair use be a continued use and therefore vested and grandfathered, of which burden of proof has not been met. In addition, another basis is that even though the Board has decided to act on the application for appeal, the applicant has not met the timeline for an appeal of the decision. Mr. Falman seconded and the vote was three "aye's" and one "nay" and the motion carried.

MOTION: Mr. Freeman **MOVED** to accept the minutes from the July 29, 2004 meeting. Mrs. Belcher seconded and the motion carried unanimously.

Mr. Ciardelli closed the hearing.

The meeting adjourned at 8:45 PM.

Respectfully submitted,

M. Lonek
Recording Secretary

Approved on 2/23/06