

Town of East Kingston, New Hampshire
Zoning Board of Adjustment Meeting Minutes
January 22, 2009
7:00 pm

AGENDA

Members Attending: Chairman John Daly, Vice Chairman Catherine Belcher, David Ciardelli, Norman Freeman
Alternate Members: Paul Falman, Tim Allen
Also present: Applicants Messers Layne Carter and Grant Carter, Jr.
Mr. Ed Woiccak, Marshall Law Office, representing the Carters
Abutters Ms. Margaret Caulk, 69 South Road
Mr. Davis Finch, 91 South Road
Mrs. Sandy Hoelzl, 56 South Road
Mr. Ron Morales, 69 South Road
Mrs. Susan Porro, 64 South Road
Mr. Lindell Weeks, 48 South Road

Mr. Daly opened the meeting of the East Kingston Zoning Board of Adjustment (ZBA) at the Pound School, 41 Depot Road on January 22, 2009 at 7:00 PM.

Public Hearing 09-01 – Layne Carter, 68 South Road, East Kingston (MBL 13-02-01). The applicant is seeking a use variance from Article III - USES PERMITTED for a business in a residential zone.

Mr. Daly opened this public hearing and acknowledged that Mr. Layne Carter and Mr. Grant Carter, Jr. were in attendance. Also in attendance was Mr. Ed Woiccak, Marshall Law Office, who will be representing the Carters for this public hearing. Messers Carter are before the Board tonight on an application for a use variance to operate a business in a residential zone.

Mr. Daly reviewed procedures for the hearing. He asked abutters to wait to be recognized and to address the Chair directly, and not other members of the Board or the applicant. He also asked that they state their name and address for the record. Mr. Daly further explained that the applicant will make his presentation, Board members will question the applicant, comment from the public will be invited, the applicant will be given a chance to address any comments by the public, the floor will be closed to the public, and the Board will deliberate.

Mr. Daly stated that Mr. Freeman had asked to be recused from this hearing since he has a relationship with the Marshall Law Office. Mr. Daly announced Mr. Falman and Mr. Allen would participate in the discussions.

Mr. Daly turned the floor over to Mr. Woiccak to explain the proposal.

Mr. Woiccak explained that Walter Carter is the owner of the property in question and his sons Layne and Grant Carter Jr. are here with this proposal tonight. Mr. Woiccak proceeded to display some photographs of what the property looks like at the present time, explaining that the intent was to keep the look of the property the same. Over the years the taxes have risen from \$500 to \$3,500 per year.

Mr. Woiccak clarified that the property was 59 acres in total, and has always been farmland; originally it was the old Currier farm. In 2003, Earl Carter passed away and left the land to his brother Walter. Walter is now 81. The concerns are driven partly by taxes and partly by the love of the land and his desire to keep it the same as always.

Mr. Woiccak said that he realizes that the zoning is agricultural/ residential and Mr. Carter believes there are three choices he can make. He can do nothing and leave it the way it is, paying the taxes for as long as he can afford them. He can sell it to a developer, who could build a cluster development. Mr. Carter likes the present look and character of the land and wants to try to maintain it as such, so his solution is to take 12 acres out of current use and turn it into a low-key, simple golf driving range.

Mr. Woiccak showed on the drawings where the 12 acres that would be taken out of current use were in relation to the entire 59-acre parcel. He noted that the driving range would consist of an unpaved parking area for 6 cars, a driveway, and a tee area for 6 golfers. There might need to be some pavement installed at the edge of the road to the parking area to preserve the edge of the road. There are 3 existing buildings on the property, a barn and two other buildings. One of the buildings would be used to store the tractor used to pick up the balls and another would be used to store the equipment and for the person employed to run the business to work out of. A small shed that looked the same as the rest of the structures would be built to enclose a porta-potty; there would be no green plastic porta-potty displayed on the premises.

There are three wagons on the property at the present time; one at 100 yards, one at 200 yards, and one at 300 yards. The intent is only to add a flag in the field out past the third wagon. Again, the only structural additions to the property would be the porta-potty shed, the parking area, and the tee area.

Mr. Woiccak then reviewed the criteria that must be satisfied to obtain a use variance.

Criteria 1. The proposed use would not diminish surrounding property values because:

Visually the area, as proposed, would change the look of the property minimally, if at all. At the present time, it is an open field with a barn and a couple of buildings. It would still be an open field with a barn and a couple of buildings if it were a driving range the way it is proposed here. A porta-potty will be added, but with the intended shed enclosure, will blend in with the existing buildings. Therefore, the Carters do not think the golf driving range will diminish the surrounding property values.

The driving range itself will be strictly a daytime usage, with no lights or electricity and there will be no advertising signs. The only advertising will be the silhouettes of two golfers on one of the existing buildings. The traffic impact will be minimal as there are only spaces for six golfers.

Criteria 2. Granting the variance would not be contrary to the public interest because:

This proposal does not change the essential character of the neighborhood as it exists at the present time. The purpose of this proposal is to be able to keep the area as it exists now and not be developed into a subdivision. It is consistent with the East Kingston Master Plan, which encourages the development of businesses in the town. This is a nice business for the town as it will take 12 acres out of current use and increase the tax base. There will be no impact on the schools, and minimal impact on the infrastructure of the town as there will be minimal traffic. From this standpoint, it is not contrary to the public interest.

Criteria 3. Denial of the variance would result in unnecessary hardship to the Owner because:

a. the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment,

The hardship that is unique to this particular piece of land is that unless you want to turn it into a residential neighborhood, there is no real way that this land can pay for itself in an agricultural use. Based on the type of soil and the wetlands, in order to make it into a productive farm, there would need to be a huge investment in equipment, soil preparation, chemicals, etc. The alternatives would be an uneconomical farm, a housing development, or the proposal before you tonight. The hardship is that if this proposal is not allowed, Mr. Carter will be forced to sell the land to a developer, which he does not want to do.

b. that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property.

The proposed change in use will not change the character of the parcel. It is basically an open field and will remain, visually the same. The only difference is that at times, there would be 6 cars parked in the lot.

c. the variance would not injure the public or private rights of others.

It is such a low-key use that there will be a very minimal impact on the area. There will be no substantial impact in traffic, no noise, no lights. Visually the property will look the same as it does now.

Criteria 4. Granting the variance would do substantial justice because:

We feel that granting the variance will do substantial justice because it will enable Walter Carter to preserve the agricultural character of this large parcel. This is the only way he can afford to do that.

Criteria 5. The use is not contrary to the spirit if the ordinance because:

We do not feel the use proposed is contrary to the spirit of the ordinance because the visual character of this parcel will remain essentially the same as it is now. The only thing needed to maintain the grassy area would be to lime once a year and mow it. There will be no need for chemical fertilizers, weed killers or bug killers.

Also, East Kingston already has two golf courses, which are in the same type of zone as this proposal. If they work, this should work.

Mr. Daly asked if the Board members had any questions.

Mr. Fialman asked how far it was to the nearest property line. *Mr. Woicak* answered it was approximately 300' to the property line. *Mr. Woicak* emphasized that with the exception of a small portion of land, all the rest of the surrounding property belongs to Mr. Walter Grant.

Mr. Allen asked if the 12.1 acres was a separate, legal lot. *Mr. Woicak* answered it was not; it was part of the 59-acre parcel. They noted that for any land in current use with a building on it, the Town makes a one-acre lot and assesses taxes on it. *Mr. Carter* stated that if they had known that at the time they fixed the barn, they would most likely have taken the structures down, as it would have been easier to do that than to fix it up as they had done.

Mr. Grant Carter stated that the intent was to make it a separate lot, since they needed to do that take it out of current use. *Mrs. Belcher* emphasized that there was no need to go to the expense of subdividing that lot to take it out of current use. The assessing company would take the 12.1 acres out of current use for taxable purposes, but it did not need to be subdivided for them to do so; it could remain part of the original 59-acre lot. *Mrs. Belcher* explained that current use is anything over 10 acres, or any amount of wetlands less the acreage set aside for a house and septic system. Anything other than that could be put in current use, allowing for a tax break.

Mr. Daly asked what the special condition about the property that was different from anyone else's property. *Mr. Woicak* responded the fact there is no economical way to use it for agricultural purposes. There are wetlands, which would make it hard to farm. And in order to bring it up to productive agricultural use, it would take a substantial investment that could not be recouped and would not be economical. It is zoned agricultural but it cannot be used as such. *Mr. Daly* stated that even though he acknowledged he did not want nor was he suggesting it, it could be subdivided for housing as a reasonable use. *Mr. Woicak* agreed it could be done.

Mrs. Belcher recapped that *Mr. Woicak* believes that the unique setting of the property in its environment is the wetlands, the soil type and condition. *Mr. Woicak* answered yes. *Mrs. Belcher* reiterated that the test is that there needs to be something unique about the property that is not shared by every other property in that district.

The crux of the question is, "what would make it different than any other piece of property on South Road?" Mr. Woiccak stated that the uniqueness is the combination of the wet areas and poor soils that would not render it useful and productive from a strict agricultural standpoint. You could never recoup your investment and you could not make a living from it.

Mr. Ciardelli noted that earlier there was mention that the taxes on the entire parcel were \$3,500 at the present time, and it was desirable for the Carters to have this business to help pay those taxes. At the current time, they are getting a tax break on the entire parcel by having it in current use. Once you take the 12 acres out of current use, you will pay a penalty on it. Subsequently you will need to pay the full rate of taxes on the 12-acre portion since it will be out of current use. Mr. Ciardelli noted that one of the things the Carters were doing to help pay the taxes was in fact incurring considerably more taxes than at the present time. Mrs. Belcher also questioned the anticipated increase in taxes. Mr. Layne Carter agreed it would increase the taxes, but knew there would be start-up costs involved and hoped it would make enough to cover the new amount of the taxes.

Mrs. Belcher asked how they could make sure no more than the 6 vehicles parked there, would the person running the business also have a vehicle, and what about noise and hours of operation.

Mr. Woiccak responded that those types of questions would be for the Planning Board to ask if this request for variance were approved. Mrs. Belcher emphasized that the Zoning Board had the authority to set conditions as part of their decision, and it was important these questions be answered for the sake of the abutters.

Mrs. Belcher opined that low impact might not have an impact on surrounding property values, but a business might infringe on someone's privacy in the evening as to light and noise. She asked the following questions:

1. How they would guarantee their neighbors that there would only be six cars parked there at one time and not cars parked on the side of the road? Did they plan on installing a gate to discourage more than 6 cars? Were they planning on a sign stating only 6 cars at one time?

Mr. Layne Carter stated they were not planning on installing a gate, any attempted parking on the side of the road would be discouraged, and they had not considered any signage as they were trying to lessen the impact of the business.

2. What were the hours of operation they were considering?

Mr. Layne Carter answered that they had not thought about the hours of operation yet, but it would perhaps be from 9:00 am to dusk- until you could no longer see where the ball landed. Mrs. Belcher noted the hours would be longer in the summertime since it stays light longer.

3. What were their plans for expansion?

Mr. Layne Carter answered there were no plans for expansion.

Mr. Allen asked how many feet of frontage they had on South Road and how far the tee area was from the nearest neighbor. *Mr. Grant Carter* stated there was 830' of frontage, *Mr. Layne Carter* stated it was approximately 200' to the nearest neighbor across the street from the tee area.

Mrs. Belcher asked how much noise it made to hit a golf ball. *Mr. Carter* answered it was not really very loud, and would be different for each person hitting the ball. Mr. Allen opined it would be somewhat softer than the sound of an aluminum bat hitting a ball.

Mr. Falman stated that they had addressed the agricultural possibilities of the property and why that could not be utilized economically. He asked if they had had any studies done to develop it as residential property. What makes it unique that it could not be used as residential property?

Mr. Grant Carter answered that Fish Road was 3,300 feet of road frontage. They had not had any engineering studies done to see what the possibilities to develop the land would be. What they were trying to do was prevent it from being developed by proposing this business.

Mr. Allen asked what percentage of the property was wetlands. Mr. Grant Carter replied that figure was 25-30%

Mrs. Belcher asked if there was an airstrip on the property. Mr. Layne Carter stated there was an airstrip there, but it was not operational. It was the large elevated area shown on the aerial photo.

Mr. Daly opened up the floor to a better comment.

Mr. Ron Morales, 69 South Road. Mr. Morales stated that Mr. Woicak had left part of the statement out when he had referred to the Master Plan and he wanted to clarify that part of the Master Plan. Mr. Morales stated that a key word was left out in the quote. Goal 5 of the Master Plan reads as follows: "Encourage development *in* the commercial and light industrial districts in order to expand the tax base." Mr. Morales noted there is a Light Industrial District, a Commercial District, and as of the 2007 Town Meeting, a Town Center, which expanded the Commercial District.

The Planning Board is applying to Plan NH to get assistance in investigating expansion of the commercial area. There will be visioning sessions, and information will be put before the voters for a decision in 2010, if it gets that far. This proposal is spot zoning, which is discouraged in the Master Plan.

Mr. Morales reiterated the Mr. Woicak had mentioned three options; doing nothing, developing it for housing, or having this golf driving range business to offset the taxes. Mr. Morales noted that there was a 4th option that had not been mentioned – putting in it conservation. This would save the money on taxes and preserve the parcel the way it is now.

Mr. Morales asked if Messers Carter had contacted the University of New Hampshire Coop Extension who would do a soil analysis for free or for very little money, as UNH is pushing sustainability at the present time, wanting people to grow locally. Mr. Morales opined if the Carters grew organically, they could have a very viable farm either sub-contracting or sharecropping. *The Carters answered that they had not contacted UNH about the soil.* Mr. Morales opined the property could be hayed twice a year, which would also pay for the taxes.

Lindell Weeks, 48 South Road. Mr. Weeks stated two years ago they had purchased their property to build a home for retirement. They were looking for rural property, and might not have purchased the property if there was already commercial property on the road. Mr. Weeks is not sure the proposed use is the best use for the Carters' property, and has concerns.

On the way to this meeting, they had ridden by Richardson's on Rt. 114 in Massachusetts. The history of that business shows they started as a dairy farm, then they opened an ice cream stand. There is also a driving range and mini golf, and a large, paved parking lot with lights that is very busy in the summer. It is a very large commercial activity. If the unintended effect is to increase the taxes, naturally they would look to increase the commercial use of the property to recoup those increased taxes; and the result may not be reversible. Twenty years from now, it could continue to develop.

Mr. Daly stated that if the ZBA granted the variance, the use would not be expandable.

Ms. Margaret Caulk, 69 South Road. Mrs. Caulk asked about the Carters plans for trash disposal and recycling, and if they were planning on having drinks available. *Mr. Layne Carter stated there would be no drinks available, and Mr. Grant Carter stated there would be no power at the property.*

Mrs. Caulk also asked about tents and events on the property. *Messers Carter stated there would be no events or tents, as there would only be room for 6 cars.* Mrs. Caulk asked how they would ensure only 6 cars would be there; could people call and inquire about availability? *Mr. Grant Carter stated that someone interested in using the facility would drive by and if there were no parking spaces available, would need to come back at a later time.*

Mrs. Caulk also asked about insurance for damage. *Mr. Woicak stated they would get a commercial, general liability insurance policy.*

Mr. Davis Finch, 91 South Road. Mr. Finch opined that the agricultural potential of the property is far greater than it had been stated here tonight. Ariel photos from the 1940's and 1950's show the entire property was extensively agricultural, with large crops of corn and other crops. Mr. Finch's father had worked haying when the Curriers owned the property. It was a profitable farm in those years, and Mr. Finch opined it could be a profitable farm again.

Mrs. Susan Porro, 64 South Road. Mrs. Porro stated she lived next door to the proposed driving range. She reported that last year they could hear the people who were out driving the golf balls and talking loudly. She was not looking forward to having six people out there are one time whacking golf balls and talking.

Mr. Daly stated it appeared that Messers Carter had been trying this business out already, and *Mr. Layne Carter stated they had been doing it for 2 ½ years.*

Mrs. Sandy Hoelzl, 56 South Road. Mrs. Hoelzl asked what would happen 10 years down the road if the Carters or whomever owned it at that time wanted to expand the business.

Mr. Daly answered that the ZBA has the power to impose conditions on the variance, should it be granted, and one of those conditions would be that the business would not be able to be expanded. It would then go to the Planning Board, who could impose more conditions and restrictions.

Mr. Daly asked Messers. Carter if they had anything to add, now that the abutters had finished asking their questions. *Mr. Layne Carter answered that all they were trying to do was to keep the land as it was presently and not have it developed; but it needed to support itself. Mr. Layne Carter stated he did not have the time to be a farmer or lease it out; he builds houses and is not a farmer.* Mrs. Belcher commended Mr. Carter for posing this use over development.

Mr. Daly asked who would be on the premises to run the business, and *Mr. Layne Carter answered it would most likely be his 16-year old daughter.*

Mr. Daly closed the public hearing so the Board could consider the application. Members of the public started to leave, and Mr. Daly informed them they were welcome to stay and hear the Board deliberation.

Mr. Ciardelli noted it had been argued it is not the Board's preference to build houses, but regardless if the Board likes it or not, it is an allowable, reasonable use of the property. That is the foundation of the Board's decision-making process and goes against the hardship criteria

Mr. Daly reviewed the Criteria with the Board.

Criteria 1. The proposed use would not diminish surrounding property values because:

Mr. Daly expressed the view that what the Carters were proposing would not diminish property values in this case. Mr. Falman agreed that even with the addition of a tee-off space, an unpaved parking area and a porta-potty shed, the land would look the same as it does at the present time; it would not diminish the surrounding property values. Mr. Allen, Mrs. Belcher and Mr. Ciardelli agreed.

Mr. Allen, Mrs. Belcher, Mr. Ciardelli, Mr. Daly and Mr. Falman, all concluded that there *would not* be any diminution of property values. The vote was 5 (*would not*) and 0 (*would*). The Board voted 5 to 0 that the criteria *was* satisfied.

Criteria 2. Granting the variance would not be contrary to the public interest because:

Mr. Daly did not see that granting the variance would be contrary to the public interest other than the fact that it is a commercial use in a residential area. He opined it was a non-intrusive use. Mr. Ciardelli said that given the scale of the proposal, it would not alter the essential character of the locality. Mr. Allen agreed that the Carter's proposal was to keep the property agricultural; Mrs. Belcher agreed.

Mr. Allen, Mrs. Belcher, Mr. Ciardelli, Mr. Daly and Mr. Falman, determined that granting the variance *would not* be contrary to the public interest. The vote was 5 (*would not*) and 0 (*would*). The Board voted 5 to 0 that the criteria *was* satisfied.

Criteria 3. Denial of the variance would result in unnecessary hardship to the Owner because the zoning restriction as applied to the property interferes with the reasonable use for the property, considering the unique setting of the property in its environment such that:

Mr. Ciardelli suggested that no matter how the Carters presented their proposal, he did not see how they could prove that the zoning restriction interfered with the reasonable use of the property, as there were several other ways they could use it. He did not see where they had proven their property was any more unique than any other property on the same road, and it could be farmed or have houses built on it.

Mrs. Belcher stated that given the economic conditions at the present time, even though houses could be built on that property, if there was no one who could afford to purchase that property and build those houses, in her opinion it was not a viable alternative. Nor was the farming of the land if it was not affordable at the present time. This said, she did agree there was nothing unique about the property that would separate it from the surrounding properties. Mr. Daly, Mr. Falman and Mr. Allen agreed there was nothing to distinguish this piece of property from those surrounding it.

Mr. Allen, Mrs. Belcher, Mr. Ciardelli, Mr. Daly and Mr. Falman, concluded that denial of the variance *would not* interfere with the reasonable use of the property. The vote was 5 (*would not*) and 0 (*would*). The Board voted 5 to 0 that the criteria *was not* satisfied.

Criteria 4. Granting the variance would do substantial justice because:

Mr. Daly stated the argument would be the preservation of the character of the property. Mr. Ciardelli agreed. Mrs. Belcher stated that they would get income from the property to pay the taxes and not having to develop the land; it would stay essentially the same. Mr. Allen and Mr. Falman agreed.

Mr. Allen, Mrs. Belcher, Mr. Ciardelli, Mr. Daly and Mr. Falman, agreed that granting the variance *would do* substantial justice. The vote was 5 (*would*) and 0 (*would not*). The Board voted 5 to 0 that the criteria *was* satisfied.

Criteria 5. The use is not contrary to the spirit of the ordinance because:

Mr. Daly stated this was a proposed commercial use in a residential zone. The applicant argued that it is essentially not changing from the agricultural use; it is an open field and will stay the same. Mr. Ciardelli opined this was a disguised commercial use and would fit into the spirit of the ordinance. Mr. Falman opined that they could be using this as a family driving range and there would be no restrictions. Mrs. Belcher opined that it was not contrary to the ordinance. The spirit of the ordinance is to not create commercial-looking entities within residential zones, and this proposal would keep the land looking as an open field. Mr. Allen noted the spirit is to keep things as residential and agricultural as possible, and opined the proposed driving range did that.

Mr. Allen, Mrs. Belcher, Mr. Ciardelli, Mr. Daly and Mr. Falman, determined that the proposed use *is not* contrary to the spirit of the ordinance. The vote was 5 (*is not*) and 0 (*is*). The Board voted 5 to 0 that the criteria *was* satisfied.

Mr. Daly reviewed that criteria 1,2, 4 and 5 were satisfied; criteria 3 was not satisfied.

Mr. Daly asked for a motion on the application.

MOTION: Mr. Ciardelli **MOVED** that the variance be **DENIED** for the application of Mr. Layne Carter seeking a use variance from Article III - USES PERMITTED for a business in a residential zone based on the applicant's failure to satisfy the criteria that not granting the variance would be a hardship. Mr. Falman seconded. The vote was five "ayes" and the motion carried.

Mr. Daly closed the public hearing.

Messers Carter thanked the Board for their time.

Mr. Daly informed the applicants that they had 30 days in which to apply for a rehearing.

Board Business

Mr. Daly asked for a motion to approve the October 2007 minutes, since that was the last time the Board had met. There were no changes submitted.

MOTION: Mr. Daly **MOVED** to accept the minutes of October 22 as presented. Mr. Ciardelli seconded, and the motion carried unanimously.

The meeting was adjourned at 8:20 PM.

Barbara White
Recording Secretary

John Daly
Chairman