

TOWN OF EAST KINGSTON, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT MEETING MINUTES

FILE

March 12, 1998

AGENDA

7:30 East Kingston Board of Selectmen – Motion for Rehearing re: case #98-01 (Young) (1998-03)

Members attending: Chairman John V. Daly, David Ciardelli, David C. Boudreau, Edward Cardone, and Alternates Peter A. Riley and Charles F. Marden.

Absent: Norman J. Freeman.

Others attending: E. Michael & Dawn M. Young, Jr., Robin Lynn Ward, Patrick O'Malley, Selectmen J. Roby Day, Jr., Donald C. Andolina and John L. Fillio.

East Kingston Board of Selectmen – Motion for Rehearing re: case #98-01 (Young): Chairman Daly opened the hearing on the application for a motion for rehearing. This petition was brought to the ZBA by the Board of Selectmen for a rehearing in respect to the February 12, 1998 Zoning Board's decision in relation to case #98-01 E. Michael Jr. and Dawn M. Young, 140 Depot Road.

Chairman Daly informed the public that the purpose of this hearing is to consider action on the Selectmen's petition for a rehearing in connection with the February 12th decision rendered by the ZBA. He stated that this is not a public hearing where public participation is invited although all present are welcome to stay and listen.

Chairman Daly stated that both the application for rehearing and the response to this hearing submitted by the Young's attorney, may be considered in this hearing. He went on to say that part of the confusion, if any, may result in the fact that there was no particular reason given for the ZBA's decision on the February 12th. He further stated that in order to grant a rehearing, the applicant must provide new evidence, which was not presented at the first hearing, or they must prove that technical errors were made in the Board's decision.

He continued to say that the issues in this matter come down to two things. One, the allegations that the operation of the well and pump business is grandfathered; and two, the business qualifies for a home occupation permit. He added that there was conflicting evidence presented at the February 12th meeting on both of those issues. Part of this Board's responsibility is to weigh the evidence that was presented and the evidence before the Board tonight. If a rehearing is granted, the Board can come to the same decision it came to on the 12th, or it can come to a different decision.

Mr. Boudreau stated that he participated in the discussion, but did not vote on the 12th. He stated that in reviewing the Selectmen's petition, he doesn't see anything that was not discussed on the 12th. There does not appear to be any new evidence.

He went on to say that some issues in the Selectmen's letter for rehearing are communicated better than what was said on the 12th. Given this clarification, the ZBA may have made a technical error in its decision. He stated that in reversing the Selectmen's decision and granting a home occupation permit, the business does not meet the provisions of the home occupation ordinance. The office itself is permitted, but he's not sure about the equipment. He stated that if it's just an office they are running, a permit is not even needed.

Mr. Boudreau continued to say that under the home occupation ordinance, an office is listed as a permitted use. That is the only part of the business that conforms to the ordinance. He stated that maybe the ZBA lost sight of what they should have been voting on. He stated he is not sure the business should be a home occupation, but the ZBA made it a home occupation when it reversed the Selectmen's decision.

Mr. Ciardelli stated that if the business is grandfathered, it doesn't make any difference what the business is. The issue of being grandfathered came up.

Mr. Boudreau responded that the applicants were applying for a home occupation permit and were denied. The ZBA reversed that decision and granted one. He stated he is not sure this business falls under the home occupation provisions.

Chairman Daly stated that if the business pre-existed the zoning ordinance it wouldn't matter.

Mr. Riley stated that he also did not vote at the February 12th hearing, as it was not required. He then stated that there was a question about being grandfathered, as there was a change in corporate structure after 1989. He stated he does not know what effect this change has on the case.

Chairman Daly stated that there is no evidence that the business was a different entity in 1989, only that it had a different name.

Mr. Riley responded that Atty. Troisi indicated that there was a change in structure approximately four years ago. Does this have any bearing on the argument? He then stated that he agrees with Mr. Boudreau in that the home occupation ordinance is being stretched to the limit with this well drilling business. The large garage itself occupies more than the 25% gross floor space allowed under the home occupation provisions.

Mr. Ciardelli asked if it was the contradicting information that Mr. Riley has a problem with; i.e., supplies being sent to the premises, testimony from Selectmen that no business is being operated from the premises, etc. He stated that this could be interpreted in a different way: *no there wasn't a business there as the drilling is done off site, but an office was.*

He went on to say that he is convinced something was operating there back in 1988. That is why he voted the way he did on the 12th and he still believes the same now.

Mr. Cardone asked if commercial vehicles and vendors entering and exiting the premises had any effect on the issue as more traffic is being created.

Chairman Daly responded that that is one of the reasons the ordinance exists – to limit the types of businesses permitted. He asked if we are talking about an office operation or a well drilling operation? Is it how you characterize it or what you call the business? And if any part of that business is conducted on the premises, does that take the business outside the guidelines of the ordinance? He stated that these are questions the Board has to address.

Mr. Ciardelli stated that he does not feel the well and pump company is even close to the permitted uses outlined in Article X. He went on to say that he does feel the business pre-existed the zoning ordinance.

At Chairman Daly's inquiry, Mr. Ciardelli stated that if he felt the business wasn't grandfathered, he would have voted against granting a home occupation permit.

Mr. Cardone stated that if this were the case, he would have also voted against the permit.

Chairman Daly stated that there is evidence in the record that contradicting statements were made in reference to the nature of the business and if in fact there was a business prior to the zoning ordinance.

Mr. Ciardelli quoted testimony at the February 12th hearing:

The business on site at 140 Depot Road is limited to a small office for the clerical portion of the business.

Mr. Boudreau stated that the office could be considered for home occupation. He went on to say that if the office was in operation back in 1989, then the Young's should have applied for it then. He stated that he is not sure if the Board sifted through everything as there are parts that suggest there was a business and parts that suggest there wasn't. There's discussion about the office being the business and there's discussion of the equipment being the business.

Mr. Boudreau stated that he was not sure if the Board was voting on the business being allowed at the residence of if they were voting on allowing a home occupation.

The Board then reviewed the Young's original application submitted to the Planning Board in September 1997. The application lists *well drilling* as the nature of the business and *East Kingston Well & Pump Co. Inc.* as its name. No other specifics were given.

Chairman Daly stated that the decision rendered on the 12th of February could mean either the Board found the business was grandfathered *or* the business should have been issued a home occupation permit.

Mr. Ciardelli stated that Mr. DiProfio characterized the business as a commercial business and not a home occupation. Mr. Ciardelli stated that he did not disagree with Mr. DiProfio's characterization, but that he (Ciardelli) viewed the business as pre-existing the zoning ordinance. It didn't make any difference whether it was a home occupation at the time or not. It was pre-existing.

Chairman Daly stated that the prior testimony reflects Mr. Young, Sr. saying that there was no business at the premises. He further stated that Atty. Troisi explained that Mr. Young, Sr. may have felt under fire and denied the business' operation at 140 Depot Road. Chairman Daly continued to say that – bottom line – if it wasn't the truth, does it matter now? Should the testimony of a prior owner have any effect on the decision today?

Mr. Boudreau stated that at that time, the business may have only been an office, not the commercial entity it is today. Maybe the Board should have asked if there were trucks going in and out of the premises in 1988.

Mr. Cardone stated that he asked that question at the February 12th hearing and the response was that there were trucks registered at 140 Depot Road ten years ago.

At Mr. Cardone's inquiry, Atty. Troisi stated that the business' vehicles are registered at 140 Depot Road. This has been the case for the past ten years, including when the business was named EM Young.

Mr. Riley stated that at the February 12th meeting he inquired if the applicants had any evidence of the vehicle registrations. The response was negative.

Mr. Cardone asked if the Board could ask the applicants for proof of their certification of insurance and vehicle registration from ten years ago.

Mr. Ciardelli responded that at the October planning board meeting, the Young's were told they were lacking evidence. They brought evidence to the second hearing in November as they thought that's all they needed to satisfy the Planning Board. This evidence included an invoice stating items were shipped to 140 Depot Road in 1988, statements that materials were being sent to 140 Depot Road, etc. This is not office type material; this was done in 1988. The business address was 140 Depot Road in 1988.

He went on to say that he believes something was going on there and materials were being shipped to 140 Depot Road. That is a business activity that he (Ciardelli) considers grandfathered.

MOTION: Mr. Ciardelli motioned to deny the motion for rehearing based on the business being grandfathered, which was not depicted at the February 12, 1998 ZBA hearing. Mr. Cardone second.

DISCUSSION:

Mr. Boudreau inquired if Mr. Ciardelli thinks the business should be grandfathered or should have a home occupation permit.

Mr. Ciardelli responded that the business is not a home occupation. The Board put stipulations on the business --no more than two commercial vehicles may be kept on the premises and they must be garaged. He stated that he understood the business was grandfathered.

Mr. Boudreau stated that the Board reversed the Selectmen's decision and granted a home occupation permit. The Board did not deem the business grandfathered in that motion.

Chairman Daly stated that the argument before the Planning Board was that a) the business was grandfathered and didn't require a permit; and b) the business qualified as a home occupation even if it wasn't grandfathered. He continued to say that the Planning Board in its decision said that the business didn't qualify as a home occupation. They did not address [in their decision] that the business was grandfathered. The Selectmen then voted to accept the Planning Board's decision.

Mr. Riley inquired how the business can be considered a business in 1988 when the Selectmen's record indicates Young Sr. as saying no business existed. This is a matter of public record. He stated that the Young's can't have it both ways. He said he finds it hard to go along with this as the Young's argued one thing several years ago and now they are arguing something different.

Mr. Ciardelli responded that there is no question there is a conflict here, the Young's were using the premises as a business address in 1988 and denying it at the same time.

Mr. Riley stated that if the business is not grandfathered, it is outside the scope of the home occupation provisions. This well drilling business does not conform to the definition of a home occupation.

Mr. Cardone stated that the burden of proof should be on the Young's. Give them the opportunity to provide further documentation of the business existing prior to 1989, i.e., vehicle registrations, insurance certificates, etc.

Mr. Riley stated that the purpose of this hearing is to consider the motion for rehearing and that the Board would need to grant a rehearing to allow any further evidence. He continued to say that he feels most of the members would like to see the business stay, however there are technical requirements that argue against the Young's standing decision.

Chairman Daly directed attention to the motion on the floor, which is to deny the motion for rehearing.

Mr. Boudreau stated that the motion on February 12th should have been to *reverse the selectmen's decision based on the grounds the business was grandfathered.*

Chairman Daly responded that that was one of the possibilities. He stated that the motion on February 12th should have been clearer. He then reiterated that the purpose of this meeting is only to decide whether or not a rehearing should be granted.

The vote was called. Mr. Ciardelli and Mr. Cardone in favor of denying the application for rehearing; Mr. Boudreau and Chairman Daly opposed. The motion fails.

Chairman Daly reviewed member positions as follows:

1. Mr. Boudreau takes the position that the business may or may not be grandfathered *and* that the business does not conform to the home occupation ordinance.
2. Mr. Ciardelli takes the position the business is grandfathered.
3. Mr. Riley takes the position the business is not grandfathered and that it does not meet the provisions of the home occupation ordinance.
4. Mr. Cardone takes the position the business is grandfathered.
5. Mr. Marden takes the position the business was in operation at 140 Depot Road prior to 1989 with equipment and office despite previous denials by the applicants.

Mr. Boudreau stated that he has no problem with the agreeing the office was in existence in 1989. He's just not sure the full well drilling operation, including the equipment was. He stated that although a building permit was issued for the barn, there's no indication the barn was used for the business other than the office portion.

Mr. Cardone responded that one does not build a barn that size and not use it for this type of business.

Mr. Boudreau stated that anyone could build a large barn on their property, and not use it for business purposes. This barn may not have been built with the well drilling business in mind.

Mr. Riley added that a building permit was issued for the office, therefore the building inspector was restricting the business use of the barn to an office only. The barn is now used as a truck repair facility. The use has clearly changed.

He again stated that Mr. Young, Sr. stated that there was no business in 1988. That's the record.

Mr. Cardone stated that the Young's testified the vehicles were registered to 140 Depot Road for the past ten years.

Mr. Ciardelli read from the November 20, 1997 Planning Board minutes:

*Mrs. Fillio inquired at the address of the business, as it would be listed by the insurance company back in 1988.
Atty. Troisi replied that the vehicle insurance was listed as 140 Depot Road.
Mrs. Fillio inquired if the business insurance was also listed as 140 depot Road.
Atty. Troisi responded that he didn't know.*

Mr. Ciardelli stated that according to this testimony, the vehicles were insured at 140 Depot Road.

Mr. Riley stated that the petitioners have the burden of going forward. The Young's made statements in 1988 that are in direct conflict to what they are saying now.

Chairman Daly read from the February 12, 1998 ZBA minutes:

At Mr. Cardone's inquiry, Atty. Troisi stated that the business' vehicles are registered at 140 Depot Road. This has been the case for the past ten years, including when the business was named EM Young. Mr. DiProfio responded that Mrs. Fillio at the November meeting asked at what address the vehicles were insured. He said that the Young's had indicated they were insured elsewhere, not at 140 Depot Road. Discussion of whether the town has record of the registration history of the vehicles in question transpired.

Mr. Boudreau stated that a rehearing of this case would allow those things to be proven. He said that the Board should have continued the February 12th hearing to allow for this vehicle registration proof to be presented.

Chairman Daly responded that the Young's presented evidence at the prior meeting. He noted the following exhibits:

1. Reference deed of the 140 Depot Road property to Mr. & Mrs. Edward Michael Young, Jr., dated April 30, 1994 showing the grantors as E. Michael and Norma M. Young, Sr. as purchasing the property on August 4, 1988.
2. Morris pipe and supply company invoice dated 6/28/88 with shipping to 140 Depot Road, East Kingston.
3. Statement from Hedley Tingley testifying material was shipped to 140 Depot East Kingston during 1988.
4. Statement from Gordon Hollabaugh testifying material was shipped to 140 Depot East Kingston during 1988.
5. Statement from Kenneth Strong testifying he did business with Michael Young, Jr. and Sr. at 140 Depot Road East Kingston in early 1988.
6. Statement from Mark Young testifying he has shipped material to the 140 Depot Road location since 1988.
7. Statement from Peggy Tibbetts testifying she dealt with Mr. Young, Sr. at his business location of 140 Depot Road in 1988.
8. Affidavit from Michael Young, Jr. testifying he and his father did business from the 140 Depot Road location in 1988.

Mr. Ciardelli stated that had the Young's known that making a big deal of their business in 1988 would have been advantageous to the business in 1997, they probably would have done so. He stated that if the business was in operation in 1988 and they followed the rules, they would be considered grandfathered. The Young's have indicated they didn't follow the grandfather procedures because they didn't know about them.

He continued to say that it's impossible to figure out why Mr. Young, Sr. denied the business to the Selectmen. Maybe he thought it was the best answer at the time, but that doesn't mean the business wasn't there.

Mr. Riley stated that he thinks it's East Kingston should have businesses and that the location of the East Kingston Well & Pump Company is a good one. He then stated that even so, this business is outside the scope of the ordinance.

Mr. Cardone stated that he agrees with Mr. Ciardelli, and the applicants should be given the opportunity to provide further proof.

Chairman Daly responded that evidence was already presented. What other evidence is the Board looking for?

Mr. Boudreau stated that he would like to know what type of supplies were delivered to 140 Depot Road in 1988 and what is delivered there now. He stated that he is not satisfied that anything but an office was operated prior to the ordinance.

Mr. Riley stated that other items of documentation that could be considered are tax return, vehicle registration and insurance addresses. These items should have been presented at the last meeting.

Mr. Boudreau stated that he is convinced the office was there prior to the ordinance, however he is not sure of the time between the office alone and when the trucks arrived on the premises. If it was proved the trucks and supplies have been there since 1988, he would be convinced the business is grandfathered. He stated that he is concerned a change in the nature of the business took place.

Mr. Riley asked if the business is grandfathered, shouldn't the Young's have applied for a permit?

Chairman Daly responded that the Young's argued they did not understand they needed to apply for a permit when they were grandfathered.

The Board reviewed the February 12, 1998 decision.

Mr. Freeman motioned to reverse the December 1, 1997 decision rendered by the Board of Selectmen and grant the application for a home occupation permit on the condition that no more than two commercial vehicles may be kept on the premises and that they be garaged. Mr. Ciardelli second.

Mr. Boudreau stated that he's not sure the Board's motion was in tune with the zoning laws. Just restricting the number of vehicles doesn't prevent the business to store a large amount of supplies; it has the potential to turn into a warehouse. This could create a lot more traffic. The Board should have given additional specific restrictions.

He continued to say that a rehearing would allow the Board to set strict conditions on the expansion of the business. He stated that it has not been proven to him that the business as it exists today, existed in 1988: the business in its entirety, not just the office.

Chairman Daly stated that there is no evidence before the Board that there was any change in the nature of the business in 1988 compared to the business that was conducted in 1997.

The Board reviewed the building permits of July 1988 and September 1994.

Mr. Riley stated that Mr. Young, Sr. stated there was no business in 1988 and the Board should take the petitioner on his word. The building permit for the garage was issued in 1994.

The Board argued that the garage was built in 1988.

Mr. Boudreau stated that if the business were grandfathered then it would need to comply with 10.7 of the ordinance. He then read Article X–Home Occupations, 10.7:

Nonconforming Uses: Any home occupation in operation at the date of the public posting of this ordinance (January 6, 1989) shall be required to comply with 10.5 of this section. Provided, however, that any noncompliance in effect as of January 6, 1989 shall not increase. In addition, such occupation shall not be relieved from compliance with other state and local regulations.

He continued to say that the business would not need a home occupation permit. He stated that if the office were the only part of the business in existence at 140 Depot Road in 1989, then *only* the office portion of the business should be grandfathered. The complete scope of the business in 1989 has not yet been proven.

Mr. Ciardelli stated that it was stated the office was in the house prior to 1994, the office was moved to the garage in 1994. The garage was built in 1988, materials were delivered in 1988, and vehicles were registered and insured there in 1988. He went on to say that given this information, the business was in operation in 1988, whether it is in the house or the garage. The town put its seal of approval on this as building permits were issued.

He stated the business is pre-existing in some format regardless of where the office was. It has been stated that most of the trucks are kept off site. He continued to say that in view of the spirit of the ordinance – if the Board places constraints on the business that it won't get any larger, or change from how it is now and was in 1988, then the Board has honored the spirit of the ordinance.

Chairman Daly stated that the October Planning Board minutes reflect Atty. Troisi addressing the home occupation provisions:

- 10.1– There is no question that the well drilling business is carried out from the office. The actual drilling is done at the job site.*
- 10.3.1 – The business is located in the barn.*
- 10.3.2– No evidence of the business, not even a sign (although one is allowed.)*
- 10.3.3– Three commercial vehicles are owned by the Young's. One pick-up truck, one drilling rig, and one water truck. The drilling rig and water truck are 90% of the time located at other locations (job sites). When they are at the residence, they are kept in the garage.*
- 10.3.4 – No public traffic. Driveway was modified as requested by the town.*
- 10.3.5 – A resident of the property is conducting the business.*
- 10.3.6– Business does not omit smoke, noise, fumes etc.*
- 10.3.7–Already addressed traffic.*
- 10.3.8– The business does not use more than 50% of the gross floor area.*
- 10.3.9– Only two residents are employees of the business.*

Mr. Boudreau stated again that he is not convinced that the operations of the business carried out from the premises in 1988 are the same as what was being carried out in 1997. The grandfathered provisions state that no increase in the business operations are allowed.

Chairman Daly responded that if the business was in operation in 1988 and it doubled in size five years later, this would not have any effect on whether or not the business is grandfathered. The growth of the business now becomes an enforcement issue. The business itself is still grandfathered.

Mr. Riley added that once you're grandfathered, you're grandfathered as long as the type of business hasn't changed. He went on to say that the issue of whether or not the truck maintenance was being carried out from the garage in 1988 could be addressed at a rehearing.

MOTION: Mr. Boudreau motioned to grant the application for a rehearing based on the need for additional evidence concerning the nature of the business conducted from 140 Depot Road in 1988 in comparison to the business being conducted from the same location in 1997. Mr. Ciardelli second.

DISCUSSION:

Mr. Ciardelli stated he agreed a business was being conducted from 140 Depot Road in 1988. Proof of exactly what operations were being conducted can be presented at the rehearing. If more evidence would allow members to be satisfied then he agrees a rehearing is in order.

Mr. Boudreau stated that the intent of his motion is to grandfather the scope of the business that was in operation in 1988.

Mr. Ciardelli stated that discussion of home occupation is no longer the case. The issue is whether or not the business is grandfathered.

Mr. Riley inquired if this motion addresses the Board of Selectmen's request and if it would raise even more issues.

Chairman Daly responded that once a rehearing is conducted, ALL issues are open for discussion.

Mr. Boudreau stated that the application for a home occupation was granted at the February 12th hearing because the Board felt there was a business going on prior to 1989. However, he is not sure the same operations are being carried out now as was in 1989.

Mr. Marden responded that well drilling is well drilling. It's still one type of business.

Mr. Boudreau stated that conducting an office in 1989 in comparison to what is being carried out now is different. The scope of the business now is more commercial and has an industrial nature.

Mr. Marden replied that the nature of the well drilling business changes from time-to-time throughout the year. If the trucks were always kept at the job site, it's still a well drilling business. He then asked if it was the deliveries Mr. Boudreau was referring to.

Mr. Boudreau stated that his concern is the entire scope of the business in 1989 in comparison to its entire scope of today. The office was there in 1988, which has been proven.

Mr. Marden asked how the exhibits presented of materials being delivered in 1989 differs from what was being conducted in 1997. Is it the number of deliveries? How deep does the Board want to get into this? A well drilling business is a well drilling business and unless the number of rigs and employees change there is no difference in comparison from one year to another.

Mr. Boudreau stated that he understands Mr. Marden's point and further stated that the home occupation permit that was granted at the February hearing places limitations on it.

He continued to say that the Board did not clarify any restrictions to the amount of materials that can be shipped to the premises.

Chairman Daly stated that the record shows several statements reflecting materials being delivered to 140 Depot Road and one invoice reflecting the same.

Mr. Riley stated that the business could have increased 2000%, but as long as the business was there before the ordinance went into effect, the business is grandfathered.

Chairman Daly stated that Mr. Riley is correct and that the Board's decision must be specific. What evidence will satisfy the Board that the same business is being conducted now that was in 1988? Is it the quantity of materials being delivered to the property, the number of trucks, amount of traffic? And how should this be measured?

Mr. Boudreau replied that quantity is not the issue. He said if everyone here is satisfied that what was going on in 1989 is going on now, then there is no sense in having a rehearing. He stated if there were proof that vehicles were registered and insured at 140 Depot Road in 1989 then he would be satisfied.

Mr. Ciardelli stated that the applicants testified the vehicles were registered and insured there.

Mr. Boudreau replied that there is conflicting evidence to that issue.

Chairman Daly stated that there is conflicting evidence on every significant issue to some extent.

Mr. Riley stated that the Board should keep in the back of their minds that if the application for rehearing is denied, then the selectmen would probably go to superior court. If the appeal is granted and the applicants are not allowed to continue the operation of their business, they too will go to court. He recommends the Board hold a rehearing and give both sides the opportunity to present as much evidence and information as possible.

He continued to say that because of the conflicting evidence and the technical defects made in the Board's previous decision, a rehearing is in order. Both parties can present better cases.

Chairman Daly called the vote: The motion passed 3-0. Mr. Cardone, Mr. Boudreau and Mr. Ciardelli in favor.

A rehearing is granted and all issues will be open for discussion. This rehearing will be conducted on Thursday, March 26, 1998 at 7:30 PM at the Town Hall.

February 26, 1998 Zoning Board Minutes: With no corrections or objections, the February 26, 1998 Zoning Board of Adjustment Minutes (Rutledge case # 98-02) were approved for the record.

This March 12, 1998 Zoning Board of Adjustment meeting adjourned at 9:04 p.m.

Respectfully submitted,

Catherine Belcher

Minutes completed and on file March 16, 1998.