

Town of East Kingston, New Hampshire
Zoning Board of Adjustment Meeting Minutes
March 26, 2009
7:00 pm

AGENDA

Members Attending: Chairman John Daly, Vice Chairman Catherine Belcher, David Ciardelli
Alternate Members: Paul Falman
Also present: *Applicants* Mrs. Diana Whitmore
Attorney John Ratigan, representing Mrs. Whitmore
Abutters Mr. & Mrs. Brad Reardon, 98 Depot Road
Mrs. Nancy Hinz, 76 Main Street

Mr. Daly opened the meeting of the East Kingston Zoning Board of Adjustment (ZBA) at the Pound School, 41 Depot Road on March 26, 2009 at 7:00 PM.

Public Hearing 09-02 – Warren and Diana Whitmore, 108 Depot Road (MBL 04-02-11). The applicant is seeking a use variance from Article XVI for a business in a residential zone.

Mr. Daly opened this public hearing and acknowledged that Mrs. Whitmore was in attendance. Also in attendance was Attorney John Ratigan, from Donahue, Tucker & Ciandella, who will be representing Mrs. Whitmore for this public hearing. Mrs. Whitmore is 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 be recognized before they spoke and to address the Chair directly. He also asked that they state their name and address for the record.

Mr. Daly inquired who would be speaking; Mrs. Whitmore indicated Attorney Ratigan would speak. Attorney Ratigan introduced Mrs. Whitmore. He asked Mrs. Whitmore to explain what her plan was. Mrs. Whitmore said that she has been an administrative assistant for 30 years and was looking for a way to stay home and earn some income. She has four dogs of her own and sometimes sits for a friend's dog. Her plan was to rearrange the cellar in her house, sectioning off two areas, install two doggie doors in the garage doors, and build two dog runs out from the garage doors. This would allow room for two dogs. She has asked for the variance for three dogs as she often watches a friend's dog as a favor and wanted to make sure she was covered for that additional dog. The friend's dog is kept in the house with her own dogs as they all get along.

She had been before the Planning Board for a home occupation and as her proposal did not meet the listed criteria, she was denied. She was now before the ZBA to obtain a variance.

Since her house does not face the road as such, the proposed runs and the garage doors are at the rear of the portion of the house that faces the road. Mr. Falman noted it appeared those garage doors were not visible from the road, and Mrs. Whitmore confirmed that fact. Mr. Daly asked if you could even see the house from the road, and Mrs. Whitmore answered you could barely see it in the winter and when there were leaves on the trees, you could not see it at all.

Mrs. Whitmore said there was room for approximately 6 cars to park in her driveway area, but at the present time it was muddy. She and her husband had intentions of graveling the driveway, or perhaps paving it in the future to make it more accessible.

Mrs. Whitmore stated that there is ½ an acre around the house that is presently fenced in for her own dogs. She had spoken to her neighbors, the people on the abutter list, and no one had any objections to what she proposed.

Attorney Ratigan referred to the letter he had sent to the Board, and also the submitted a letter from a real estate broker, Nancy C, Dow, who has experience in evaluating larger dog daycares and the impact on property values. Ms. Dow did not see any impact to the surrounding area and as the application was for 3 dogs, did not perceive any diminution of the surrounding property values.

Attorney Ratigan reviewed that in looking at the tax maps, there were a number of lots in the area that are old historic lots that are relatively long and narrow in size and shape. This neighborhood has at the present time and has had for a long time various animal uses happening. Also someone in the neighborhood has geese, which can make quite a lot of noise. This neighborhood is unique as opposed to other neighborhoods as it has so much animal activity.

Attorney Ratigan also asked the Board to consider the needs of the community. There were many families with dogs who go on business trips or who have a family illness that could benefit from a service such as Mrs. Whitmore proposes. This proposal would fit the needs of occasional use.

Attorney Ratigan noted that the home occupation uses do not anticipate every type of need. The Town has determined that child daycare is acceptable and the traffic that would go along with that. Mrs. Whitmore's proposal would only have at most 3 clients at a time, normally only two, and there would be only a modest amount of traffic attached to that service. Unlike for a traditional daycare, in this case it would be very unusual that all 2-3 clients would be picking up or dropping off at the same time. There would be negligible impact. This area is on one of the busiest streets in Town and is in a neighborhood that already has a lot of existing, established animal uses. He opined that the proposed caring for 2-3 dogs fits in with that neighborhood.

Attorney Ratigan does not feel there will be any diminution of property value, and that the spirit and intent of the ordinance and the public interest standards of the ordinance are met since this proposal would not change the intent of the property or the neighborhood in any way. From a substantial justice aspect, where someone is asking for such a modest use, there is no public interest that is served in denying the use when the impacts will be negligible, if at all. On the contrary denying the use, for those who have dogs and might need a place to board a dog that would be well cared for a short period of time, would not be in the public interest.

Mr. Daly asked Attorney Ratigan to address the hardship issue.

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,

This area along Rt. 107 is unique as there are many long, narrow historic lots, a high concentration of animal uses (both farm animals and breeding animals), which is not like most neighborhoods and is an existing use of the land, which makes this area unique. Attorney Ratigan understands that normally the uniqueness is in reference to the physical characteristics of the property and what it is that sets it off from everything that surrounds it. He opined that there had not been a case that addresses the issue of looking at uniqueness from the perspective of what is going on in the neighborhood and he does not think looking at it that way is impermissible. The dropping off of animals would not be inconsistent with a high traffic road. More importantly, there are a lot of animal uses going on in the neighborhood and this proposal is not inconsistent with those uses. He realizes the proposed use would not be appropriate in other areas, such as the age-restricted developments, where the houses are close together.

Attorney Ratigan feels that 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.

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

Attorney Ratigan noted the general purpose of the zoning ordinance is "to preserve and improve the attractiveness of the Town of East Kingston as a rural, residential and farming community and to continue its desirability as a place in which to live and do business and to promote the health, welfare, morals, convenience and safety of its citizens." To provide a needed use in this Town where there is no such use, considering it is only a few animals added to an area of Town that already has many animal uses, it is not inconsistent with that. He opined that those purposes do not seek to restrict this type of use. Those purposes are aimed at rural, residential farming, and this proposed use is consistent with that. Nothing proposed will danger the health, welfare or safety of anyone.

Attorney Ratigan feels there is no fair and substantial relationship between the general purposes of the zoning ordinance and the specific restriction on the property.

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

Attorney Ratigan does not see any public or private rights that are implicated by the request and therefore there is no injury.

Mr. Daly commended Attorney Ratigan for his creativity in his written submission in reference to greenhouse gases. He asked why the information about Hidden Hollow Farm was included. Attorney Ratigan knew the Board was familiar with the uses, but he thought it was illustrative of the fact that there are farming uses in the neighborhood. What they were speaking to was the rehabilitation of some space in the existing basement, a change to the garage doors and a couple of chain link dog runs.

Mr. Daly stated that East Kingston's ordinance did not treat dogs as farm animals. Mrs. Belcher had checked with the state and said the state did not clarify dogs as farm animals either. She had also contacted OEP in regard to kennels, and this proposal does not fit into the criteria for a commercial kennel. She was trying to understand how to look at it. It was not agricultural, even though Attorney Ratigan states it is similar to an agricultural use, but it is not a commercial use either. A home occupation can be a business but not a commercial use.

Mr. Daly clarified that it is a commercial use since Mrs. Whitmore intending on charging for her services, and opined looking at it as a home occupation only served to confused the issue.

Mrs. Whitmore noted that there was no restriction as to how many dogs she could own; she could have 10 dogs if she wished. She had done some research and found that there were 604 dogs registered in East Kingston.

Attorney Ratigan explained that the reason he had characterized the variance as a home occupation is because the definition of a home occupation is "a professional or service occupation... carried out from the home which is clearly accessory and subordinate to the residential use ..." He thought it was a more specific way to approach it rather than just calling it commercial.

Mr. Falman asked if Mrs. Whitmore planned on any signage, and she answered she did not. She planned on performing her service for friends, family and by word-of-mouth. She had gone to the Town Clerk's Office to inquire how many dogs were in East Kingston; there were 604. She had thought she might send post cards to the dog owners.

Mr. Falman wondered if would constitute an invisible home occupation since there would be no signs and you could not see if from the road; Mrs. Belcher verified it was still a commercial as she would be having paying

clients coming to her house. Mrs. Whitmore asked if it would make a difference if she arranged to pick up the dogs and not have people come to her house, and was informed it would still be classified as a business in a residential district as she would be compensated for her services.

Mr. Ciardelli commended Mrs. Whitmore for "doing the right thing" and coming to the Zoning Board for the variance.

Mrs. Belcher was having a problem with the hardship criteria and if they were met with this application. She was trying to understand what made their explanation of hardship meets the state's definition. She pointed out that Attorney Ratigan appeared to have flipped the explanation around and described that the unique slope benefited the proposal. Mrs. Belcher wanted to know how the zoning ordinance interfered with the reasonable use of the property. Attorney Ratigan had described the neighborhood as being "unique"; Mrs. Belcher stated they wanted to know what was unique about this particular parcel.

At a previous variance hearing, Mr. Ciardelli had posed the question "Why would he say yes to this person to have this business and say no to their neighbor?" That is the same question I am asking you. What is different about her property that is different from her neighbors that would allow us to say yes?

Attorney Ratigan stated that any more case law does not require because you have an existing use of the property, therefore you cannot satisfy this criteria. Mr. Daly interjected it does not say any use. Mrs. Belcher affirmed it does not say any other use, it says why is this one different. Attorney Ratigan stated that most cases address the unique setting of the property in its environment; what is unique about the physical characteristics of the land that distinguish it from other properties. Although he is not aware of any case that has come up that talks about the unique setting in a different context, he does not think the words prohibit that.

Attorney Ratigan stated you could look at it in terms of neighborhoods; you can take an area of Town and look at certain characteristics. The Town Center District, for example, has different characteristics than other areas of Town. He feels you can also recognize that there are neighborhoods in Town that are different from other neighborhoods; therefore there is a reasonable basis for making a distinction. If he were seeking to support a decision based on this criteria, he would talk about what is different. He would note that are large lots that are long and narrow, there is still some farming and a lot of animal husbandry uses going on, and how that is different that the property along Route 125 or the Town Center District. It is different from the neighborhood that is the elderly housing development. He thinks there is a reasonable basis for making such a distinction.

Mrs. Belcher read from the handbook, *Rather than having to demonstrate that there is not any reasonable use of the land, land owners must now demonstrate that the restriction interferes with their reasonable use of the property, considering its unique setting. The use must be reasonable. The second part of this test is in some way a restatement of the statutory requirement that there be something unique about this property and that it does not share the same characteristics as every other property in the zoning district. The facts of the case makes a conclusion that the zoning restrictions may interfere with the proposed use of the property, yet they may not support a conclusion that the ordinance interferes with the reasonable use of the property. "While its size may make it uniquely appropriate for the business, that does not make it unique for zoning purposes."*

Attorney Ratigan stated that the cases this is based on are cases in which the applicant failed to demonstrate there was something unique about the property, either geographically or physically, about the land that distinguished it from others, or they have demonstrated it. He does not think the court has been asked to look at other aspects of what *environment* means. He opined that the word *environment* did not mean single lot; if it meant single lot they would have written single lot. Therefore it must be something else. They are making their case that the environment is something other than the lot. Mr. Daly clarified it was the "unique setting of the property in its environment."

Mr. Falman referred to page 16 in the handbook, under reasonable use which states: *"The ZBA must consider the surrounding environment, which includes an evaluation of whether the applicant's proposed use would alter the*

essential character of the neighborhood, because the impact of the character of the neighborhood is central to the analysis of the use variance."

"Put another way, whether the proposed use of the property is reasonable will depend to a larger degree on the setting that surrounds the property. For example if an application is seeking a use variance to allow a pig farm in a residential neighborhood, the ZBA may well conclude that the proposed use of the property is not reasonable considering the unique setting."

Attorney Ratigan explained that not every house in the neighborhood could accommodate the easy transformation of the basement area to facilitate this use and to accommodate the two proposed runs that are not visible. The runs would be in the area between the two slopes on either side of the driveway and for the most part hidden. The topography of the house differs from the neighbors; Mrs. Whitmore's house is up high and neighboring houses are down low. This makes it different from the neighbors in environment.

Mr. Ciardelli agreed the land from the road sloped up to where the house is located, and that the driveway goes back quite far and the house is mostly hidden from view, even without foliage. It also appears there is a lot of vegetation around the house, as per the Google Earth picture he was looking at.

Mr. Ciardelli asked what size of the proposed runs would be and were they proposed to be made of chain link fence? Mrs. Whitmore answered the size was 5' wide x 20' long and they would be chain link fencing. Mr. Ciardelli asked about her own 4 dogs; are they in runs? Mrs. Whitmore stated they had the run of the yard, which is fenced and there is a doggie-door for them in her dining room. She would have the runs from the garage doors for the boarding dogs, as they might not get along with her dogs.

In looking at Article XVI, paragraph C.6. of the home occupation ordinance which states, "*A home occupation must not offend by emitting smoke, dust, odor, noise, gas, fumes, light, or refuse matter,*" Mr. Ciardelli noted that the only thing he says that came close was the noise issue. How was she going to handle the noise?

Mrs. Whitmore answered that at the present time, she had her 4 dogs and one that was a friend, for a total of 5 dogs. She asked her neighbors about noise and barking, and none of them said there were any problems with barking. Most of the neighbors also have dogs.

Mr. Daly asked if Mrs. Whitmore had ever gone to the Selectmen, and she stated she had not. She had only been to the Planning Board, where she was denied. Mrs. Belcher asked why she did not appeal, and Attorney Ratigan stated it was after the 30-day time period. Mrs. Belcher stated they could have argued whether it fits as a home occupation versus having to meet the hardship criteria. Even though it is not listed on the home occupation list, it has all the characteristics of one; it sort of meets the agricultural piece, day cares can be noisy also, etc.

Mr. Daly asked if there were any more questions to the applicant from the Board. Mr. Falman asked for clarification since she had mentioned 3 dogs, but the application only stated 2 dog runs. Was she applying for two dogs or three? She answered it was for 3, only because she watches one dog for a friend, and did not want that to interfere with the proposal for the two dogs. Mr. Falman explained that one of the fears of allowing a variance is that once the door is opened, if this is successful, would you then come back for 10 dogs? He stated she would need to be clear on what her long-term intentions were. She stated it was to board two dogs in kennels and to have a third that got along with her dogs and would be in her home with her dogs; she only has space for two runs. Mr. Daly stated that since she would be charging to "board" all three dogs, she was in actually asking for permission for three dogs. The semantics of how she placed them was up to her.

Mr. Daly recognized there were abutters present and asked if they would like to speak.

Mr. Brad Reardon, 98 Depot Road. Mr. Reardon did not have a problem with what Mrs. Whitmore proposed to do; he has farm animals on his property. He stated that if the runs she was talking about were constructed property, he had no problem with them. He wanted her to make sure Mrs. Whitmore would ensure the dog's

vaccinations were up-to-date in case they got out. These were his only two concerns. He noted that he would have to walk to the top of his orchard to even see where these runs are proposed. He has dogs too; and dogs bark. Mostly they only bark when someone comes up the driveway.

Mrs. Whitmore noted that when you start a business like this, the first thing you need to do is to interview people and get the medical records for the dogs and make sure their shots are up-to-date. That is part of the procedure. Mrs. Belcher noted that if the variance were to be granted, and Mrs. Whitmore went back to the Planning Board to work out details, one of the things they might require is an annual inspection by the Animal Control Officer. Mr. Ciardelli noted it seemed that Mrs. Whitmore was a responsible person both with her own dogs and her friend's dog. Mrs. Whitmore stated she did go to her closest neighbors and asked if they would sign a statement that they did not have a problem with her proposal. She submitted that statement to the Board.

Mr. Daly asked if she was planning any other changes to her property other than the dog runs. Mrs. Whitmore answered that the only other thing they would be doing is to clean up the driveway somewhat to make it more drivable; either put more gravel or pave it. And she would be doing that if it were a business or her home.

Mrs. Nancy Reiss, 76 Main Street. Mrs. Reiss stated she has been an East Kingston resident for years and had watched how these things evolve. She is concerned with home businesses in East Kingston; but is also concerned with people making a living. She did not think that in a rural, quasi-suburban community, that they can make a distinction between animals (dogs) and animals (farming). There are more people working out of their homes, and Mrs. Whitmore had made a good point about 604 dogs in Town. It would be good to have the business she proposes in Town, and in Mrs. Reiss's opinion it qualified as an invisible business as it would not show from the road and would not have any signs. It would be way to keep Mrs. Whitmore in her home, give some income, and help the people in Town. She would like to see this be legal so a variance is not an exception.

Mrs. Belcher explained that there is a provision in the home occupation ordinance that states that *Businesses that can demonstrate they do not create any traffic, visual or other impacts on the neighborhood (other than those impacts from the residential use of the property) may be exempted by the Selectmen from these permitting procedures by virtue of being "invisible"*. This would be an option for Mrs. Whitmore. Mr. Falman had also wondered if Mrs. Whitmore had been to the Selectmen.

Mrs. Reiss noted it was not very clear just what procedures a person should follow; she offered a better definition or progression of the processes might be necessary. Mr. Daly thought perhaps some information to that effect posted on the website could be helpful, and noted that home occupations have always been confusing for all the Town Boards.

Mrs. White observed that she had not directed Mrs. Whitmore to the Board of Selectmen; she had not known it was an option. She had been directed that it needed to be on the list or indirectly related to the list. Then if it was on the list, it is decided whether it is invisible or not. If it is not on the list, its not approved. Mrs. Belcher noted that Article XVI.E.11. states "*Occupations not listed above that are of a similar nature, and only if the Board of Selectmen finds that the occupation meets the provisions of this section.*"

Mr. Daly offered that the Board could table the hearing and Mrs. Whitmore could go to the Selectmen. Then she would not need a variance. If the Selectmen refuse it, she could come back to this Board. Mrs. Whitmore asked if the ZBA made a decision to not grant the variance, would she still have the option of approaching the Board of Selectmen. Mr. Daly stated she would. He explained that she could not come back to the ZBA unless there was something new. Mrs. Whitmore decided to continue with the ZBA tonight.

Mr. Daly closed the hearing to the public, so the Board could deliberate. The members of the public started to leave, and Mr. Daly explained that they could stay and hear what the Board had to say.

The Board reviewed the criteria.

Criteria 1. *Would there be diminution of the value of the surrounding property as a result of the granting of this variance.*

Mr. Falman stated in looking at the setting of the property and the surrounding properties, the location of where the runs are proposed, the explanation that the closest neighbor would need to go to great lengths to see anything, and the letter from the real estate broker stating in her opinion it would not affect property values, he did not believe there would be any diminution of surrounding property values. Mr. Ciardelli, Mr. Daly and Mrs. Belcher agreed.

Mrs. Belcher, Mr. Ciardelli, Mr. Daly and Mr. Falman, all concluded that there *would not* be any diminution of property values. The vote was 4 (*would not*) and 0 (*would*). The Board voted 4 to 0 that the criteria *was* satisfied.

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

Mr. Ciardelli did not believe that granting this variance would be contrary to the public interest because it could provide a low-key service to the community where that are a lot of dogs, the change would not be noticeable, and there are already a number of dogs in the neighborhood. Mr. Falman, Mr. Daly and Mrs. Belcher agreed.

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 4 (*would not*) and 0 (*would*). The Board voted 4 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. Daly opined that the zoning restriction as it applies to the property *does not* interfere with the reasonable use of the property. In Mr. Daly's opinion, there is nothing about the property that is unique. Attorney Ratigan himself had stated that the property was typical of the properties in that neighborhood. Mrs. Belcher agreed. She thought that the unique slope of the property added to the benefit to the proposal, but did not necessarily make the property unique in itself from any other property around it. Mr. Ciardelli agreed. Mr. Falman agreed, but also did not think Mrs. Whitmore needed to be before the ZBA for a use variance; he thought she should go to the Selectmen. He opined the hardship criteria was a difficult one for a person to meet for what could be an everyday occurrence for any resident could have for additional dogs on their property. He does not think the hardship criteria is applicable for what she was applying for.

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 4 (*would not*) and 0 (*would*). The Board voted 4 to 0 that the criteria *was not* satisfied.

Attorney Ratigan asked if they could withdraw the application so they could go to the Selectmen. Mr. Daly stated they could withdraw it or table it. Attorney Ratigan noted that they might need some more information before they would proceed.

Mr. Daly made a MOTION to table this public hearing for a period of 60 days, pending further information from the applicant. The Board agreed.

Attorney Ratigan wanted Mrs. Whitmore to approach the Building Inspector and ask about if what she was proposing was a home occupation. Mrs. White stated that what Mrs. Whitmore was asking for was not on the list, and that was what the Planning Board went by. Mr. Daly said there was more to it than what the ordinance allowed.

Mrs. Belcher stated it appeared that the Planning Board had not considered #11, which states that if the Planning Board cannot make the decision, then the Selectmen are the ultimate deciders of whether it fits in the zoning. If they say it doesn't, you can go for an appeal.

Attorney Ratigan asked if the Selectmen would be the proper place to go after the Building Inspector, and Mrs. Belcher stated that she felt they should go directly to the Selectmen. Mr. Daly suggested since they were not positive who should be the next one to approach, Mrs. Whitmore should call the Building Inspector and ask if she should apply to him or directly to the Selectmen. Mrs. Belcher stated that ultimately the Selectmen are the entity to decide if what she wants to do fits into any of home occupation categories. Mrs. Whitmore might want to go to the Selectmen and ask for the Building Inspector to attend the meeting. Attorney Ratigan decided they would go to the Selectmen.

Mr. Falman asked why Mrs. Whitmore's application had asked for a variance from Article XVI.E, which are the definitions of a home occupation. Attorney Ratigan had made the decision to apply for the variance under that article as the Planning Board had told Mrs. Whitmore when she applied through then that she was not in the correct place, that she needed relief and to go to the Zoning Board.

Attorney Ratigan and Mrs. Whitmore thanked the Board for their time.

Other Board Business

Mr. Daly noted that the cell tower issue is coming back before the ZBA to produce a written decision within 30 days from the date of the received notice. They will submit their decision to the parties and it remains to be seen where it will go from there.

Mr. Ciardelli will put together a draft decision with Peter Loughlin and the Board will meet to go over it at a public hearing. The court is not involved at all. The two parties will be noticed and may attend, but may not give input. The Board will deliberate and decide if the draft decision is acceptable, and if so, it will be finalized to be distributed to the parties.

The meeting was adjourned at 8:30 PM.

Barbara White
Recording Secretary

John Daly
Chairman