

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

April 2, 1998

FILE

AGENDA

7:30 E. Michael Jr. and Dawn M. Young – Rehearing: Appeal from Administrative Decision (1998-04)

Members attending: Chairman John V. Daly, David E. Ciardelli, David C. Boudreau, Norman J. Freeman, and Alternate Peter A. Riley.

Absent: Edward A. Cardone and Alternate Charles F. Marden.

Others attending: Atty. James Troisi, E. Michael & Dawn M. Young, Jr., Catherine George, John Ryan, Robbie-Lynn Ward, Selectmen J. Roby Day, Jr., Donald C. Andolina and John L. Fillio, Richard A. Smith, Sr., Nathaniel Rowell, Patrick O'Malley, Peter Jewett, Richard Cook and Seacoast News Correspondent Becky Hanna.

E. Michael Jr. and Dawn M. Young – Appeal from Administrative Decision: Chairman Daly opened this rehearing for E. Michael & Dawn Young, Jr. at 7:35 p.m., on their application for Appeal from Administrative Decision with respect to the December 1, 1997 decision rendered by the East Kingston Board of Selectmen in relation to Article X – Home Occupations of the East Kingston Zoning Ordinance. The applicants propose to operate a well and pump business known as East Kingston Well & Pump Company from the 140 Depot Road location.

Chairman Daly stated that this rehearing has resulted from a petition filed by the East Kingston Board of Selectmen in regards to the Zoning Board's decision dated February 12, 1998 which overturned the Board of Selectmen's December 1, 1998 decision.

He went on to say that there has been a lot of discussion concerning the Home Occupation provisions in the East Kingston Zoning Ordinance, in particular, the section that deals with nonconforming uses. It has been acknowledged at previous planning board and zoning board meetings that this section contains a typographical error. That section currently reads:

*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 10.4 of this section...*

Chairman Daly stated that the original ordinance when adopted in 1989 also read "to comply with 10.4 of this section". The original section 10.4 reads:

*10.4 Permit Required: An annual permit to operate a home occupation must be obtained from the Board of Selectmen during the second calendar year beginning in 1989 (permit cost: \$50.00). Agricultural/Farm Home Occupations (10.3.8) shall be exempt from these permitting procedures.*

He further stated that when amendments to the home occupation ordinance were adopted in 1996, section 10.4 should have been renumbered to 10.6 to reflect its original reference to obtaining an annual permit. He stated that for the record, this board will make that reference.

Chairman Daly stated that this now raises the question of whether or not Mr. Young, Sr. should have originally obtained a permit in 1989 even though his rights may have been grandfathered at that point.

For clarification purposes, Chairman Daly stated that under the issue of what's grandfathered or not, grandfathered rights run with the property. It's not affected by the change in the ownership of the property or the change in the entity, which operates the business on the property. The use must remain consistent.

For the record, Atty. James Troisi stated that he is a lawyer from Salem, NH and that he represents the applicants, Mr. & Mrs. E. Michael Young, Jr. He then offered a response to Chairman Daly's previous comments.

He stated that regardless of whether the ordinance should read 10.4 or 10.6, it is irrelevant to the grandfathering issue. He went on to say that grandfathered is grandfathered, period. If the Zoning Board finds that the applicants had this use prior to 1989 then they are grandfathered. The Board can recharge the permit fee retroactive to 1989 if they wish.

Secondly, he stated that if there is a mistake in the ordinance such as the Chairman has pointed out, it doesn't matter. Anyone in this room or in this town has the right to depend upon what is written in black and white. Thus the mistake is with the town, not the reader. This is not the citizen's mistake, as they have no control over it.

Atty. Troisi went on to say that in regard to tonight's hearing, he appreciates the amount of time spent, as reflected in the minutes, at the March 12<sup>th</sup> meeting when the Zoning Board considered the Board of Selectmen's request for a rehearing. He continued on to read the notice of decision:

*Notice is hereby given that the Zoning Board of Adjustment, by the affirmative vote of three members, granted the application for a rehearing of case #98-01 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 conducted from the same location in 1997.. (Bold emphasis added.)*

Atty. Troisi stated that he will conduct his presentation of this case in chronological order and he will focus on the additional evidence referenced in the notice of decision. He will also discuss the difference in the operation of the business, if any, as was in 1998 and today.

Atty. Troisi stated that the Young family (E.M Young Sr.) purchased property located at 140 Depot Road in 1988. He stated that Young Sr. was looking for a piece of property for his son and daughter-in-law to live and raise a family. At the same time, they were also looking for a place to accommodate their business vehicles and the business office. He continued to say that prior to purchasing the property, Young, Sr. checked it out and inspected the large barn in the backyard.

He stated that the barn was so big in 1988 that it encroached about 60 feet onto the neighboring property. The barn, prior to the Young's purchasing it, was used for vehicle and seasonal boat storage. Atty. Troisi further explained that Young, Sr. along with the Building Inspector, Mr. Conti inspected the property. Young, Sr. indicated to Mr. Conti that he wanted to purchase the property for a) a residence, b) to park business vehicles and c) conduct an office for the business. Atty. Troisi stated that the Building Inspector said this was okay and then made Young, Sr. put in a new driveway along the boundary line to access the barn.

Atty. Troisi stated that for the record, he would like all exhibits, testimony and evidence presented in the previous planning and zoning board hearings incorporated into this hearing by reference. He then presented the Board with photographs of the property<sup>1</sup>. He stated that picture number one shows the garage that the Young's built in 1988. The permit that Mr. Conti issued was done so after all this discussion with Young, Sr.

He continued to say that in looking at the nature of the garage, it is obvious that its use was to be able to park large commercial vehicles, like the well drilling rig when it was not at the job site. He stated that the Young's feel they are grandfathered, without question, to park these commercial vehicles on the property.

He stated although he does not feel the Young's need a home occupation permit because they are grandfathered, the application for a home occupation permit submitted by the Young's last year indicates an office used for a well drilling business that is conducted off site. The business on site is limited to a home office, which basically involves a telephone, some billing etc. He said that they felt they had obtained this use legally and were entitled to it.

Getting back to the photos, Atty. Troisi stated that on July 8, 1988 the Young's received a permit to raise the roof and construct the garage, and that this was done prior to the Young's taking title of the property. The use of the property was planned out back in 1988.

Atty. Troisi presented a signed warranty deed for MBL# 4-2-2 from FMR, Inc. to E. Michael Young, Sr. and Norma M. Young dated August 4, 1988 recorded at the Registry of Deeds as BK2753 P1878<sup>1</sup>. He noted that the building permit to construct the garage was issued in July of 1988, one month prior to the Young's purchasing the property.

He stated that Young Sr. spent in excess of \$15,000.00 to build up the side driveway, as directed by Mr. Conti, to accommodate the heavy trucks going to the garage out in back of the property. Furthermore, Mr. Conti told Young Sr., that he did not need a business permit because:

1. There is no sign for the business;
2. There is no customer traffic to and from the residents;
3. No separate meter is needed for the garage; and
4. All well drilling is done off site.

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<sup>1</sup> See attached.

Atty. Troisi stated that Mr. Conti even coached Young Sr. on how to get a state driveway permit through Concord. He then listed the commercial equipment owned by the Young's back in 1988 as:

- 2 well drilling rigs,
- 2 water trucks,
- 1 dump truck,
- 1 trailer,
- 1 backhoe,
- 1 pump crane, and
- 2 commercial vans.

He stated that at the last hearing Mr. and Mrs. Young Jr. agreed to restrict the number of commercial vehicles to two. It's obvious that the scope of the business is much smaller than what was enjoyed in 1988. He added that the Young's researched with the State to get copies of the vehicles registered at the 140 Depot address back in 1988. They were informed that State's computers only went as far back a 1992 and that any information prior to then would need to go through a special mail service, which would take much longer than the time available for this meeting.

Atty. Troisi said that despite the evidence already given, there seems to be a request for more evidence to substantiate the fact that the Young's were doing business back in 1988-89. He stated that at one of the prior hearings, the Young's delivered, what he thought was, substantial, credible evidence that would elude to the fact that the well drilling business was in operation at 140 Depot Road in 1988.

He referred to exhibits presented at the November 20, 1997 Planning Board hearing.

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 been shipping 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.

In addition to the evidence noted above, Atty. Troisi submitted into the record an invoice dated October 1, 1989 to Mr. Paul Adrien and noted that the well drilling stationery reflects a business location of East Kingston, New Hampshire with a telephone number of 603-642-7761.

He then submitted into the record another invoice dated July 19, 1992 to the East Kingston Golf Course on the same type stationery as indicated above. He stated that although the business is not called E.M. Young Artesian Well Co., the use was never abandoned, it only got smaller.

Chairman Daly stated that both an East Kingston phone number and Salem phone number are indicated on the invoices.

Atty. Troisi responded that the business was operated out of Salem as well. He further stated that the company originated out of Salem. He noted that Young Bros. Artesian Well Company was its original name.

He then read the October 16, 1997 Planning Board meeting minutes in which Mr. William DiProffio, direct abutter across the street and who complained about the vehicles, indicated the following:

*He continued to say that Mr. Young has been a fine neighbor, however, he (DiProffio) has problems with the business. There have been large pieces of equipment at the 140 Depot Road location since at least 1990.*

Atty. Troisi stated that this admission to the equipment being at the premises since at least 1990 is a witness to the fact that the business was in operation back then and that the Young's have evidence that it was there in 1988. He read on:

*Mr. DiProffio continued to explain that if only the office was located at the premises and no trucks or truck maintenance, he (DiProffio) would not have a problem with the business. It is true that the Young's have improved the property. Mr. Young Sr. purchased the property and relocated his business from Salem, NH here.*

Atty. Troisi stated that only part of Mr. DiProfio's statement is true. Young Sr. did purchase the property and he did set up a business location there in 1988, but it wasn't all moved from Salem to East Kingston. He added that a few years later, around 1994-95, some of the equipment that was housed in East Kingston was moved to the Salem location under the name of E.M. Young. At that time, the amount of vehicles substantially decreased. The only business vehicles left in East Kingston are the well drilling rig and the water truck.

He further stated that what is most telling here is that everything fits in with the size of the garage and the building permits issued. He stated that when Mr. Conti met with Mrs. Dawn Young about moving the office from the house to the barn, Mr. Conti was explicit on what they could have in the office: 1 desk, 1 chair, 1 telephone, 1 file cabinet, etc. On file with the town is a building permit dated September 7, 1994, signed by Conti, "to construct office in barn w/toilet and heat, and stove in barn and vinyl side the east end of barn, toilet to pump into existing system".

Atty. Troisi then focused on the word "estoppel". He explained that if a citizen deals with a town agent, or someone represented by the town, and that agent or town official allows the citizen to go through with a project/proposal, and the citizen relies on the agents authority, and the citizen spends a large amount of money on the project/proposal, that citizen gets vested property rights. The town is then estopped. The town cannot turn the clock back and tell the citizen he cannot do his project anymore. He went on to say that there are cases documented about this issue.

Atty. Troisi stated that he doesn't know how anybody can turn around ten years later and say the Young's can't use the property for what they purchased it for, invested money into and is their livelihood.

On the issue of statements made by Young Sr. to the Board of Selectmen, Atty. Troisi stated that when Mr. Young Sr. indicated to the Selectmen that there was no business at the premises in 1995 he (Young Sr.) was referring to no automotive business being conducted from the premises. Atty. Troisi explained that the focus of that meeting with Young Sr. and the Selectmen was on the issue of there being eight unregistered vehicles in the yard. The Selectmen were concerned if there was a vehicle repair business starting up there. The focus was not whether or not there was a well drilling business at the premises, that business' office was already blessed by the town when the building inspector issued a permit for it.

He went on to say that the April 24, 1995 Selectmen's meeting minutes reflect a dialogue to confirm the focus of the meeting was about unregistered vehicles on the property. The minutes further reflect that Young Sr. openly states that the property is used for the parking of his equipment. Young Sr. was trying to convey to the board that he was not operating a garage business open to the public.

For the record, Atty. Troisi stated that the business office set up is a 10' x 6' room, with one telephone, one file cabinet, and that billing and correspondence is conducted from there. There are only two residents of the premise employees, Mr. & Mrs. Young Jr.

He went on to say that at the October 1997 Planning Board meeting, Mrs. George motioned to continue the public hearing to give the applicants the opportunity to provide satisfactory documentation that the business was in existence prior to January 6, 1989. Two additional members at that hearing felt the same way. He stated that at the November 20, 1997 Planning Board meeting, such evidence was provided and the application was denied. He stated that the Selectmen followed the recommendation of the Planning Board and denied the permit. He went on to say that when the Selectmen motioned to deny the application for a home occupation permit, there was not one sentence recorded in the minutes where the Selectmen discussed the merits of their decision. He stated the Young's appeal the Selectmen's decision and ask for the ZBA's consideration.

Atty. Troisi stated that at the last ZBA hearing, the Board by a 3-0 vote, voted to reverse the Selectmen's decision and grant a home occupation permit with reasonable conditions established. The Board of Selectmen appealed that decision and once again, no record in the Selectmen's minutes of any discussion to the merits of their appeal.

He then questioned if the Selectmen were in a habit of holding secret meetings and that if he were a resident of East Kingston; he would be very concerned about it.

He then read the notice of decision dated March 13, 1998 concerning the application for rehearing submitted by the Board of Selectmen:

*Notice is hereby given that the Zoning Board of Adjustment, by the affirmative vote of three members, granted the application for a rehearing of case # 98-01 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 conducted from the same location in 1997.*

For the record, Atty. Troisi pointed out that although the Young's adamantly believe their business is grandfathered, the business can also meet the provisions of the home occupation ordinance. He quoted:

10.1 *A Home Occupation is a professional or service occupation or business carried out from the home, which is clearly accessory and subordinate to the residential use of the property. A Home Occupation is the provision of a service and/or the production or selling of a product on the premises.*

He stated that the definition of a home occupation is extremely broad, it isn't specific about what your allowed to sell. He then read:

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 10.4 of this section. Such occupations shall not be required to comply with the other provisions of this section. Provided, however, that any noncompliance in effect as of January 6, 1989 shall not increase. In addition, such occupations shall not be relieved from compliance with other state and local regulations.*

He repeated that if the business was established before 1989, then the home occupation does not need to comply with the rest of this section. This has already been done. He stated that even if the Board wishes to measure this business and the parking of its vehicles, to the home occupation standards he offered the following:

- 10.3.1 The business office is located in the garage.
- 10.3.2 The applicants' feel they meet this: they don't even have a sign.
- 10.3.3 Two commercial vehicles are used and they are shielded by the garage. One is a well drilling truck and the other is a water truck. Other vehicles at the home are personal vehicles. The well drilling truck spends 3 to 4 weeks out of the year at the premises as it is usually at the job site.
- 10.3.4 Adequate off-street parking is provided.
- 10.3.5 The business is conducted by Mr. & Mrs. Young who are residents of the premises.
- 10.3.6 The business does not omit smoke, fumes, noise, etc.
- 10.3.7 The business does not create hazardous traffic conditions.
- 10.3.8 The office is 6' x 10'.
- 10.3.9 Only two employees and both are residents.

He continued to say that the Young's are outstanding citizens with tremendous support to the community. He asked that the Board either bless the Young's with a grandfathered statement or a home occupation permit. He noted that with a grandfathered statement, the business must not expand. He stated that the Young's would agree to the number of commercial vehicles restriction as was applied before.

Atty. Troisi then submitted a copy of the warranty deed for MBL# 4-2-2 with grants to Edward M. Young, Jr. and Dawn M. Young from E. Michael Young, Sr. and Norma M. Young dated April 30, 1997 and recorded at the Registry of Deeds BK3211 PG1871<sup>1</sup>.

Chairman Daly inquired why the well business was not known to the Town in 1989. He stated that the town has a list of businesses that were in operation in 1989 and this was not one.

Atty. Troisi responded that he suspects that since the Building Inspector told the Young's they did not need a permit, one was not sought. He stated that it is possible things were less strict in 1988 than they are in 1998. He added that it was no secret to Mr. Conti as he issued the building permits and the driveway. He stated that it was advertised in 1988 as their stationery reflects this.

He then stated that this is an opportunity for the town to register the business and in doing so, it restricts it from any expansion.

Mr. Boudreau stated that at the last hearing, the ZBA reversed the Selectmen's decision because they felt the business was grandfathered, however, it is his (Boudreau's) opinion that the issue was not weighed correctly. He stated that although he has no doubts the office was in existence prior to 1989, he is not convince the entire scope of the business, as it is today, was.

He stated that the few invoices submitted at this hearing are not convincing. He inquired if the materials shipped to 140 Depot Road in 1988 were for the development of Brandywine Drive.

Mr. E. Michael Young, Jr. responded that they were not.

Mr. Boudreau continued to say that he does not understand how there has not been a problem with the town and abutters prior to 1995 if the business was there in 1988. He stated that a member of the Board of Selectmen lived next door to the business for six years and nothing was ever mentioned about a business then.

Atty. Troisi replied that the business was going on, but it was never a problem.

<sup>1</sup> see attached.

Mr. Boudreau stated that there was an office and occasionally a couple of well trucks.

Atty. Troisi responded that Mr. DiProfio stated he knew there was a business there as far back as 1990. He lived right across the street and he didn't say anything during that time. He's an eyewitness to that fact. He stated that almost all the abutters say the business has been there.

Mr. Boudreau stated that one supply delivery in 1988 does not constitute a business.

Atty. Troisi inquired as to why the Young's would have made the improvements to the garage and installed a second driveway to the garage if it was not for their business. He reminded the Board that the permit for the garage was issued in 1988.

Mrs. Catherine George, Planning Board member stated that the taking down of the barn in 1988 was due to the fact that when the property owners wanted to subdivide, the new lot line went through the barn. The barn had to be torn down to meet the new boundary setbacks.

Atty. Troisi stated that the building permit and the purchase of the property by the Young's were within 30 days of each other. Part of the purchase agreement with the Young's was to have the garage built up, which was done only after consulting town officials.

Mr. Boudreau stated that he still does not see how an office and a few commercial trucks parked in the yard constitute a full well and pump business.

Atty. Troisi stated that the scope of the business has narrowed to what it was in 1988. Well drilling is not being done on the premises. If the Board doesn't want anymore supplies delivered there they can set that as a restriction as well.

Chairman Daly requested that Atty. Troisi clearly define what the business was in its entirety back in 1988 and what it is today.

Atty. Troisi responded that other than the physical items already described, the office is set up to receive calls, the office activity includes quoting prices, generating invoices, accounts payable etc. The Young's visit potential sites and quote prices for well drilling services. The well drilling rig is then moved from job site to job site, as it is needed.

He stated that this is comparable to a carpenter who also conducts his work at the job site.

Mr. Boudreau inquired about commercial deliveries to the premises.

Mr. Young, Jr. stated that pipe casing is delivered to the premises every two months. That is what the supply invoices as submitted earlier pertained to. One delivery lasts about two months. The pipe casing is transported to the job site as needed.

Atty. Troisi stated that the invoices from Morris Supply are for pipe casing and they are dated back to 1988, thus showing that that delivery activity was going on back then.

He stated that essentially the business described in 1988 is the same as what is going on in 1988. The only physical difference is that the business had eight vehicles back then, it only has two now. At Mr. Riley's inquiry, Atty. Troisi stated that the barn was bigger in 1988 than it is now as it stored cars and off-season boats.

Again at Mr. Riley's inquiry, Atty. Troisi stated that in 1988 the office was in the house. It was moved to the garage in 1994 at the approval of the building inspector. The garage was built in 1988.

Mr. Ciardelli stated that the barn as shown in the pictures submitted, was built up in 1988 and there were pipe casing deliveries back then.

Mr. Young responded affirmatively.

At this time, Chairman Daly directed the Board of Selectmen to make their presentation.

Mr. Roby Day will be representing the Board of Selectmen. He submitted several documents for the record<sup>1</sup>. These items include Town Report excerpts from Year Ending December 31, 1988 and 1972, Selectmen correspondence dated January 24, 1997, April 22, 1997, July 31, 1997 and memorandum dated November 20, 1997.

Mr. Day directed the Board's attention to the Town Report dated 1972. He noted that Article III reads:

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<sup>1</sup> see attached.

*For the purpose of regulating the use of land and the location and construction of buildings, the Town of East Kingston shall be considered as one district of residential, agricultural or forestry use only. Business, commercial and industrial uses are prohibited except as hereinafter provided.*

He stated that that article has not changed since then, it is in today's current zoning ordinance. He then directed attention to the Town Report excerpts dated 1989. It is noted that a new Article X – Home Occupations is added. He noted that section 10.5 and 10.4 allude to grandfathering.

*10.5 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 10.4 of this section. Such occupations shall not be required to comply with the other provisions of this section. Provided, however, that any noncompliance in effect as of January 6, 1989 shall not increase. In addition, such occupations shall not be relieved from compliance with other state and local regulations.*

*10.4 Permit Required: An annual permit to operate a home occupation must be obtained from the Board of Selectmen during the second calendar year beginning in 1989 (permit cost: \$50.00). Agricultural/Farm Home Occupations (10.3.8) shall be exempt from these permitting procedures.*

Mr. Day continued to say that it doesn't take a rocket scientist to figure out that if you were operating a business or enterprise and it didn't conform with section 10.3 of the home occupation ordinance, then the town was inviting you to come in and get a permit and be named grandfathered.

He went on to say that in East Kingston's perspective, this issue has become not only a question of land use but also a blatant disregard of the law. He stated that the zoning ordinances in East Kingston start in 1952 and they dealt with basically dwelling materials and setbacks. In 1959 the Town decided to invent a building inspector, a clear assumption for the rest of the ordinance was that full construction was to be of dwelling and homes.

He stated that in 1963 there is the first indication of land use zoning, the town was described as a residential and farming community. It was considered to be a single zone. The planning board and zoning board were also established in 1963. In 1972, the zoning ordinances took their present shape. In 1989 the Home Occupation ordinance was adopted for activity quote "clearly accessory and subordinate to the residential use of the property". The escape clause was this nonconforming paragraph.

Mr. Day then presented the following synopsis:

Mr. Young Sr. purchased the property in 1988 and obtained a permit from the building inspector to take down the barn. In September 1994 the building inspector issued another permit to construct an office in barn... and to upgrade the electrical service to the house and the garage.

In April of 1995 the Board of Selectmen asked Mr. Young Sr. to address questions about the number of unregistered vehicles at his Depot Road property. He stated that he would remove them and take care of the situation. He stated that he had no retail or wholesale business and there are no salesmen, no bills or checks issued from the Depot Road address. He stated that this is used for parking his equipment only.

Selectmen Ray Donald asked if he was maintaining a business, either doing construction work or doing maintenance on their equipment. Mr. Young stated that he doesn't do maintenance, but that he did it in March in order to get his equipment ready for stickers. It was noted he did not have a qualifying type of business.

In January of 1997, Selectmen Berridge questioned the legality of a business possibly in operation at the 140 Depot Road address. He saw an advertisement for East Kingston Well & Pump Company on a business card at Jewett's General Store and he noted that it had been a year and a half since Mr. Young stated he did not operate a business from his residence.

At the Board of Selectmen's meeting dated January 20, 1997, Selectmen's Assistant Donald Clark stated he had contacted Mrs. Dawn Young of the residents who stated that she and her husband Mike Jr. are not running a business from their home. She further stated that the main office for the East Kingston Well and Pump Company is in Salem, NH. and that the business is currently inactive as the well truck tipped over. The Board noted that it is obvious the business is being conducted from the home because the business' name and telephone number, resulting in violation of the zoning ordinance.

A letter was then generated to the Young's indicating so and informing them that a home occupation permit was necessary to operate the said business. It was suggested that it be established with the Planning Board whether a permit was appropriate.

At the Selectmen's meeting dated February 24, 1997 it was noted a letter was sent to the Young's and no response was yet received. Chairman Donald ordered a Cease and Desist Order be sent to the Young's along with a copy of the business card which clearly indicates a business being run from 140 Depot Road.

At the Board of Selectmen's meeting dated March of 1997, Mr. Young Sr. and Mr. Young, Jr. were present. Mr. Young, Sr. said that he owned the house but that his son and his family resided there. Mr. Young, Sr. also stated that his son is now running a business out of the home. In the past when Mr. Young, Sr. lived there, he did not run a business out of the house. Mr. Young, Sr. said that bills are sent from the home and mail is received under the East Kingston Well and Pump Company. Basically there are trucks coming and going.

Chairman Berridge stated that the property is located in a residential zone and not a commercial zone. He suggested they seek a variance from the ZBA. The home occupation of a well drilling business may not meet the criteria for a home occupation permit. Mr. Young stated that the business is not conducted from the home, only trucks are parked there. Mr. Berridge stated the East Kingston Well and Pump Company is a business. Mr. Young Sr. contended that he was grandfathered from about 10 years ago. He took out the necessary permits with Building Inspector Joe Conti and was issued a permit to locate the office out in the garage. Mr. Berridge stated that he would not pursue the violation any further contingent to the Young's appealing to the ZBA. A letter was sent in April 1997 stating such.

Absent an application from the Young's for the May 1997 ZBA meeting, the Board of Selectmen would then proceed with steps to bring the Young's violation into compliance.

In July, the Selectmen sent a letter to Atty. Troisi, stating that if the Young's continue to persist in applying for a home occupation, they must apply to the Planning Board. The Selectmen did not feel the Young's business met the provisions for a home occupation and were surprised Atty. Troisi directed his clients to the Planning Board and not the ZBA as directed by the Selectmen.

The Young's submitted a home occupation application September 10, 1997 and the nature of the business was described as well drilling.

At the Planning Board meeting in October, Atty. Troisi stated that the Young's have the right to assert the position that they do not need a home occupation permit. He indicated the Young's bought the property in 1988 and at that time and that a home office has been operating there ever since. Alterations were made to the garage with the building inspector's approval. At that point, Mrs. George requested the meeting be continued to allow more evidence to Atty. Troisi's claim of the business being in operation be presented.

A motion to deny the Young's a home occupation permit failed 3-2. Mr. Day contacted former Building Inspector Joe Conti who stated that Mr. Young, Sr. assured him that the barn would not be used for a business purpose. And to do so would be in violation of the zoning ordinance. Mr. Conti indicated he could not deny the Young's a building permit based on his suspicion of the intended use.

At the Planning Board meeting in November 1997, various statements from vendors were submitted. Alternate member Fillio asked about business address information in regard to business insurance requirements. No definitive information was forthcoming. Atty. Troisi stated that the Young's had been unaware of their need to apply for a permit and that now they were here to apply for one. The Planning Board voted unanimously 5-0 to deny a home occupation permit "predicated on the nature of the business (not a permitted use) and that the business in its entirety is a commercial enterprise located in a residential zone".

The Board of Selectmen confirmed the Planning Board's recommendation and denied the home occupation permit.

Mr. Day went on to say that the Board of Selectmen had initiated this whole train of events and Mr. Troisi's concern that there wasn't any discussion is moot. The Board of Selectmen followed this case very closely. He went on to say that the Planning Board voted no because of the scope of the business in a residential zone. He stated that the business cannot be brought into conformity as a home occupation because it does not even remotely approximate a permitted use today, nor did it in 1989.

He continued to say that no one came forward in 1989 for nonconforming use and that window of opportunity has been closed for nine years. We cannot accept the Young's argument that they did not know. Ignorance is no excuse in any court.

Mr. Day stated that the business is commercial and it violates the local residential zoning. It is impossible to grandfather. There was no commercial business there in 1972 and in 1994 the Young's have repeatedly stated that no business was in operation at their residence.

He said that case law states that in order to be grandfathered, a right must be vested by having an activity in place before a restriction is imposed. In 1972 a restriction was imposed. It doesn't matter what happened in 1988. Unless it can be shown that there was a well drilling company there in 1972, they are in violation. He stated that additionally where activity is grandfathered it couldn't be expanded. The Young's failed both these provisions of the law and that should be obvious.

He further stated that the zoning ordinance came into effect long before any business was conducted. By the Young's own admission, the business has grown, having moved the operation from Salem to East Kingston. Mr. Day stated that the Board of Selectmen have come to conclude, that from the evidence, the present business has been surreptitiously established, it's a defiance of our zoning ordinance. He stated any pretense to establish that they have been doing business from 140 Depot Road since 1988 has got to be a fabrication.

Mr. Day concluded that the Town asks the Zoning Board of Adjustment to confirm the Board of Selectmen's decision.

Mr. Boudreau inquired what 1972 has to do go to do with this case.

Mr. Day responded that the 1972 Zoning Ordinance was voted in and established clear definitions of what our zoning should be. Unless other wise noted, the Town was clearly residentially and agriculturally zoned. He stated that it was actually done in 1963 but that a court would view the 1972 ordinance more favorably.

Mr. Boudreau inquired as to the procedure the Selectmen would take when they found out a business was going on in town.

Mr. Day responded that it would be handled just as this case is being handled. This business was brought to the Selectmen's attention by a business card. When the Selectmen suspect there's a zoning violation, they must act.

Mr. Boudreau stated that he has a hard time believing that something this big has gone unnoticed since 1988.

Mr. Day stated that the contention was that there was a business going on, however, the Young's were telling us there was no business going on. The Building Inspector if here today would say that he was assured by Mr. Young, Sr. that the barn was not going to be used for a business. He continued to say that Mrs. Young stated there was no business going on there.

Mr. Boudreau stated that back in 1989 when he had a carpentry business, he felt he too did not need a permit because he was not doing any work at his residence, all work was done at the job site.

At Mr. Riley's inquiry, Mr. Day stated that in order for a business to be grandfathered, it would have had to be there before 1972.

Mr. Riley asked why this 1972 ordinance wasn't raised before this evening.

Mr. Day responded that the grandfathering question muddied the waters, the Board of Selectmen never thought grandfathering was an issue. Once it was raised as an issue, it had to be established what its parameters really were. He stated that with the evidence researched by the Selectmen, it was clear no business existed before 1989. It was the ZBA who made grandfathering an issue.

Mr. Boudreau replied that the ZBA made it an issue because our current ordinance states that any nonconforming use in existence prior to 1989 is considered grandfathered.

Mr. Day stated that the Planning Board put a home occupation ordinance together to make the existing businesses legal. He further stated that his impression of the Planning Board's intent with the home occupation ordinance was to grandfather all the businesses in operation in 1989 and then be able to regulate and allow certain types of businesses. He then stated that no one stepped forward from 140 Depot Road.

Mr. Riley asked Mr. Day if he thought because the Young's did not apply for a permit in 1989, they should waive their rights.

Mr. Day replied that if the Young's went to Town Meeting in 1988, they would have realized they needed to get a permit. Again he stated that ignorance is not an excuse.

Mrs. Robbie-Lynn Ward directed her questions to Mr. Day. She inquired as to how long he has been a resident of the Town of East Kingston. At his refusal to answer the question, she inquired as to how long he has been a town official. At his response of 2 ½ years, she asked how it was possible that he has never seen the business logo on the Young's truck and how he has never seen the kids running around the baseball fields with East Kingston Well and Pump Company on their shirts. She stated that he has accused the Young's of secretly operating their business when it is apparent to everyone else that there is a business there and that it has been there for a long time.

Mr. Day replied that if the Town wants, they can hire a code enforcement officer who will do that type of policing.

Mr. Freeman stated that the people who originally owned that property back in 1972 were the Chamberlains. When word came through back in 1972 that more restrictive zoning was up for adoption, the Chamberlain's established their property (on record with the town) as Chamberlain Enterprises to allow for them to use their property in a business fashion despite the residential districting. He then inquired if this would be applicable to the issue at hand.

Mr. Ciardelli stated that he agrees with Mr. Boudreau about the 1989 Home Occupation Ordinance. He stated that Mr. Conti was involved with this as he issued a lot of permits to the Young's in the late 80's and 90's. Documentation has been provided that something was going on at 140 Depot Road in 1988; there is no question there. There were vehicles, a garage, and supplies at the residence in 1988-89. Much of this evidence is on record in the November 20, 1997 Planning Board minutes.

He then addressed the Planning Board minutes dated October 16, 1997:

*Mr. Day motioned to deny the application for a home occupation permit predicated on Article 10.5, permitted uses. Mr. Johnson second. The motion failed 2-3.*

*Mrs. George motioned to continue the public hearing for Edward M. Young, Jr. to November 20, 1997 to give the applicants the opportunity to provide satisfactory documentation that the business was in existence prior to January 6, 1989. Dr. Marston second. The motion passed 3-2. (Mr. Day and Mr. Johnson opposed.)*

He continued to say that 1972 was never mentioned and that the town (Planning Board in this case) stated that they needed evidence that this business was there before 1989. The evidence was produced to show that. He stated that personally he feels it is unfair to change the rules after they have already been established.

The Board discussed ownership of the property throughout the years. (Chamberlain to Whatmough to FMR to Young.)

Atty. Troisi replied that maybe Mr. Day should have been the building inspector in 1989. He went on to say that he appears to be seeing this issue through one thin point of view or bureaucracy. He stated that there is only one individual representing that bureaucracy tonight, which ignores the other 90% of the real world. That 90% is represented by the abutters here tonight as well as the many others who have shown their support at past meetings regarding this case.

He went on to say that the garage built, the driveway installed, and the interaction with Joe Conti is all evidence of the business' existence. The business vehicles are parked and an office is conducted at the residence. All well drilling is done off site.

He iterated that in 1995 when Mr. Young, Sr. stated that no bills or checks, etc. were generated for a vehicle repair business as the Selectmen had inquired. He stated that the ordinance is clear, any business in effect prior to 1989 is grandfathered. On the question of ignorance, the Young's thought they were grandfathered. There are no secrets. He questioned what Mr. Conti could be thinking when he saw the 16-foot garage doors.

Mr. Day stated that the Board of Selectmen are obligated to take this kind of action whenever an issue is brought to our attention, whether it's a business card indicating an unauthorized business or whenever it's a dog is running loose. The Board, as the governing body has to act whenever confronted with a situation, regardless of how the information is obtained.

He went on to say this is not a personal vendetta, it's a matter of what the law says. Not to apply a law that was voted by the town is like not having a law at all. The point here is the point of law.

Atty. Troisi stated that he respects Mr. Day's position. He understands that Mr. Day felt there was a violation here and he called it in a year ago. The Young's have gone through many procedures and proper channels to make this right. The Young's want to abide by the law.

Mr. Derrick Tibbett questioned how the building inspector could not know there was business at the residence when he made the Young's put in a new heavy duty driveway to get to the barn outback. Didn't the building inspector inspect the property?

Mr. Day responded that Mr. Conti told him he was assured by Mr. Young, Sr. that there were no business intentions for the property.

Atty. Troisi stated that for the record he wanted it to be clear that firstly, Mr. Day is not Mr. Conti, and secondly, when Mr. Young, Sr. spoke with Mr. Conti, it was clear Mr. Conti knew of the business. He reiterated that Mr. Conti made the Young's put in a new driveway to accommodate the trucks, and he told the Young's they did not need a permit because the well drilling was done off-site and that no second meter was needed on the garage, and he issued the permit for the office to be moved to the garage.

Mr. Day responded that Atty. Troisi is siting the enterprise off the premises because the well drilling is done off site. He stated that the business site has to be somewhere. You have to define your enterprise someplace. If you have your trucks, equipment and office in a single location yet provide a service someplace else, that does not mean your business is in some infinite point around you. It is at 140 Depot Road.

Chairman Daly asked how this business is different from a plumbing business.

Mr. Day responded that would be a decision of the Planning Board. It may be a degree of scope that can only be answered by the Planning Board. They interpret that.

Mr. Boudreau stated that the whole purpose for his position on the rehearing was that he wanted to be sure of what was going on in 1988 in comparison to 1998. He stated that it is his position now is that this business falls under the provisions of 10.7 nonconforming uses. It would have been better had the applicants gotten a permit in 1989 vs. going through all these proceedings.

The Chairman advised the Board that this rehearing, and that what is before the Board now, is the decision made by the Selectmen to deny the home occupation permit. The Board can agree with that decision and affirm it, it can disagree and reverse it, or it can modify it and make such order as the Board deems appropriate. He stated that the motion must be specific.

**MOTION: Mr. Ciardelli motioned to reverse the December 1, 1997 Selectmen's decision and grant the application for a home occupation permit based on the evidence that the business is grandfathered. Mr. Freeman second.**

**DISCUSSION:**

Mr. Boudreau stated that if in 1989 the business was given a permit as a nonconforming use, one of its restrictions is that it cannot grow. If this is grandfathered, does it allow the business to grow?

Chairman Daly replied that if the business is grandfathered as a nonconforming use, then it could not be expanded. The business if grandfathered, is entitled to a home occupation permit.

Mr. Riley stated that any expansion of the business must go through the variance process. He then questioned how the 1972 ordinance fits into this decision.

Mr. Boudreau stated that the 1972 ordinance didn't relate to any of the other businesses that were considered nonconforming in 1989 and were issued permits.

Mr. Ciardelli stated that the way the town represented itself to the applicants was that proof of the business' existence prior to 1989 was the issue. Anything prior to that time is grandfathered.

Chairman Daly stated that each member must make that decision for himself. The Board could construe the 1972 ordinance as controlling, or they could take the position of Mr. Ciardelli, or they could construe the 1989 ordinance as controlling.

Mr. Freeman again stated that the Chamberlain's established Chamberlain Enterprises prior to the restrictive zoning.

Mr. Riley responded that in order for the business to be grandfathered under that, the nature of the business must be consistent throughout the period.

It was noted that any conditions to the business must be imposed now. The earlier decision required that only two commercial vehicles be allowed and that they be garaged.

It was also noted that in the absence of Mr. Cardone, Mr. Riley would be participating in any voting matters before the board.

**MOTION: Mr. Boudreau motioned to amend the motion to include that only two commercial vehicles may be kept on the premises and that they be stored in the garage. Mr. Freeman second.**

**DISCUSSION:**

Mr. Riley stated that his concern is that the building is so large and the office is so small. It is difficult to enforce what goes on inside of it.

**Chairman Daly called to vote to amend the original motion. The motion passed 3-1, (Mr. Boudreau, Mr. Ciardelli and Mr. Freeman in favor. Mr. Riley opposed).**

The motion made by Mr. Ciardelli and amended by Mr. Boudreau now reads:

To reverse the December 1, 1997 Selectmen's decision and grant the application for a home occupation permit based on the evidence that the business is grandfathered with the condition that only two commercial vehicles be kept on the premises and that they be stored in the garaged. Mr. Freeman second.

DISCUSSION: None.

The motion passed 3-1, (Mr. Boudreau, Mr. Ciardelli and Mr. Freeman in favor. Mr. Riley opposed).

**March 12, 1998 Zoning Board Minutes:** With no corrections or objections, the March 12, 1998 Zoning Board of Adjustment Minutes regarding the Young's Motion for Rehearing were motioned for approval by Mr. Freeman and seconded by Mr. Ciardelli. The motion passed unanimously 4-0.

**April 9, 1998 Zoning Board of Adjustment Meeting:** It was noted that in the matter of Richard Cook's request for variance for property located on Haverhill Road and known as the Light Industrial Park, Mr. Marden and Mr. Cardone are abutters to the proposal. It was also noted that Mr. Freeman attorney's office would be representing the opposing party to the proposal. Discussion of whether Mr. Freeman should be disqualified as a voting member in this case transpired. Chairman Daly will research the issue and report his findings at the April 9<sup>th</sup> meeting.

**OSP Annual Spring Conference:** It was noted that the OSP Annual Spring Conference would be held on Memorial Day weekend. Any member wishing to go must register with the recording secretary before May 1, 1998.

This April 2, 1998 Zoning Board of Adjustment meeting adjourned at 9:55 p.m.

Respectfully submitted,

Catherine Belcher  
Minutes completed and on file April 6, 1998.