

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

FILE

May 13, 1999

AGENDA

7:30 Thomas J. Brandolini – 17 Rowell Road – Appeal from Administrative Decision (1999-01)

Members attending: Vice Chairman David Ciardelli, Norman J. Freeman, David C. Boudreau and Alternates Peter A. Riley, Richard A. Cook, and Charles F. Marden.

Absent: Chairman John V. Daly, Edward Cardone and Alternate J. Roby Day, Jr.

Others attending: Raymond R. Donald – Selectman, Donald C. Andolina – Selectman Chairman, John L. Fillio - Selectman, Atty. Daniel W. Jones, Richard A. Smith Sr. – Planning Board Chairman, Thomas J. Brandolini and Mark & Cheryl Durkee.

Thomas J. Brandolini – 17 Rowell Road – Appeal from Administrative Decision: Vice Chairman Ciardelli opened the public hearing at 7:32 p.m. for Thomas J. Brandolini of 17 Rowell Road. The applicant is requesting an Appeal from Administrative Decision regarding his automotive repair business automotive repair business “Haverhill Tune-up“ in relation to the January 25, 1999 Board of Selectmen decision to 1) at the recommendation of the Planning Board, deny the application for a grandfathered business; and 2) deny the application for a home occupation permit based on the fact that the proposed type of business is clearly not part of the home occupation rules (not a permitted use).

The applicant is also requesting an Appeal from Administrative Decision regarding his automotive repair business “Haverhill Tune-up” in relation to the January 21, 1999 Planning Board decision to recommend that the Board of Selectmen deny the application for a grandfathered business based on the lack of sufficient proof of the existence of the business prior to January 6, 1989, when the ordinance went into effect.

Vice Chairman Ciardelli noted that this public hearing has been duly posted and that there is a sufficient number of voting members (at least five) to proceed with the hearing. He then announced that the following members and alternate members would be participating in any voting matters before the board: Mr. Boudreau, Mr. Marden, Mr. Freeman, Mr. Riley and himself (Vice Chairman Ciardelli).

Vice Chairman Ciardelli further explained the rules of engagement for this public hearing. He noted that in accordance to RSA 674:33:

I. The zoning board of adjustment shall have the powers to:

A) Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16; ...

II. In exercising its power under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order of decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.

He further expounded that in essence, the Zoning Board of Adjustment shall become and wear the same hats of the Board of Selectmen and the Planning Board [in this matter].

Atty. Daniel Jones representing the applicant began his presentation by saying that the application before both the Planning Board and the Board of Selectmen was for a permit that would allow Mr. Brandolini to continue the operation of an auto repair business from his 17 Rowell Road resident. He then quoted East Kingston Zoning Ordinance Article X–Home Occupations:

10.1 Definition: 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 of selling of a product on the premises.

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 10.6 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 continued to say that Mr. Brandolini was not before the boards to apply for a new home occupation permit. He stated that perhaps the Planning Board did not clearly understand that. Mr. Brandolini was operating as a pre-existing home occupation under Article 10.1. He stated that the list under Article 10.5 does not apply to grandfathered home occupations.

Atty. Jones went on to say that there was a lot of confusion with the Planning Board members as to what was required of Mr. Brandolini [as reflected in the September 1998 minutes]:

Mrs. Fillio stated that he has not proven beyond a reasonable doubt that the business was in operation at 17 Rowell Road before 1989.

He further stated that a similar phrase "beyond a shadow of a doubt" was also used. He explained that in a criminal case the burden of proof to be convicted is "beyond a reasonable doubt". In a civil case (and zoning cases) the burden is the preponderance of evidence. This is not a criminal case and the Planning Board may have been operating under a different concept, where there was much greater proof required of Mr. Brandolini.

He stated that the question before the Planning Board was whether Thomas Brandolini's auto repair business was in operation before January 6, 1989. It wasn't the question of whether or not the neighbors liked the business. He stated that the Planning Board could be characterized as antagonistic. He then went over the evidence of the case as reported in the Planning Board minutes noting that the role of the Planning Board in this particular case was to sit, listen and weigh the evidence before them, not to take an active role in the hearing. A pro-active stance should not have been taken, as only a factual determination was needed. He stated that this is where the Planning Board erred.

September 17, 1998 Planning Board minutes:

...Mr. John J. Mahoney stated that before he and his auto parts business moved to Contoocook, NH, he supplied Mr. Brandolini with auto parts from as early back as 1984. He stated that Mr. Brandolini has invoices to prove that he supplied auto parts to the 17 Rowell Road location as early as 1988. He stated that the original invoices would reflect a Haverhill post office box even though deliveries were being sent to East Kingston. Because there was confusion with the auto parts delivery people, the post office box address was changed to 17 Rowell Road.

Mr. Brandolini stated that there is no business in Haverhill, but he keeps a post office box there as many of the cars he repairs come from that area...

Mr. Mahoney adding to his testimony stated that Mr. Brandolini took care of his fleet of vehicles from December 1983 to 1987 (moving to Contoocook in 1987). He further stated that he delivered his vehicles to 17 Rowell Road for repairs and maintenance except for oil changes, which were conducted on site.

Mr. Couture after being recognized by the Chairman stated that he moved to East Kingston in February 1988 and observed then and still today, that Mr. Brandolini has been working on cars.

Atty. Jones added that throughout the hearing, Mr. Brandolini testified that he was doing business in East Kingston back in 1988. He then noted the next witness for Mr. Brandolini's position also in the September 17, 1998 Planning Board minutes.

Mrs. Louise Castonguay of 18 Rowell Road stated that she has lived in East Kingston since 1980. She said she couldn't testify whether or not his business has been going on since 1988...

Atty. Jones stated that Mrs. Castonguay's testimony goes to the burden of proof, as she couldn't say whether or not the business was in operation in 1989. He stated that at the end of that meeting, the Planning Board chose not to make a factual finding although it was requested. He continued to say that at the September 17, 1998 Planning Board meeting, testimony was submitted by Mr. Mahoney and Mr. Couture as well as a file folder containing approximately 102 invoices showing parts being delivered to Rowell Road, East Kingston. He stated that the minutes also reflect Mr. Brandolini stating that he moved to East Kingston in 1986 and began running the business from there in 1987.

Atty. Jones then stated that because of some antagonistic challenges at the September meeting, Mr. Brandolini provided photos of the address in Haverhill at the January 1999 Planning Board meeting. He noted that these photos show no garage or space to conduct auto repairs, only an apartment house. He stated that the address was only used as a business office for the business.

He stated that the January 21, 1999 Planning Board minutes reflect that a number of invoices were submitted into the record as well as copies of his (Brandolini's) bills. He noted that although the bills reflect a Haverhill address, no Massachusetts sales tax appears on

any of them, thus it could be concluded the business was not conducted in Massachusetts (Haverhill). He went on to say that the Planning Board requested Mr. Brandolini provide 25 different types of documentation to support his claim of operating his business prior to January 6, 1989. These documentation items were geared for large businesses, not the small-scale business that Mr. Brandolini is operating. Some documentation was submitted, but it was impossible for Mr. Brandolini to come up with much of the types of documentation that was requested.

Atty. Jones then quoted the January 21, 1999 Planning Board minutes:

Mr. Brandolini responded that the Board must understand the scope of the business. It grosses about \$27,000 to \$30,000 per year. It is a part-time garage with only one employee.

Atty. Jones stated that what is more convincing is that in all of Mr. Brandolini's banking records, no checks or payments were made for the leasing or renting of garage/repair space. One must conclude that the business was being done at 17 Rowell Road. He went on to say that at the January 21, 1999 meeting, Mrs. Cheryl Durkee (direct abutter) indicated that she did not observe the business until 1994. She further states that she cannot recall if the business was in operation in 1989. Atty. Jones stated that both Mrs. Durkee and Mrs. Castonguay could not prove the business was not there in 1989, yet Mr. Couture and Mr. Mahoney could.

Mr. Wayne Couture, also an abutter, stated that he moved into town in 1988 and can testify that he has observed Mr. Brandolini working on cars from the time he moved in until the present.

Mrs. Fillio stated that in the June 1994 minutes, Mrs. George stated that she went down to see Mr. Brandolini's house and that she would not say it was a business if she were driving by.

Atty. Jones stated that Mr. Brandolini's business is not a noticeable business and that that is the nature of a home occupation. He stated that Mr. Brandolini did carry the burden of proof that he was in business in East Kingston back in 1988. He went on to say that there is no evidence he was not in business, only two people who couldn't recall when he started working there. He stated that this is the reason they (he and Brandolini) are appealing the Planning Board's decision. He said that it is his position that there was significant evidence to support their claim that the business was in operation in East Kingston prior to January 6, 1998.

Atty. Jones then directed the meeting to the appeal from the Selectmen's January 25, 1999 decision to deny a home occupation permit and their decision to deny a grandfathered home occupation permit. He stated that the focus and discussions held by the Board of Selectmen centered on whether the business was a permitted use. He reiterated that pursuant to Article 10.7 Nonconforming Uses, businesses that are in operation in East Kingston, prior to January 6, 1989 are exempt from Article 10.5 Permitted Uses.

He read aloud Article 10.1 again and noted that Mr. Brandolini's business has been providing a service all along and if he was in existence prior to the cut off date, then he would not be required to go through the rest of the items in Article X. He continued to say that Mr. Brandolini has been a good neighbor and has been quietly conducting his business.

Atty. Jones then noted that he would like to point out a similar case back in 1992 regarding an auto repair business being conducted by Ed Warren. He said that Mr. Warren stated that his auto repair business was part-time and that the only burden of proof to support his claim of operation prior to January 6, 1989 was Fire Chief Conti's recollection that Mr. Warren serviced his suburban prior to the cut off date. Atty. Jones stated that Mr. Warren has previously been turned down for a home occupation permit and that it was only the Fire Chief's say so that the business was in operation in June 1988. The Board of Selectmen then approved his application. Atty. Jones continued to say that the minutes of March 19, 1992, reflect the issuance of a new home occupation permit, not a grandfathered permit, for an auto repair business. Mr. Warren's home occupation permit was issued on March 30, 1992.

Selectman Raymond R. Donald stated that he was a member of the Board of Selectmen when Ed Warren's home occupation approval was granted. He stated that there is no relevancy in the Ed Warren case as Mr. Warren originally applied for a grandfathered home occupation permit, was turned down and then came back with additional information, which included testimony from the Fire Chief, Building Inspector and a Selectman. The Board of Selectmen realized Mr. Warren was in fact in business prior to the cut off date and a permit was issued. He reiterated that the Warren case has absolutely no bearing on this case.

Selectman Donald further stated that at the March 1989 Town Meeting, a home occupation ordinance was proposed and accepted by the Town. Then Article 10.4 read;

An annual permit to operate each home occupation must be obtained from the Board of Selectmen during the second quarter of the calendar year beginning in 1989 (permit cost: \$50.00). Agricultural/Farm home occupations and Family Day Care operations (up to six pre-schoolers plus up to three school-age children (10.3.8) shall be exempt from these permitting procedures.

Selectman Donald went on to read Article 10.6 as it read in March 1989:

Any home occupation in operation at the date of the public hearing 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...

Selectman Donald stated that Mr. Brandolini did not comply with any of the ordinance. He stated that he (Brandolini) did not come forward to say he was in business nor did he give any indication to the Town that he was in operation. Selectman Donald said that from a selectman's standpoint, he is not entitled to go forward under the grandfather clause. He did not comply with any ordinance and even if he was in business prior to 1989, and Mr. Donald does not believe he was, he (Brandolini) still did not comply with any part of the home occupation ordinance.

Vice Chairman Ciardelli clarified that Articles 10.4 and 10.6 as read by Selectmen Donald are the same as the current Articles 10.6 and 10.7.

Atty. Jones responded that Mr. Brandolini will admit that he did not register and did not pay an annual permit fee, however, the ordinance does not state that if such actions aren't done, you lose your grandfathered rights. He then gave an example with gravel pit ordinances, which require specific actions by a specific date and further states that rights would be forfeited if not done. He stated that the East Kingston Home Occupation Ordinance does not include any language to support a loss of rights if business owners do not register or pay annual permit fees.

Selectman Donald disagreed and stated that Atty. Jones is far reaching here.

Vice Chairman Ciardelli opened the meeting to questions from the Board and abutters. With no Board questions at this time, abutter Cheryl Durkee stated that this case has been going on for years and hostilities are growing. She stated that at the last Planning Board meeting, Mr. Brandolini was given opportunity to address a list of 25 items that could support his claim of being grandfathered. She said that the Planning Board went through the entire list and the only things Mr. Brandolini could provide were several tax returns that couldn't support the business being in East Kingston or Haverhill. She stated that parts invoices do not constitute a business.

Mr. Riley stated that he was a member on the Planning Board during Mr. Brandolini's second hearing and he (Riley) found nothing convincing to support his (Brandolini's) claim.

Atty. Jones requested that Mr. Riley, having served on the Planning Board during Mr. Brandolini's case, recuse himself from voting at this hearing.

Mr. Riley agreed and Vice Chairman Ciardelli designated Mr. Cook to participate in any voting matters before the board.

Mr. Riley then went on to say that the 1994 Planning Board minutes reflect Mr. Brandolini stating his business had only been in operation in East Kingston for 3 years, thus making it 1991. He stated that it is the grandfather condition that controls this discussion. He further stated that Mr. Brandolini was unable to provide any persuasive evidence that the business was grandfathered. Mr. Riley said that even Mr. Brandolini's tax returns reflect a Haverhill address until 1992.

Mr. Brandolini stated that he listed Haverhill on his tax returns because that is where the business' office was. Mr. Riley replied that businesses in New Hampshire have to file tax returns.

Mr. Riley went on to say that Mr. Brandolini's call forwarding bills dated 1999 were also not convincing that the business was in operation in East Kingston back in 1989.

Mr. Brandolini responded that he has provided more information than what the record shows Mr. Warren submitted and he (Warren) was granted a permit. He stated that the Planning Board came to the conclusion that he (Brandolini) was not grandfathered based on the documentation list. He said that the list was not directed toward the small business owner. He has no letterhead and no insurance. He stated that he brought in 102 parts invoices, the testimony of an abutter and the testimony of a parts dealer. He continued to say that his tax returns have no bearing on whether he serviced vehicles in East Kingston.

Mrs. Durkee stated that Mr. Brandolini could not provide any state permits either.

Mr. Mark Durkee stated that he is concerned with the waste oil, fluids, antifreeze, brake binders and run-off of possibly contaminated water on to his property. He stated that he is worried about his well and that he can't even open his own windows during the day because of the noise. He said the neighborhood is suffering.

Atty. Jones responded that these issues are the same ones the Planning Board got hung up on. The only question before the board is whether or not the business was in existence prior to January 6, 1989. He then stated that one does not need a state permit to operate a business in New Hampshire.

Selectman Donald stated that even if his business was in existence in 1989, and he is not saying it was (only hypothetical), the fact that he (Brandolini) did not come forward as provided for in Articles 10.4 and 10.5 negates the business ever existed.

Mr. Cook inquired if Mr. Brandolini had any further evidence to present to the board. He stated that he too was a small business owner, but could provide telephone receipts and customer receipts to support when his business began.

Mr. Brandolini stated that he did present his telephone bill showing call forwarding. He stated that his utility bills are not separate from his home utility bills. He said he brought in all his records and that the proof of what he says is not there. There are no receipts for leasing auto repair space because he didn't.

Mr. Cook asked if Mr. Brandolini ever had his compressor serviced to show an equipment repair address. Mr. Brandolini responded that he has never had it serviced. When asked about purchasing tools, Mr. Brandolini stated that tool purchases would be delivered with auto parts. He reiterated that only the business' office was in Haverhill.

At Board inquiry, Mr. Brandolini stated that he didn't file when the home occupation rule came out because he didn't pay a great deal of attention to what was going on in Town. He stated that he did apply for a home occupation permit in 1994.

Mr. Marden asked if Mr. Brandolini ever filed a New Hampshire Business Profit Tax. Mr. Brandolini replied that he only filed a schedule C and paid federal taxes.

Mr. Boudreau stated that in 1994 Mr. Brandolini indicated that he started his business in East Kingston in 1991. He stated that the Planning Board weighed the evidence. He continued to say that he doesn't see how, 10 years later, Mr. Brandolini can be grandfathered. He said that the minutes dated September 1998 specifically indicate Mr. Brandolini admitting to lying and credibility is an issue.

Mr. Brandolini replied that he did lie in 1994.

Mr. Boudreau stated that based on the evidence, he doesn't see how the Planning Board made an error in their decision.

Mr. Riley stated that during the January 1999 Planning Board meeting, he (Riley) tried to bend over backwards to get more information from Mr. Brandolini to support his claim, something to rest his argument on. He said that Mr. Brandolini failed to prove his case.

Mr. Brandolini reiterated that he submitted parts invoices and testimony from two eyewitnesses. He stated that he presented more information than any other grandfathered permit applicant.

With no further discussion,

MOTION: Mr. Boudreau motioned to deny the application for an Appeal from Administration Decision regarding his automotive repair business "Haverhill Tune-up" in relation to the January 21, 1999 Planning Board decision to recommend that the Board of Selectmen deny the application for a grandfathered business, based on the lack of sufficient proof of the existence of the business prior to January 6, 1989. Mr. Freeman seconded.

DISCUSSION:

Mr. Boudreau stated that he found no error in the Planning Board's decision.

Vice Chairman Ciardelli called the vote. The motioned carried 4-0.

MOTION: Mr. Boudreau motioned to deny the application for an Appeal from Administration Decision regarding his automotive repair business "Haverhill Tune-up" in relation to the January 25, 1999 Board of Selectmen decision to 1) at the recommendation of the Planning Board, deny the application for a grandfathered business; and 2) deny the application for a home occupation permit, based on lack of evidence presented to the Planning Board in 1994, 1998, and 1999, and the Board of Selectmen in 1994, 1998, and 1999 that the business was in existence in East Kingston prior to January 6, 1989. Mr. Marden seconded.

DISCUSSION: None.

Vice Chairman Ciardelli called the vote. The motioned carried 4-0.

At this time (8:24) the applicants left the meeting.

The Board held further discussion to clarify the language of the motions.

OTHER BUSINESS

Minutes: The Board reviewed the minutes dated April 22, 1999 and without any objections approved them for the record.

Rockingham Planning Board Training Series: The Board noted the 1999 schedule for the Rockingham Planning Commission's workshops. Members were advised to notify the recording secretary if they planned to attend.

MOTION: Mr. Boudreau motioned to adjourn. Mr. Marden seconded. With no further discussion, the motion carried 5-0 and this May 13, 1999 public Zoning Board of Adjustment meeting ended at 8:32 pm.

Minutes completed and on file May 17, 1999.

approved 6/24/99