

TOWN OF EAST KINGSTON  
BOARD OF ADJUSTMENT MINUTES  
JUNE 19, 1996

FILE

AGENDA

7:30 John L. Eaton - Variance from Article VI.G.3 (1996-02)  
8:00 Jeremy D. Russman - Variance from Article IV.D.6 (1996-03)

**Attending:** John V. Daly - Chairman, David. C. Boudreau, David Ciardelli, Edward Cardone and Norman J. Freeman.

**Others Attending:** Glenn Clark - Building Inspector, J. Roby Day - E.K. Selectman, John L. & Patricia A. Eaton - Applicants, Charles Grant, Gail Anderson, Barbara Colanton - Eaton Abutters, Jeremy D. Russman - Applicant, Larry Bean, Marshall Bean, Mrs. Judy Bowley, Mrs. Theresa Collette - Russman Abutters and Harvey Purrington.

**John L. Eaton - Public Hearing:** Chairman Daly opened the public hearing for John L. Eaton on the application for a variance from Article VI.G.3: Two family dwellings shall require 300 feet of frontage at 7:35 pm.

Mr. Eaton explained to the board his proposal to add a duplex addition to his home at 52 East Road to accommodate his mother-in-law, father-in-law and sister-in-law who reside next door and are handicapped. He then entailed how he went before the Planning Board requesting a permit to build this addition. The Planning Board after reviewing his request, directed him to apply for a variance [by reason of lack of frontage] via the Zoning Board of Adjustment.

Mr. Eaton further explained that he currently has 200 ft. of frontage to his property and a 212 ft. deeded right-of-way. He is requesting that he be permitted to include the 212 ft. right-of-way as acceptable frontage to accommodate this 300 foot frontage requirement.

Mr. Eaton then expounded that he shares a driveway with the Perreault's of 48 East Road. Because of the location of his property and the embankment at the front of that property, a 400 ft. site distance was could not be met, resulting in this deeded shared driveway.

Mr. Eaton then described the proposed duplex addition as a two bedroom ranch style home consisting of a kitchen, bath, living and dining area, with handicap ramps. This addition would be connected via carport to the rear of his existing two-story garage and would meet the 800 sq. ft. requirement. He also stated that the addition would be difficult to see from the road as an 8 ft. embankment, trees, and his existing garage would hide it from view.

At this point Mr. Eaton submitted plans of the proposed addition and reviewed it's layout with the board.

At Mr. Ciardelli's inquiry, Mr. Eaton explained that his handicapped mother-in-law, father-in-law and sister-in-law currently reside next door which is about 156 ft. from their house to his own and was concerned about such a distance in the event of an emergency.

Mr. Eaton then stated that he is a builder and that he will construct this addition himself, meeting his own high standards of workmanship.

Mr. Glenn Clark, Building Inspector, stated that the Planning Board had two concerns regarding this proposal.

1. Mr. Eaton does not own his driveway as he has an easement from another piece of property.
2. Mr. Easton does not own his deeded right-of way.

Mr. Eaton reiterated that because of the 400 ft. site distance requirement, there were no other choices for his driveway location. This was know at the time of the original subdivision of his property and this deeded right-of-way was part of the purchase agreement.

Chairman Daly asked if Mr. Eaton understood the five criteria that must be met in order to grant this variance. Upon his affirmative response, Chairman Daly requested Mr. Eaton address them.

Mr. Eaton addressed the five criteria as follows:

1. The proposed use would not diminish surrounding property values because anything added to the existing property would only upgrade the current property value. Mr. Eaton added that he keeps his property well-maintained.

2. Granting the variance would be of benefit to the public interest because this proposed addition is intended to accommodate the care of his family (in-laws) which would eliminate the need for public care/assistance for their special needs.

At this time, Mr. Charles Grant stated that he felt the granting of this variance is a benefit to the public as the in-laws have been community members all of their lives and the fact that the Eaton's are willing to take them in and care for them is a big asset to this community.

He further stated that in his opinion, the criteria in which Mr. Eaton had to address was intended to put Mr. Eaton's in-laws "out to pasture".

Chairman Daly then informed Mr. Grant that the criteria Mr. Eaton must address is the same criteria each and every applicant must address established by the Supreme Court in the State of New Hampshire. It is the responsibility of Mr. Eaton to satisfy this board of those criteria.

Mr. Grant then added that Mr. Eaton keeps his property immaculate.

Mr. Eaton continued to address the criteria.

3. Denial of the variance would result in unnecessary hardship to the owner because of the following special circumstances of the property that distinguish it from other properties similarly zoned as in Mr. Eaton's research of other similarly zoned homes, no other had the shared right-of-way and frontage situation like his. If Mr. Eaton only had 200 ft. of frontage [and no deeded right-of-way], he would not consider adding a duplex addition to his property. Because of the shape of the property, it limits it's use.

Mr. Freeman stated that Mr. Eaton could add the extra bedrooms and bath and then the addition wouldn't be considered a duplex.

Mr. Cardone explained that his concern is that if the variance is granted, what guarantees are there that Mr. Eaton won't turn around and rent out the addition or sell the home as a duplex for profit.

Mr. Eaton stated that his intention is solely for the benefit and welfare of his in-laws, however, at some point the in-laws will pass away and because the taxes are so high in East Kingston, Mr. Eaton would like the option of renting the addition out to another family member or friend.

Mr. Ciardelli then read the following excerpts from the Board of Adjustment in New Hampshire handbook, showing the guidelines in which the Zoning Board of Adjustment must consider:

*For hardship to exist under our test the deprivation resulting from application of the ordinance must be so great as to effectively prevent the owner from making reasonable use of the land. If the land is reasonably suitable for a permitted use, then there is no hardship and no ground for a variance, even if the other four parts of the five-part test have been met.*

*Unnecessary hardship cannot be based on the fact that a variance will allow the landowner to make a greater profit with his land; or that the granting of the variance will be convenience to the landowner; or that the abutters have no objections; or that the use of the land by the landowner, after granting the variance, will bring more taxes to the community.*

Mr. Grant inquired if the guidelines presented include the 1990 Disability Act signed by President Bush.

Mr. Ciardelli responded that the variance is considered by the hardship of the land not the hardship of the disabled or the owners.

Mr. Cardone stated that Mr. Eaton could add the bedrooms now and come back for a variance after the in-laws are moved in to add on a kitchen.

Mr. Eaton responded that the layout of his house prohibits the in-laws from getting around there. The doorways are not wide enough to accommodate a wheelchair and the home is a two-story. He further stated that his house is not big enough to accommodate three more people.

Mr. Cardone reiterated his concern about the guarantee that Mr. Eaton is not seeking this variance for rental purposes. He further explained that he would be convinced of Mr. Eaton's intentions if the in-laws moved into the addition before any kitchen be constructed.

Mr. Eaton stated that as long as the kitchen could be installed at some point for the in-laws, that wouldn't be a problem for him.

Chairman Daly directed the hearing back to the criteria at hand.

4. Granting the variance would do substantial justice because of the land configuration. Mr. Eaton stated that he has a right-of-way and he cannot buy it. There is no more land to buy.

Mr. Clark stated that Mr. Eaton would need to upgrade the septic system to handle this proposed addition.

Mr. Eaton responded that he is willing to install a new septic system and well.

Chairman Daly inquired that since Mr. Eaton is applying for a variance for the frontage, can it be assumed that Mr. Eaton can meet all other duplex requirements.

Mr. Eaton responded affirmatively.

5. The use is not contrary to the spirit of the ordinance because most duplexes look like duplexes, this proposed duplex addition will look like an addition off the back of Mr. Eaton's house, most of which will be hidden behind the garage.

Mrs. Eaton explained that she can understand why some people would be upset at the idea of adding a duplex for rental purposes, but that their intended purpose is for the care and benefit of her family.

Mr. Eaton added that his intention is to live in East Kingston, and not to build and sell his home. The sole purpose for this duplex addition is usage for handicap family members.

Chairman Daly inquired if any abutters had any concerns regarding Mr. Eaton's proposal.

Mrs. Gail Anderson, Mrs. Barbara Colanton, and Mr. Charles Grant stated they had no objections to Mr. Eaton's duplex addition proposal.

At the inquiry of Mr. Boudreau, Mr. Eaton explained the layout of the new septic and well showing that Mr. Eaton had enough property to accommodate the ordinance requirements. He continued to explain that the driveway is two and a half times wider than standard driveways.

Mr. Boudreau stated that the hardship criteria was difficult to prove.

Mr. Ciardelli then quoted another excerpt from the Board of Adjustment in New Hampshire handbook:

*When the restriction, as applied to a particular piece of land, is unnecessary to accomplish a legitimate public purpose or the gain to the public is slight but the harm to the citizen and his property is great, the exercise of the police power becomes arbitrary and unreasonable and this court will afford relief under the constitution of this state.*

Mr. Eaton stated that all the abutters are present and that none have any objections to his proposal.

Chairman Daly stated that the board will assume for the purposes of this hearing that the right-of-way is deeded and properly recorded with the Registry of Deeds. He continued to say that in his opinion, all the criteria has been easily met except for the hardship, which in relying on the configuration of the property, could be satisfied.

Chairman Daly further stated that the configuration could be considered a hardship given that a properly deeded right-of-way does exist and counting the footage of that right-of-way would give this property the required frontage for this proposed addition.

**MOTION:** Mr. Ciardelli made a motion to approve the application for variance of Article VI.G.3 contingent upon well, septic and all other town ordinance requirements. Mr. Freeman second. The vote passed unanimously. (5-0)

**Jeremy Russman - Public Hearing:** Chairman Daly opened the public hearing for Jeremy Russman on the application for a variance from Article IV.D.6: Septic systems leach field boundaries shall be located more than 20 feet from any property boundary and 100 feet from any standing or running water, and 100 feet from any well at 8:14 pm.

Mr. Russman explained to the board that back in December of 1995, he requested a variance from Article VI.1 & 2 to build a small home on an undersized lot. [The lot's history being a subdivision by the courts, with Mr. Bowley owning the larger lot and Mr. Bowley's sister owning the smaller lot.] The variances requested by Mr. Russman were granted by this board in December.

Mr. Russman continued to explain that in the spring after all the snow had melted, a full survey of the property was commissioned. This survey resulted in this request for variance for the septic system boundary location with regards to a well location. The state requires any septic leach field boundary 75 ft. from any existing well and the town ordinance requires 100 ft., which can only be waived by the granting of a variance.

Mr. Russman went on to say that he commissioned Paul Nichols a Licensed Engineer, to not only survey the property but to draw up the septic system plans. He stated that the house itself meets all other setback requirements. The existing well is only 75 ft. from the proposed septic system and there is no other point on the lot that will accommodate the septic system and still meet all the other setback requirements.

Mr. Russman stated that the existing well straddles the boundary line and is actually 7/10th on his property and only 3/10th on Mr. Bowley's. (Mr. Russman pointed out the well area on the plot plan he provided to the board). He continued to say that under today's standards, that the existing well would not be allowed to be placed where it is.

He then stated that he was back before the board to further request that he be allowed to meet the state requirements for this septic system proposed location. He then addressed the five variance criteria:

1. The proposed use would not diminish surrounding property values because the home would be built as a single family home meeting all building code requirements. The house would sit back 170 ft. from the water. The area is residential as is a single family home. Even the birch trees located on the property would be spared from removal.
2. Granting the variance would be of benefit to the public interest because it would raise the property value of the lot up to and in excess of \$100,000.00. The lot would be cleaned of all debris and garbage. The lot is currently being taxed as a \$25,000.00 building lot.

He then stated that a note in the Building Inspector file states that this lot is considered buildable upon the septic approval.

3. Denial would result in unnecessary hardship to the owner because of the following special circumstances of the property that distinguish it from other properties similarly zoned as the lot itself has the hardship because every effort has been made to accommodate the 100 ft. septic requirement to no avail. At the most a 25 ft. waiver would be necessary to meet the well/septic requirements. He further stated that the well is also on his land.

At the inquiry of Mr. Ciardelli, Mr. Russman stated that the well belongs to Mr. Bowley and that Mr. Bowley was currently using it. He continued to say that because of the size and configuration of the lot, and that the well being on the lot line, is an additional hardship. There is no other use for the property than the proposed use at hand.

4. Granting the variance would do substantial justice because the lot would be cleaned up and the property value would raise the tax base. The 75 ft. waiver of the septic/well requirements would be consistent with the state requirements. This lot will increase the value of the surrounding properties as well.
5. The proposed use is not in contrary to the spirit and intent of the ordinance because this variance would only promote the health and safety of the community. It would not change the character of the neighborhood and would again increase the surrounding property values. The state approved septic plan is created to protect the ground water supply.

Chairman Daly asked Mr. Russman if he is granted this variance that he is requesting, will all other requirements be satisfied.

Mr. Russman responded affirmatively.

Mr. Clark stated that he had some concerns regarding Mr. Russman's request for a variance. He continued to say that he received a call from the NH Water and Resource Commission (owners of the Trickling Falls Dam). The NHWRC was concerned about Mr.

Russman putting a house on that property as in the event of a flood, there needed to be enough clearance for the river to be raised three feet.

Mr. Clark continued to explain that the lot is a 70 x 300 ft. The back 50 + ft. is river height, thus the actual lot size is 70 x 250 ft. The NHWRC has the legal right to raise the river in a flood condition. Under the flood condition, Mr. Russman's proposed well would be under water.

Mr. Russman responded that he may go ahead and use the existing well that Mr. Bowley is using as it is as much on his land as Mr. Bowley's land and that the well issue with Mr. Bowley will be settled at a later date.

Mr. Russman further stated that should the NHWRC raise the river by three feet, he will not be the only property owner along the river with water on his property. The NHWRC will contact Mr. Russman in writing or in person should they have any concerns about the location of his well and septic after receipt of his plans to the State.

He continued to say that the contour of the land has a six foot drop from the house to that low area. This issue is irrelevant to whether the water is raised or not.

At the inquiry of Mr. Cardone, Mr. Russman stated the proposed house is for his son and was not going to be placed on the market. He also stated that he did not receive or investigate further the well and septic ordinance setbacks at the time of his last public hearing. Had he received all the information then, he would have requested this variance as well.

Mr. Russman explained that he is aware that Mr. Bowley is unhappy with his plans to build on this lot, and he is trying to accommodate Mr. Bowley, not further upset him. He stated that he has no problem with Mr. Bowley's family using the existing well.

Mrs. Judy Bowley stated that the Town didn't want this property to be built on, but to be sold to one of the abutters to extend their own properties. She added that the original foundation to the old house that was once there, is still there.

Mrs. Bowley further stated that Mr. Russman stated at the last ZBA meeting, that he would not come back before the board requesting anymore variances.

Mr. Clark presented the board with the original plot plans dated October 1970 [surveyed by "Town Planning Engineers and Associates of Amesbury, Massachusetts] and stated that the original subdivision plans were signed by the East Kingston Planning Board as "not buildable".

Mr. Russman responded that the deed to this lot is free and clear and that this lot was created by the courts. He stated that he can meet all state codes and that he has never tried to make a "back door" approach to this issue. He has always been straight forward with his intentions to this board.

Mr. Russman also stated that the original land surveyors were not licensed to survey in New Hampshire and that the actual surveying work was in error as differences of the 1970 plans and Mr. Russman's updated plans were apparent. He stated that the plans that he submitted to the board are confirmed correct by the abutters deeds as well as the NHWRC plans.

Mr. Roby Day a member of the East Kingston Planning Board and Board of Selectmen, stated that he found it difficult to believe that the courts would take it upon themselves to do the Planning Board's work. It is his conclusion that in 1971, the Planning Board did not consider this court imposed lot to be buildable.

Chairman Daly stated that there is a presumption that the court wouldn't create a non-buildable lot.

Mr. Day responded that the court can create any type of lot it desires, but that doesn't necessarily mean the lot will fit the perimeters for a planning board's buildable lot.

Mr. Russman reiterated the size of the lot, its value and its restrictions to its use. He stated that the lot does perc and can meet all the State required septic/well setbacks. There are many lots that can be made workable which do not necessarily meet the exact dimensions under current ordinances.

Mrs. Theresa Collette stated that she was concerned with the proposed system being too close to her own well. She also stated that she felt the lot was too small to place a house on and that too many variances are needed to make this lot buildable.

Mr. Russman stated that under the present septic plan, her well would be 150 ft away from his septic system.

Mr. Larry Bean stated that the board should consider that Mr. Russman was asking for a variance from a neighbor's well and not his own.

Mr. Russman responded that the well and septic setback requirements he is proposing are acceptable to the State and that the well is 7/10th on his own property. He then stated that Mr. Bowley has 2 1/2 acres and he is not requesting that the well be moved to his own property. Mr. Bowley will still be allowed to use the existing well.

Mr. Day stated that it might be in the best interest of the board to consider a site walk of this lot, as then it would be evident of just how unbuildable it is.

Chairman Daly responded that it is not the zoning board's providence to decide whether or not the lot is buildable, but it is the board's concern whether or not the variance criteria can be satisfied.

Mr. Day replied that in view of the properties obvious physical difficulties, Mr. Russman knew perfectly well the difficulty of finding some suitable arrangement to accommodate building a home and keeping within all the required setbacks and ordinances. He further stated that this prior knowledge of the circumstances discounts Mr. Russman's hardship claim.

Mr. Russman responded that the hardship is not to himself, but to the land.

Mrs. Bowley reiterated the fact that Mr. Russman stated that he would not seek further variances once his request [in December] was met.

Mr. Russman stated that he is here before the board to provide a State approved septic system plan. He further explained the proposed house to be a small two-bedroom cape with a three bedroom septic design.

Mr. Bean stated his concerns of a possible failed septic system in the future and asked how Mr. Russman would deal with that issue.

Mr. Russman responded that he would deal with that if and when it happened. He again stated that he has no intention of shutting off the water supply to Mr. Bowley.

At the inquiry of Mr. Cardone, Mr. Russman explained the back-up septic system in the event of a failed septic as: the system is an elevated system therefor, the new system would be built in the same place as the previous system. He further stated that none of his septic systems have ever failed in his last ten plus years of business.

Chairman Daly reviewed the criteria and stated that criteria 1, 2, 4, and five have been met with several considerations. He further stated that in his opinion, the hardship criteria has also been met because the lot's hardship was created by design and the town bears some responsibility for that.

Chairman Daly then stated that he was disappointed that Mr. Russman was before the board seeking further variances than what was already granted in December of 1995.

Mr. Freeman stated that he voted against the variance request in December, and that his feelings about this additional variance is the same. Just because a judge creates a lot out of a settlement, doesn't mean it is a buildable lot. There are several backlots in East Kingston that don't have right-of-ways, that are not buildable lots.

Mr. Ciardelli explained his concern that the board is dealing with a 25 ft. waiver on a septic/well setback, however, there were some substantial compromises made at the December 1995 public hearing. Combining all of the other variances granted along with this current request for variance, the question to be asked is: has the board granted Mr. Russman too much.

He continued to say that the key question is: can a septic system be safely placed on this lot without being too close to the abutters.

Mr. Russman responded that the State can still turn his plans down as well as the NHWRC. He stated that he is only asking for a 25 ft. waiver and not a foot more.

**MOTION:** Mr. Cardone made a motion to deny the application for variance from Article IV.D.6: Septic system leach field boundaries shall be located more than 20 feet from any property boundary and 100 feet from any standing or running water,

and 100 feet from any well. Mr. Freeman second. The vote was defeated. (2-3) Chairman Daly, Mr. Boudreau and Mr. Ciardelli opposed.

**MOTION:** Mr. Boudreau made a motion to grant the application for variance from Article IV.D.6: Septic system leach field boundaries shall be located more than 20 feet from any property boundary and 100 feet from any standing or running water, and 100 feet from any well subject to a conditional State approved septic system. Mr. Ciardelli second. The vote passed. (3-2) Mr. Cardone and Mr. Freeman opposed.

**February 8, 1996 Minutes:** It was noted for the record that the February 8th, 1996 ZBA minutes were accepted and approved as prepared.

This June 19th, 1996 Zoning Board of Adjustment public meeting adjourned at 9:05 pm.

Respectfully submitted

Catherine Belcher