

FILE

East Kingston Board of Adjustment

June 22, 1995

**Attending:** John Daly-Chairman, David Ciardelli, Joseph Conti, Norman Freeman Sr-Alternate (present and not voting), Edward Cardone (present and not voting)

This meeting opened at 7:34 PM.

Mr. John Daly began "This is a hearing only on the motion submitted by the Bodwell's for a rehearing. So we are limited in what we have to consider because of that. We don't need to get to the merits of argument at all. They are asking us to reconsider their decision on the basis of one of two reasons:

- #1. There is new evidence
- #2. That we made a clear error to the planning ordinance or law.

Procedurally, they filed an application for a permit with the Selectmen, and the Selectmen chose not to give them a hearing because it was already pending an appeal from a denial of a variance by the Zoning Board to the Superior Court, alleging that the Zoning Board had made an error when we denied them a variance requesting the second building on the site.

When they came before this Board, appealing that administrative decision, last month this Board voted to send it back to the Selectmen for reconsideration, and they are actually asking for a rehearing on that decision."

Mr. Daly informed the Board the following options:

- #1. Grant their petition for a rehearing, or
- #2. Deny their petition for a rehearing.

He added the basis for granting it would be because the Board made an error in applying the law, or they presented new compelling evidence.

Mr. Conti felt the Bodwells should be granted a permit to open an office.

It was pointed out to Mr. Conti that that wasn't the issue, the issue before this Board was whether or not to grant a rehearing, and not to make a decision on the merits.

At 7:39 PM Attorney Robert Donovan entered the meeting, informing the Board about a call from Judy Bodwell, regarding a meeting that the Bodwell's nor Mr. Donovan had received notice of the hearing.

Mr. Daly informed Mr. Donovan, that the meeting had been posted, that this meeting was only for considering a motion for a rehearing, and invited Mr. Bodwell to remain during this public meeting. Mr. Donovan excused himself.

Mr. Conti thought the Board should grant the rehearing.

It was very clear to Mr. Ciardelli that the place to obtain a permit to operate a home occupation is with the Selectmen. He pointed out that the Selectmen have not heard the Bodwell's case, and have not dealt with the Bodwell's on that issue. It seems the Bodwells don't want to work with the Selectmen, but wants to work with the Zoning Board.

Mr. Daly quoted from RSA 633 II "In exercising its powers 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 or 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."

Mr. Daly stated that the Zoning Board had broad authority in that situation. He thought what Mr. Donovan was trying to say is that the Board made an error when it was sent back to the Selectmen.

Mr. Ciardelli said if the Selectmen had heard the case, and denied the home permit they could have appealed that decision with the Board of Adjustment. He indicated that he would be more comfortable, if the Selectmen had heard the case, and then denied it, as opposed to not hearing the case at all.

Mr. Daly then read a quote from a 1981 case with the NH Supreme Court that says "The Rehearing process is designed to afford local zoning boards of adjustment an opportunity to correct their own mistake before appeals are filed in the courts", and further on he quotes "the reasons for granting the rehearing should be compelling evidence. The Board has no right to re-open a case based on the same set of facts unless it's

convinced that justice would otherwise be created. To do so, the first hearing in many cases would lose all importance and no decision of the Board can be filed until two hearings have been governed”.

Mr. Ciardelli supported the decision of the this Board, and felt “we are doing the right thing”. The history of this case reflects way back Joe Conti issued a permit to put a trailer on the property, which stated as soon as the house was done, they were going to move it out.

Mr. Conti agreed, and said it was for 30 days.

Mr. Daly reviewed what Atty Donovan argues in his motion, “#4. The action of the ZBA is illegal and invalid because the ZBA failed to act upon the issues raised by the appeal from an administrative decision, failed to address the presentation made by Bodwell which established that the requirements of the Ordinance for Home Occupation were met, and that as a result of the ZBA sending the matter back to the Selectmen, such action will only result in a denial of the request as the Selectmen had already incorrectly determined that the request is to use “... an illegal building . . .” which is clearly erroneous. The action of the ZBA constitutes a delaying tactic and creates unnecessary expense and hardship to Bodwell.

#5. That the ZBA should have addressed the merits of the case as presented by Bodwell, and as evidenced in the Memorandum in Support of Application for Appeal submitted by Bodwell, and the failure of the ZBA to do so is illegal and invalid and for this sole reason alone, this Motion for Rehearing should be granted.”

Mr. Daly felt when it was put in this way, what the Board did was illegal according to Mr. Donovan, and they (The Board of Adjustment) would have no choice but to deny the petition. According to Mr. Daly, he felt what the Board did was clearly appropriate.

Mr. Daly asked, is that dwelling, that building really illegal?

Mr. Conti said the building is legal for an office, but is illegal for a dwelling, or living quarters.

Mr. Daly speculated that if the Home Occupation had been granted, if he is using as an office, and the building stays the same, he could presumably rent it out any time he wanted.

Mr. Conti said he would go right back where he started if he did that, and added that he could not have two businesses in the same office. He added that the only requirement that Timmy (Bodwell) has if he puts an office in that building is he could not have a cooking stove.

Mr. Ciardelli commented that according to the details presented, he felt the square footage did not add up. Mr. Ciardelli made a comparison of the square footage reported in the interrogatory was short, and but appeared adequate in the initial application.

Mr. Conti stated that Mr. Bodwell is 20 feet short of being legal in the trailer. He added there was 3200 feet in the house, with one quarter of that equaling 800 feet, makes him 20’ feet over. In addition, he said Mr. Bodwell could not use the cellar for business, and the trailer for an office.

Mr. Ciardelli made a reference to the article in reference to Home Occupation (X). He said the home occupation use of the dwelling must not utilize more than 25% of the gross floor area, including basement and accessory structures of the dwelling. Mr. Ciardelli again made reference to the square footage computations in the interrogatory, and reported that the basement was included.

It appeared to Mr. Ciardelli, that what the Bodwells want is the greatest number possible totaling all the living space, the trailer and the basement, and compare that total to the trailer, hoping that the trailer would not exceed 25%. He thought Bodwell pushed the tipout in, to reduce the square footage of the trailer, which would reduce the square footage to equal less than 25%. He noted that the numbers on the interrogatory, the trailer was more than 25%, which does not comply with Article 10.2.3 of the Home Occupancy ordinance.

Mr. Ciardelli did speak to Mr. Donovan regarding this comparison.

Mr. Conti said that Mr. Donovan presented a square footage number of 3,600 square feet, with 25% total equal 900 feet, and the trailer was presented as 780 feet, which Mr. Conti felt was wrong, as the house did not equal 3600 feet.

Mr. Daly referred to the May 17th minutes, and stated the issue at hand is whether the decision at that hearing, is as Mr. Donovan called “clearly illegal and invalid”. This appears to be Mr. Donovan’s sole reason for the motion for rehearing.

The discussion among the Board members repeatedly supported the idea that the Bodwells should have gone to the Selectmen, and if the Selectmen refused the Bodwells on the merits of the issue, then it would be appropriate for the Board of Adjustment to have a hearing with the Bodwells.

Motion: Mr. David Ciardelli motioned the Board of Adjustment deny granting application for Rehearing - Appeal from an Administrative Decision to Timothy A. & Judith A. Bodwell, based on the Board's previous decision being legal and valid. Mr. Joseph Conti second.

Mr. John Daly	Yes
Mr. David Ciardelli	Yes
Joseph Conti	Yes

The motion was denied unanimously, with a strong recommendation that the Bodwell's appear before the Board of Selectmen.

Mr. Daly voiced his recommendation that Mr. Ed Cardone be appointed by the Selectmen as an Alternate Member to the Board of Adjustment.

The members requested copies of the new Zoning Ordinances once they are published and become available.

The meeting was adjourned at 8:14 PM.

Respectfully submitted:

Sandra Johnson  
Administrative Assistant