

Town of East Kingston, New Hampshire
Zoning Board of Adjustment Meeting Minutes
June 26, 2008
7:00 pm

AGENDA

Election of Officers

1 Case #08-01. Dale and Helen Kemp, 150 Willow Road (MBL 07-03-13), East Kingston, NH. The applicant is seeking special exception under Article VIII – USES PERMITTED Paragraph F. for an accessory dwelling unit.

2 Case #08-02. Norman and Carol Freeman (Honey Bee Trust), 52 Main Street, (MBL 09-08-01) East Kingston, NH. The applicant is seeking an area variance from Article XX, Section E – STRUCTURE OR LAND USE CONFORMANCE in order to permit a lot line adjustment involving two non-conforming lots.

Members Attending: Chairman John Daly
Alternate Members: Catherine Belcher, Paul Falman, Tim Allen.
Advisors Present: Ray Donald, East Kingston Building Inspector
Also present: Mr. Dale Kemp; Norman and Carol Freeman; Erik Newman, Attorney from Gallagher, Callahan and Gartrell and representative for Granite State Gas; and Ms. Keri Marshall, the Freeman's Attorney.

Mr. Daly opened the meeting of the East Kingston Zoning Board of Adjustment (ZBA) at the East Kingston Town Hall on June 26, 2008 at 7:05 PM.

Election of Officers. The first item on the agenda was to be the election of officers for the coming year. Since a full Board was not present, Chairman Daly opted to postpone the elections.

Public Hearing 08-02

Dale and Helen Kemp, 150 Willow Road (MBL 07-03-13), East Kingston, NH. The applicant is seeking special exception under Article VIII – USES PERMITTED Paragraph F. for an accessory dwelling unit.

Mr. Daly opened this public hearing and acknowledged that Mr. Kemp was in attendance; his wife Helen was not.

Mr. Daly gave Mr. Kemp the opportunity to postpone his public hearing until the next month in light of the fact that there was not a full Board present. Mr. Kemp stated he thought his application was cut and dry, and he would like to continue with his public hearing this evening instead of waiting until next month.

Mr. Daly asked Mr. Kemp to review his application for the Board and explain how he met the special exception conditions.

Mr. Kemp explained that he would like to build an in-law apartment so his daughter could reside with them, but have a sense of independence. He showed the plans for the in-law apartment, which illustrated that the in-law apartment was 498 sf in size, with the front door located on the side of the main dwelling through a deck, and showed the access to the main house. He noted there would be two parking spaces provided for the in-law apartment and they were shown on a separate drawing. He also noted that the septic system was rated for a 5.5 bedroom house.

Mr. Daly reviewed the Special Exception Worksheet with the Board.

Ownership. The owner of the property must occupy the main dwelling as the primary resident.

Mr. Kemp indicated he was the primary resident of the main dwelling.
This condition is satisfied.

Mr. Daly informed Mr. Kemp that the resident of the accessory dwelling unit did not need to be a family member. Mr. Kemp noted he understood this, but that the intended person to live there was his daughter.

Living Area Configuration. The total living area configuration shall not exceed 500 sf, with one bedroom, 1 kitchen/ living area and 1 bathroom. It was also to be clearly secondary to the main dwelling.

Mr. Kemp clarified that the proposed accessory dwelling unit was 498 sf, consisted of one bedroom, 1 kitchen/ living area and 1 bathroom, and was secondary to the main dwelling.

This condition is satisfied.

Construction. Only one accessory dwelling unit is allowed, and the outside entryway must not be located on the front/street side of the principal residence. There must also be an interior passage through the dwelling common walls to the main dwelling.

Mr. Kemp explained that the entryway to the accessory dwelling unit was located on the side of the main dwelling, with access via the deck, and he showed the Board on the plans where the access to the main dwelling was located.

This condition is satisfied.

Parking. Off-street parking shall be available for two cars for the main dwelling and two cars for the accessory dwelling unit.

Mr. Kemp described that there would be a paved, 2-car parking area for the accessory dwelling unit located in front of the deck. There was also ample parking for the main dwelling in front of the two-car garage.

This condition is satisfied.

Mr. Daly asked if the Board members had any questions for Mr. Kemp.

Mrs. Belcher asked for clarification on the location of the outside stairs. Mr. Kemp noted she was looking at an old version of the plan. He explained that the configuration for the stairs changed when the size of the accessory dwelling unit had to be kept to 500sf, the stairs had been re-located to the front of the deck for the sake of safety with lighting at night.

Mr. Falman asked if there was ample room for the additional parking, since no measurements were noted on the drawing. Mr. Kemp stated that there was; there would be parking for two cars side-by-side in front of the deck and it would be paved.

Mr. Allen asked how many bedrooms were in the house, and Mr. Kemp stated with the in-law apartment, there would be 5 bedrooms and they were approved for 5.5 bedrooms with the septic system. The paperwork in the file noted rating for a 4 bedroom septic system; Mr. Kemp provided the Board with the paperwork for a 5.5 bedroom system for the file. He also provided a plan for the replacement system for the septic to accommodate the in-law apartment for the file.

Mr. Donald had been concerned since the paperwork in the file stated 4 bedrooms; with the new paperwork noting 5.5 bedrooms, Mr. Donald stated he now had no concerns regarding the septic system.

MOTION: Mrs. Belcher **MOVED** that the board grant the special exception under Article VIII – USES PERMITTED Paragraph F. for an accessory dwelling unit for Dale and Helen Kemp, 150 Willow Road (MBL 07-03-13) (ZBA #08-01) based on satisfying the conditions for granting the special exception outlined in the ordinance. The vote was four “ayes” and the motion carried.

Mrs. Belcher thanked Mr. Kemp for providing such a complete application.
Mr. Daly closed the public hearing. Mr. Kemp thanked members of the Board.

Public Hearing #08-02.

Norman and Carol Freeman (Honey Bee Trust), 52 Main Street, (MBL 09-08-01) East Kingston, NH. The applicant is seeking an area variance from Article XX, Section E – STRUCTURE OR LAND USE CONFORMANCE in order to permit a lot line adjustment involving two non-conforming lots.

Mr. Daly opened this public hearing. Attorney Erik Newman, attorney from Gallagher, Callahan and Gartrell representing Granite State Gas explained he would be presenting the application to the Board. Attorney Keri Marshall, representing the Freeman's, was also present and would add to the presentation when necessary.

Mr. Newman reviewed the background of the lots. The plan before the Board depicted the Freeman's lot, with Granite State's lot shown in the Northwestern corner; Granite State's lot was 50x35. The gas company acquired title to the lot via

condemnation in 1955. Mrs. Freeman corrected him and stated Granite State had taken the lot in 1966. It was taken by eminent domain in December 1966.

Not wanting to get into the title issue, Mr. Daly stated since there was nothing of record, there should be an undertaking by the Freeman's that they will convey whatever needs to be conveyed to make this happen. Mrs. Freeman stated they had done that in their October agreement with the gas company; once everything was completed, they would give them the deed. Mr. Daly stated he did not have anything to that shows that. He has no evidence that when everything is said and done, the Freeman's will convey and confirm that conveyance of that earlier lot.

Mrs. Freeman stated it was taken by eminent domain and was surveyed. The gas company received a deed in 1967 from the Freeman's attorney, and no one knows what happened to that deed. It was taken off the Freeman's deed and the gas company deed cannot be located; it was also never recorded.

Mr. Daly explained he did not want to get involved in the deed issue, but that someone needed to demonstrate to him that they have title or will do whatever is necessary to make sure the title is vested at the time the lot line adjustment takes effect.

Mr. Newman asked Ms. Marshall if her clients would be willing to sign acknowledgement that if the gas company receives approval for lot line adjustment, they would execute the two deeds. Ms. Marshall stated that it would need to also acknowledge the Freeman's agreement with the gas company; Mr. Newman agreed. Ms. Marshall thought all that would need to be done is to record a certified copy of the condemnation.

Mrs. Belcher asked a procedural question. She had not seen this application come up before the Planning Board, and noted there needed to be a denial from them before the applicant could come before the Zoning Board. Mr. Newman answered that they had come before the Planning Board and had received a denial. Mrs. Belcher had been worried the Board would be acting on an application that had not been through the Planning Board for the denial process. Mr. Daly explained that there did not need to be a denial to come to the ZBA for a variance.

Mr. Newman explained that they had come before the Planning Board in May with application for the lot line adjustment and were denied because both lots were non-conforming. They were told the next step would be to come before the Zoning Board of Adjustment for an area variance, and that was why they were there tonight. Mr. Daly again noted that there did not need to be a denial for them to come before the Board of Adjustment.

Mr. Falman asked why, since the gas line had come through several years ago, was this issue just coming up? Why had it not been brought up before?

Mr. Newman clarified that the issue had been precipitated by the gas company's installation of a release valve in 2005 that was above ground and outside the original fenced in area of the regular station. The safety valve had been installed pursuant to an integrity management plan which was required by the *Pipeline Safety Improvement Act of 2002*. The safety valve allows the gas company to shut down a section of pipe from that valve to the next one, 6 miles to the south, so the individual section of pipeline can be closed off for emergency or for maintenance and repair without interrupting the rest of the service along the pipeline. They were wishing to add that area to the lot the gas company already owns so they could fence it in properly. Mr. Newman showed some photos of the safety valve and the presently fenced in infrastructure to the Board.

Mr. Newman explained that without going into detail in terms of the history between the Freeman's and the gas company, the parties had agreed that the differences would best be resolved by conveying the area immediately around this release valve to the gas company so they will own all the infrastructure in the immediate vicinity in fee. They would extend the area of their existing small parcel by an additional 15 feet. This way all the above ground equipment will be on one parcel owned in fee by the gas company.

Mr. Falman asked again why this was just coming up now, if had been an existing condition since 2005. Ms. Marshall explained that after the easement went through, the gas company installed the above ground valve on the Freeman's property without permission. Mr. Falman still wondered why it had taken 3 years to come before the Board and Ms. Marshall noted it had been in litigation that long.

Mr. Daly explained that the issue of title came up at the Planning Board discussions, and although it has been represented to the ZBA that the gas company owns that tract of land, there is nothing on record at the registry showing that. The Board is looking for confirmation of Granite State's ownership and the Freeman's conveyance of the land. This way, if the variance is granted, the Board would know that everything would be taken care of from a title perspective.

Mr. Newman continued that if they were granted the variance by the ZBA, it was the intent to pursue a lot line adjustment and to fence in the entire area; presently the valve is chained and locked. The new area is 15x35 feet, an area totaling 525sf. The entire area would be fenced in. They would be taking that area from the Freeman's lot and since it was a pre-existing, non-conforming lot, it was why they were before the ZBA for the variance.

Mrs. Belcher asked if the Board had jurisdiction to make a non-conforming area even more non-conforming. Mr. Daly answered that they did have that jurisdiction by variance.

Mr. Donald offered that there was a considerable amount of discussion regarding the fact that there were two non-conforming lots when the applicant came before the Planning Board and the fact that they would be making them even more non-conforming.

Mr. Newman reviewed the criteria and explained how they met the criteria for an area variance.

Criteria 1. There would be no diminution of surrounding property values. They were not changing the use of either of the lots so as to diminish their development potential or in any way change the surrounding property's development potential. After the variance is granted and if they receive the lot line adjustment, the uses of the two lots would remain identical and there would be no change in the potential uses of either lot, and therefore should have no effect on the surrounding properties.

Criteria 2. Granting the variance would not be contrary to the public interest. Since they would not be changing the existing use potential use of either of the lots, they feel it does not change the character of the locality and is otherwise not contrary to the public interest.

Criteria 3. Denial would result in unnecessary hardship. The valve was installed in 2005 to comply with Federal regulations and must be located next to the regular station. They feel that pursuing the lot line adjustment is the best resolution for both parties and have the gas company own the property in fee. Giving the location of the above ground infrastructure, there is no real feasible alternative; there is no other way to reconfigure the lot, the location of the underground pipeline or the regular station and valve. Since there is no public interest that would require the Freeman's to retain title to the area encumbered by the aboveground facility, they feel that it would be an unnecessary hardship.

Criteria 4. It would grant substantial justice. The variance would enable them to receive the lot line adjustment, which would not expand the use of either of the properties or otherwise negatively affect the surrounding properties.

Criteria 5. Not contrary to the spirit of the ordinance. The point is to not grant zoning relief that would expand a use otherwise prohibited by the ordinance. We are not expanding the use, but are maintaining the existing use; the infrastructure of the gas company which is located within a pre-existing gas right-of-way. Granting the variance would not negatively affect the public interest or any property values and would not be contrary to the spirit of the ordinance.

Mr. Daly explained that the spirit of the ordinance is not to enlarge a non-conforming use. How could the Board logically say they would not be violating the spirit of the ordinance by granting the variance? He asked Mr. Newman to expand his explanation of how they met Criteria 5.

Mr. Newman stated the purpose in that regard as it relates to minimum lot size is to not further diminish a non-conforming lot that non-conforms due to failure to satisfy the minimum lot size. Although there is no question that the Freeman's lot is non-conforming and they were reducing it by 525 sf, that area is presently and will always be occupied by the aboveground gas infrastructure. For safety reasons and other reasons, you can never develop on or in close proximity to that infrastructure. By decreasing the non-conformity, they were not running contrary to policy justification for imposing a minimum lot size and not allowing further decrease in non-conformity in that regard. The lot is a non-conforming lot and will never change.

Mr. Daly reviewed with the Board that Mr. Newman's answer goes to both criteria 2 and criteria 5.

Mr. Daly asked if the Board had any questions.

Mr. Allen inquired with regard to the hardship criteria, who paid the taxes on the easement? Mr. Newman answered that the owner of the land with fee interest would pay property taxes on the land. Mr. Allen opined that the Freeman's would be released from paying taxes on this piece of land if the variance and lot line adjustment were granted; Mr. Newman agreed. Mr. Newman stated that was one of the goals, and also to have the deeds put on record with the Town. The gas company would then pay the taxes on both the parcel of land and the infrastructure.

Mrs. Belcher asked in relation to the Freeman's property, were all the setbacks met? Would they still be met if the variance were granted? Mr. Donald explained that the pipeline easement was already controlling what the Freeman's could do in close proximity to it. In Mr. Donald's opinion, not having a fence around the valves was a safety issue. Once the fence is up and the deeds are corrected, it would be better for both parties. Ms. Marshall stated that one of the Freeman's concerns was that anyone could cut the chains that were on the valves presently. Mr. Newman stated that they would require, as one of the conditions of the lot line adjustment, be that a fence be installed around that area.

Mrs. Belcher asked if they would be able to meet the setbacks for the fence, and Mr. Donald stated the setback was 1' off the property line. Mrs. Belcher explained that her line of questioning came from a definition in the statutes that an undersized lot is permissible if it substantially meets the requirements of the setbacks. Mr. Newman noted that might pertain more to a new lot rather than an existing lot.

Mr. Daly noted there was an active driveway along the fence line; Mr. Donald remarked it was a state driveway and he saw no cause for concern; it was also pre-existing. Mr. Falman noted he thought those questions should have been addressed when the pipeline was being installed; they were a non-issue for him since it was after-the-fact.

Mr. Allen asked how the Board would know the deeds were taken care of. Mr. Daly answered they had representation from the Freeman's that when all the conditions of their agreement any subsequent court orders were complied with, they would confirm the conveyance so the title would be in the Gas Company's name.

Mr. Daly closed the public hearing. The Board reviewed the Criteria.

Criteria #1. There (would-would not) be a diminution of value of surrounding properties as a result of the granting of this variance.

Mr. Daly reviewed that the variance they were being asked to grant is from Article XX, paragraph E. "A non-conforming use or structure shall not be enlarged or expanded either in use or structure." Mr. Daly did not see they would be changing anything that would affect the values of any properties, and there is nothing before them to indicate that. Mr. Belcher agreed, and opined that the diminution of property value occurred when the pipeline was originally installed. Mr. Allen remarked that the Freeman's property might increase due to the safety factor of fencing around all of the aboveground infrastructures.

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

Based on the presentation of the applicant, it was determined there would not be a diminution of value of surrounding properties as a result of the granting of this variance.

Criteria #2 – Granting the variance (would-would not) be contrary to the public interest.

Mr. Daly opined it would not be contrary to the public interest since they were trying to preserve the safety of the town and the neighborhood. The importance of further minimizing a non-conforming lot would be secondary to the safety issue. The Board agreed.

Mrs. Belcher, Mr. Falman, Mr. Allen and Mr. Daly opined it *would not* be contrary to the public interest to grant the variance. The vote was 4 (*would not*) and 0 (*would*). The Board voted 4 to 0 that the criteria was satisfied.

Based on the information presented by the applicant, granting the variance would not be contrary to the public interest.

Criteria #3. - Denial of the variance (would-would not) result in unnecessary hardship to the owner seeking it: a. since the following special conditions of the property make an area variance necessary in order to allow the development as designed, and b. the same benefit cannot be achieved by some other reasonably feasible manner.

Mr. Daly opined that the special conditions include the existing size and location of this piece of property where the easement is located, and the federal requirements that caused the valve be added. He ascertained that the only other alternative was for the gas company to purchase the Freeman's lot, and the Freeman's were not interested in selling. The Board agreed.

Mrs. Belcher, Mr. Falman, Mr. Allen and Mr. Daly opined that denial of the variance *would* cause unnecessary hardship. The vote was 4 (*would*) and 0 (*would not*) cause unnecessary hardship. The Board voted 4 to 0 that the criteria was satisfied

Based on the information presented by the applicant, denial of the variance would result in unnecessary hardship to the owner seeking it.

Criteria #4. -- By granting the variance, substantial justice (would-would not) be done.

Mr. Daly opined he saw no negative change and no change in use, and that by granting the variance, it would enhance the safety considerations of the town. The Board agreed. Mrs. Belcher, Mr. Falman, Mr. Allen and Mr. Daly opined that by granting the variance, substantial justice *would* be done. The vote was 4 (*would*) and 0 (*would not*) that the criteria was satisfied.

Based on the information presented by the applicant, substantial justice would be done by the granting of the variance.

Criteria #5. -- The use contemplated by the petitioner as a result of obtaining this variance (would-would not) be contrary to the spirit and intent of the ordinance.

Mr. Daly opined that granting the variance would not be contrary to the spirit and intent of the ordinance since there was no change of use, and that by taking this action, the safety considerations for the town would be enhanced. The Board agreed. Mrs. Belcher, Mr. Falman, Mr. Allen and Mr. Daly opined that the use *would not* be contrary to the spirit and intent of the ordinance. The vote is 4 (*would not*) and 0 (*would*). The Board voted 4 to 0 that the criteria was satisfied.

Mr. Daly stated that all of the criteria have been voted on and that all the criteria had been met. All the points need to be met for the variance to be granted. Ms. Marshall asked that the application be amended and the variance be granted on the condition that the gas company agrees to install and maintain a fence around the parcel upon the granting of the lot line adjustment.

Mr. Daly asked for a motion on the application as amended.

MOTION: Mr. Falman **MOVED** that the area variance be granted from Article XX, Paragraph E for Norman and Carol Freeman (Honey Bee Trust), 52 Main Street, (MBL 09-08-01) East Kingston, NH (ZBA #08-02) on the condition that once Granite State Gas receives the lot line adjustment and acquires the property, they install and maintain a fence. The vote was four "ayes" and the motion carried.

Mr. Daly closed the public hearing.

Mr. Newman, Ms. Marshall and the Freemans thanked the Board.

Mr. Newman asked Mrs. White when deadline was for the next Planning Board meeting was, and she informed him it was Monday, July 1. Mrs. White asked Mr. Newman for all the pictures he had shown the Board for the file, and noted she would make sure the Planning Board had access to those pictures for the public hearing.

Other Board Business

Election of Officers. Mr. Daly announced that there would be a special meeting of the Board called for the purpose of electing officers. The presiding Vice Chairman declined to serve again, and the Board was also short members. He would be getting back to the Board on the date.

Regular Membership. Mr. Daly inquired of Mrs. Belcher and Mr. Falman, both of who are alternate members, if they would be interested in serving as regular members of the Zoning Board; they both agreed they would be happy to serve as regular members. Mrs. White will write letters of recommendation to the Selectmen to have Mrs. Belcher and Mr. Falman's membership in the Zoning Board changed from alternate member to regular member.

Resignation. Mr. Falman recapped that everyone had signed their term of appointment for a certain amount of time, and that they really should submit a letter of resignation if they did not intend to serve for the rest of their term. The Board agreed.

There was Board discussion concerning two members, one who was moving out of town and one who had been on leave of absence due to family medical issues. Their present status and intent was in question since neither had submitted an official

letter of resignation. It was the Board's decision that Mrs. White should send each of the members a letter asking them if their intentions were to continue to serve. If not, they would be asked to submit an official letter of resignation so the Board would be sure of their status, and to allow the Board to solicit other persons for membership in their stead.

Worksheets. Mr. Daly asked Board members to keep their worksheets until Mrs. White could verify that they needed to be saved. Mrs. White recalled that she had heard at one of her last trainings sessions that the worksheets had to be collected and made part of the file since they could be considered evidence. She will verify that one way or the other and get back to the Board.

Mr. Donald stated that on the Kingston Zoning Board, they filled out the sheets and the Secretary collected them and made them part of the file. Mrs. Belcher stated that would be hard to do since an opinion might be changed after hearing the input of the other Board members.

Using the Pound School for Meetings. Mrs. White reported that the Selectmen's Office is closing certain Town-owned buildings for the winter months and expects to save approximately \$35,000 on heating costs by doing so. The Planning Board and the Zoning Board's scheduled meeting times will be inserted onto the same schedule for the Pound School as they are for the Town Hall. Use of the Pound School will begin with the September meeting, as there will be no heat in the Town Hall after September 1.

Mrs. White will see that a notice is placed in the glass notice Board at the front of the Town Hall letting people know that after a certain date, the Planning Board and Zoning Board meetings would be held in the Pound School. She will also post a notice at the Post Office, Library and the Town Offices.

The meeting was adjourned at 8:05 PM.

Respectfully submitted,

Barbara White
Recording Secretary

John Daly
Chairman