

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

July 10, 1997

FILE

AGENDA

7:30 Gilbert Bioteau - Equitable Waiver of Dimensional Requirements - Article VI:E (1997-03)

Members attending: Chairman John V. Daly, David Ciardelli, Edward Cardone, Norman J. Freeman, and Alternates Charles F. Marden and Peter A. Riley.

Absent: David C. Boudreau

Others attending: Building Inspector Glenn P. Clark, Selectmen Andrew L.T. Berridge and J. Roby Day, Jr., Police Officer R. Reid Simpson, Atty. Jackson Casey, Frank Bioteau, Joseph & Henriette Conti, and RPC Correspondent Becky Hanna.

Chairman Daly designated Alternate Charles F. Marden to vote in the absence of David C. Boudreau.

Gilbert Bioteau - Case#97-04: Chairman Daly opened the public hearing for Gilbert Bioteau of 163 North Road, MBL# 16-02-04 at 7:35 p.m. Mr. Gilbert Bioteau is seeking an Equitable Waiver of Dimensional Requirements from Article VI.E of the East Kingston Zoning Ordinance.

*All residences, including manufactured housing, shall have a minimum floor area of eight hundred square feet (800 sq. ft.), outside measurement of foundation and excluding open porches and garages.*

The applicant proposes to continue residing in a dwelling at 163 North Road which has less than 800 square feet of floor area.

Chairman Daly noted that a stenographic and tape recorded record is being kept of this public hearing. Also noted was Mr. Frank Bioteau, son to the applicant, will be representing Mr. Bioteau.

Chairman Daly stated that equitable waivers of dimensional requirements is a new procedure before the board. He continued that the board has jurisdiction to grant equitable waivers with the following findings (RSA 674:33-a):

*(a) The violation was not noticed or discovered until after a structure in violation had been substantially completed, or until after a lot had been subdivided by a conveyance;*

*(b) The violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of the owner, but was instead caused by either good faith error in measurement or calculation made by an owner, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;*

*(c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, not interfere with or adversely affect any present or permissible future uses of any such property; and*

*(d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.*

*II. In lieu of the findings required by the board under (a) and (b), the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected.*

Mr. Frank Bioteau informed the board that a violation of two dwellings located on one lot has existed for years. His father's intentions are to close up the main house, via decommissioning the items that constitute it as being a residence, and continue to reside in the small 24' x 16' building. (The 24' x 16' building will be referred to as the "cabin" from this point on.) His father has resided in the cabin for the past 17 years. He stated that the main house is currently occupied by non-paying tenants as a courtesy of his father.

The board reviewed the sketch of the property submitted with the application. Noted was the house, cabin, and other out buildings. It was also noted that the main house currently complies with town ordinance.

Mr. Bioteau stated that both dwellings have existed for the past 17 years and that the main house has only been vacant for approximately 5 of those years.

Mr. Andrew Berridge gave a synopsis of this violation and how it transpired. He stated that the Board of Selectmen received a complaint that there were 2 residences located at 163 North Road. The Selectmen then approached Mr. Gilbert Bioteau about the violation and it's possible remedies. Mr. Gilbert Bioteau offered a first plan of moving back into the main house. He later changed his mind and decided to continue residing in the cabin.

Mr. Berridge further expounded that the Selectmen continued to work with Mr. Gilbert Bioteau in an effort to get he and his property into compliance. The Selectmen even contacted NHMA and Town Council for guidance. Both NHMA and Town Council advised the Selectmen to direct Mr. Gilbert Bioteau to seek an equitable waiver of dimensional requirements for the cabin. It was understood that the main house would be decommissioned into an outbuilding. The cabin would become the main residence on the property.

Mr. Berridge added that the Selectmen have only one stipulation, that is the Building Inspector must verify that the main house is decommissioned and no longer considered a dwelling unit. The Selectmen gave Mr. Gilbert Bioteau a 3 month time frame to comply. August 11, 1997 is the deadline.

Mr. Riley was concerned with whether or not there is a lease with the tenants in the main house. There is not.

Mr. Bioteau stated that this is a space issue.

Mr. Berridge added that if the cabin already had 800 sq. ft. of floor space, then this issue would not be before the board this evening.

Chairman Daly questioned whether a violation existed by virtue of the residents in the main house. The cabin is not a legal residence.

Mr. Berridge stated that currently Mr. Gilbert Bioteau is taxed on the main house as a residence. Once the house is decommissioned, he will be taxed accordingly. He (Bioteau) does not want to live in the main house or rent it out.

Atty. Jackson Casey stated that he was familiar with this matter and he agrees with Mr. Berridge's synopsis, however, presently the main house has over 800 sq. ft., thus making the request for the waiver premature. There is no violation at this point. He then requested the application be deferred until the house is decommissioned.

Mr. Bioteau stated that he would like the decision made now. His father will disable the house. He (his father) is 71 years old and has no intention of living in the main house.

Mr. Marden questioned how long, if passed, will the waiver be in effect.

Mr. Bioteau responded that whoever takes over the property after his father, can apply to the building inspector to re-commission the main house.

Mr. Day stated that Gilbert Bioteau has lived in the cabin for 17 plus years, there has been 2 residences on the property for those 17 years and the town has not acted on this violation until now. Because he (Bioteau) has lived in the cabin for so long, it was Mr. Day's opinion that his (Bioteau's) reasons for staying in the cabin are reasonable.

Mr. Day added that this waiver should be granted contingent on the disabling of the main house.

Mr. Ciardelli stated that if such conditions are set, the property must be routinely monitored to assure compliance.

Atty. Casey argued that if Mr. Gilbert Bioteau is the only resident and he is living in the cabin, then there is no violation. Only when both the cabin and the house are occupied is there a violation. If a waiver is granted, what means is used to prevent the main house from being re-commissioned.

Mr. Ciardelli responded that this is a waiver from dimensional requirements, not a waiver for 2 family residences on a lot.

Mr. Riley inquired of the building requirements back in 1979 when the cabin was constructed. Was the floor area requirement the same?

Mr. Joseph Conti, former building inspector stated that the minimum floor area was raised from 750 to 800 square feet in 1979.

Atty. Casey commented that it was no question in his mind that the cabin was never meant to be used as a residence at the time of its construction. Since this is the case, the wrong statutes are before the board. An equitable waiver is not the appropriate process for this violation.

Mr. Bioteau replied that a space requirement is sought here.

Chairman Daly inquired if the date were August 12th, when the main house is not occupied, would this case be before the board.

Mr. Berridge responded that both dwellings existed on the lot for 17 years. That is a violation in itself, whether or not they are occupied. Both dwellings have a sink, bathroom, kitchen and sleeping accommodations. That is not allowed.

He further stated that the cabin would not be a legal dwelling by reason of the floor space. That is why a waiver is sought.

Mr. Freeman asked if the board would entertain a motion to allow Mr. Gilbert Bioteau to reside in the cabin, decommission the main house, and when he (Bioteau) disposes of the property, the cabin could not be used for living quarters. Can the board put such limitations on a decision?

Chairman Daly stated that specific criteria must be met to grant this request. Conditions may not be appropriate.

Mr. Clark, Building Inspector stated that if Mr. Gilbert Bioteau chooses to live in the cabin, it (the cabin) must meet town ordinance.

At this time the board reviewed Article VI:D & E of the East Kingston Zoning Ordinance:

*D. A building lot shall have no more than one single family residence, commercial establishment or manufactured housing thereon...*

*E. All residences, including manufactured housing, shall have a minimum floor area of eight hundred square feet...*

Chairman Daly offer this scenario:

A property owner has a 2400 sq. ft. house on his lot. He builds a playhouse in the backyard. Later he installs a kitchen in this playhouse. Is there a violation?

Mr. Berridge stated that for all intents and purposes, the Town's and Town Council's interpretation of the ordinance is that there are now 2 residences on the property. This would be sighted as a violation.

Mr. Conti stated that he does not understand how, under the United States Constitution, a town can tell a man where he can or cannot sleep on his own property. As long as the main house is empty, there is no violation. There is no statute that says where you must live on your property.

Chairman Daly quoted the definitions for "dwelling" and "residence" from the East Kingston Zoning Ordinance:

*DWELLING: A building or part of a building or a manufactured housing which contains living and sleeping accommodations for permanent occupancy including separate kitchen and toilet facilities.*

*RESIDENCE: A building other than a manufactured housing which is constructed at the site or may be erected from pre fabricated parts or two or more modules permanently joined at the site, no one module of which itself meets the requirement of a dwelling.*

He then stated that the cabin meets the definition of a dwelling.

Mr. Cardone suggested the board take no action at this time as the tenants will be vacating the premises in August.

Mr. Freeman responded that the complainant may continue to protest.

At this time the board discussed the terms "dwelling" Vs. "residence". The cabin meets the term defined as "dwelling", Article VI.D uses the term residence. The technical terms are not the same.

Mr. Conti offered that they are standard definitions.

Mr. Day argued that the planning board's interpretation in writing the ordinance was that the term dwelling also means residence. No more than one single family residence is allowed on a lot. This would include the term dwelling.

Mr. Bioteau stated that if the main house was torn down, a waiver would still be required for his father to reside in the cabin. His father, for tax purposes, wants to make the lot a one dwelling lot.

Chairman Daly responded that this request may be premature.

Mr. Day offered the argument that the Bioteau case is before the ZBA because of the timeline imposed on Mr. Gilbert Bioteau by the Selectmen. He then asked the board to decide so this issue can be put to rest.

Chairman Daly reminded the board that there are no provisions for conditions in this process.

**MOTION: Mr. Freeman motioned the application for an Equitable Waiver of Dimensional Requirements from Article VI.E for property located at 163 North Road, MBL# 16-02-04 be approved as presented. Mr. Ciardelli second.**

Discussion:

Mr. Riley stated that the cabin was built in 1979 as an outbuilding. Now the applicant is trying to make it the main dwelling. The argument does not seem equitable.

Mr. Clark responded that 2 livable units are located on a single lot. Both units consist of a bathroom, kitchen and sleeping quarters. This is a violation.

Chairman Daly stated that there is a motion on the table. To grant this waiver, 2 specific findings must be met:

1. The physical or dimensional violation does not constitute a public or private nuisance, not diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of the property; and

2. Due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

Chairman Daly polled the board on findings number 1. Those in favor were Mr. Freeman, Mr. Ciardelli, Mr. Cardone and Mr. Marden, (4-0).

Chairman Daly polled the board of findings number 2. Those in favor were Mr. Freeman, Mr. Ciardelli, Mr. Cardone and Mr. Marden, (4-0).

**Based on the representation made on behalf of the owner concerning the disablement of the existing residence, the zoning board of adjustment, by the affirmative vote of at least three members, GRANTED the owner's application for an Equitable Waiver of Dimensional Requirements from Article VI, section E of the East Kingston Zoning Ordinance.**

Atty. Casey again stated that the application before the board is premature. He stated that in granting an equitable waiver the determination must be made that the violation has existed for 10 years or more. No such determination has been made.

Mr. Clark responded that the violation has been in existence for years. He does not know the exact length of time. When the matter was brought to his attention, Mr. Gilbert Bioteau was living in the cabin.

Atty. Casey question again how long the violation was in existence. If it was less than 10 years, the board does not have jurisdiction to grant this request.

Mr. Day stated that the cabin was built in 1980, thus the violation has been in existence since then.

Mr. Bioteau added that for the first 10 years, his father lived in the cabin, and his brother in the house. Then, the house was empty for five years. The house is now again occupied by tenants.

Mr. Riley again stated that this does not seem like an equitable remedy.

Chairman Daly stated that the issue of whether the violation existed for 10 years or more was addressed in the findings. This 10 year requirement was taken into consideration when the board voted on the findings. As the statute is written, such requirement was necessary for the board to proceed. This was demonstrated to the satisfaction of the board as outlined in RSA 674:33-a II.

He continued to say that if no violation existed for 10 years, then the findings must apply for 674:33-a I.(a) & (b).

The Chairman then polled the members to see if they so find that a violation has been in existence for 10 or more years. Those in favor that the violation existed for 10 or more years were Mr. Freeman, Mr. Cardone, Mr. Ciardelli, and Mr. Marden.

On the strength of the representation found, the waiver is granted.

**April 3, 1997 Meeting Minutes:**

**MOTION:** Mr. Ciardelli motioned to approve the April 3, 1997 Zoning Board of Adjustment meeting minutes as prepared. Mr. Freeman second. The motion passed 4-0.

**MOTION:** Mr. Freeman motioned to adjourn. Mr. Cardone second. The motion passed 4-0 and this July 10, 1997 public zoning board of adjustment meeting ended at 8:34 p.m.

Secretary

Minutes completed and on file July 11, 1997.