

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

July 12, 2001

FILE

AGENDA

7:30 Motion for Rehearing – Suzanne J. Ryan (2001-02)

**Members attending:** Chairman John V. Daly, Vice Chairman David A. Ciardelli, Norman J. Freeman, David C. Boudreau, Alternate members Richard A. Cook, and Nathaniel B. Rowell.

**Absent:** Donald C. Andolina and Alternates Edward A. Cardone, J. Roby Day, Jr. and Peter A. Riley.

**Others attending:** Suzanne J. Ryan, Atty. Sharon Cuddy Somers – representing Suzanne J. Ryan, and Selectman John L. Fillio.

**Motion for Rehearing- Suzanne J. Ryan:** Chairman Daly opened this special meeting with the Zoning Board of Adjustment at the East Kingston Town Hall at 7:35pm to consider a Motion for Rehearing filed on behalf of Suzanne J. Ryan regarding the board's May 24, 2001 decisions to 1) deny an appeal from administrative decision of the building inspector and 2) deny a variance request. The sole purpose of this meeting is for the board to determine whether or not to grant a rehearing requested. It is within the power of the board to consider the grounds suggested as requiring the rehearing by granting or denying a rehearing or by suspending the previous order pending further consideration. He then designated alternate member, Richard A. Cook to participate in the voting process.

Chairman Daly noted that there are a number of arguments made on behalf of the applicant, some of which deal with the validity of the Growth Control Ordinance itself, however the Zoning Board of Adjustment has no authority to deal with the validity of the ordinance, thus those arguments will not be considered. The arguments addressing the issue related to the board's decision on the appeal from the building inspector's decision under the ordinance and variance request will be considered. The applicant does not necessarily have to present new evidence; the board can grant a rehearing if they find that new evidence was available at the time they originally heard the case, or if by consensus, the board finds it erred in its earlier decisions based on the information presented by the applicant. With no questions or comments from the board, he then addressed each argument in order presented as follows:

2A. *The ZBA incorrectly applied Article XVIII (D) of the East Kingston Zoning Ordinance, and indicated that the applicant was required to rebuild her damaged home within one year of the 1993 fire; this provision of the ordinance only applies when a nonconforming building is being replaced with another nonconforming building; applicant does not intend to do so in that the new building will be conforming. Therefore there was no need to replace the home within one year. The ZBA also failed to recognize that Article XVIII states "This article shall in no way effect recorded lots that are legally existing...at the time of its passage."*

Chairman Daly responded that this was not a part of the board's decision. Board members offered no further comments on this item.

B. *The ZBA incorrectly interpreted the Growth Control Ordinance as requiring a time frame of one year for the construction of replacement buildings; however, the clear language of the ordinance contains no time restrictions for replacement.*

Chairman Daly stated that there is no such provision in the Growth Control Ordinance that addresses this, thus it does not apply.

C. *Unlike other zoning ordinances, which are designed to control, location, use or dimensions, a growth control ordinance is solely designed to regulate the timing of development.*

Chairman Daly noted that this item is not an argument.

D. *The ZBA erroneously concluded that because the applicant could obtain a building permit at some point in the future, that no hardship existed as a result of the application of the ordinance to her property.*

Chairman Daly replied that the board was not convinced that hardship was demonstrated under the circumstances presented. Mr. Cook and Mr. Ciardelli concurred.

E. *The ZBA failed to consider the unique quality of a growth control ordinance, and failed to consider that, of necessity, the hardship and relief that they were required to consider was based on the timing of issuance of a building permit.*

Mr. Ciardelli stated that timing was an issue. The applicant had a number of years to apply for building permits when they (building permits) were available. Now the applicant alleges hardship, when it wasn't a hardship up until that point. He stated he did not feel the hardship was valid.

Chairman Daly added that the board did consider hardship and uniqueness, however they concluded there wasn't sufficient hardship to satisfy the Supreme Court's definition.

*F. The ZBA erroneously concluded that the application of the Growth Control Ordinance did not constitute a restriction on the use of the property.*

Chairman Daly responded that he agrees that the Growth Control Ordinance is not a restriction on the use of the property. Mr. Freeman stated that the ordinance affects the timing but not the use of the property. No more than it restricts the use of any other property in town waiting for a building permit.

Mr. Cook stated that the Board of Selectmen indicated (via minutes) that the applicant was considering rebuilding a home earlier. The applicant did not exercise her discussion and rebuild her home when permits were available. The town was not restricting the use of her property.

*G. The ZBA erroneously denied the variance requested based on a conclusion that since any "new" lot would be subject to the application of the Growth Control Ordinance, that the applicant suffered no hardship, and the board failed to consider how this property is unique from other properties and/or the fact that it is a lot of record, and formerly contained a dwelling.*

Chairman Daly stated that the board clearly considered the property is unique, however it still did not satisfy the hardship criteria as defined by the Simplex v. Town of Newington case.

Mr. Freeman stated that the board concluded that "any" lot, not any "new" lot is subject to the Growth Control Ordinance. He further stated that any lot in town, whether newly created or not, are all "lots of record." A landowner could have a vacant lot for ten years; however, the Growth Control Ordinance still applies.

Mr. Ciardelli added that a lot of record is a lot of record, even though this particular lot had previously contained a dwelling, it sat idle for a length of time and it wound up in the same pool as other lots of record in town without houses on them. It must now compete for building permits like any other lot of record.

Mr. Freeman noted a lot on Fish Road had also previously contained a house, it now has a cellar hole, and it too needs to be applicable to the Growth Control Ordinance. He stated that there are quite a few lots like that in town.

*H. The ZBA erroneously interpreted the holding of the Simplex v. Town of Newington case as requiring that there be no reasonable use of the property in order for a variance to be properly granted.*

Chairman Daly that his recollection and in his reading of the minutes, this is not the case. The minutes state quite clearly that Simplex required the zoning restriction as applied to the property interferes with the use of the property considering the unique setting of the property in its environment.

*I. The ZBA erred in failing to find that the Planning Board decision to extend the Growth Control Ordinance to the year 2002 was based on inadequate information, that the Planning Board review was procedurally flawed, and that the Growth Control Ordinance, as applied to the applicant is unlawful.*

He then stated that this goes to the issue of whether or not the board has any authority to find if the ordinance is invalid. The board does not. This is an argument for a judge.

*J. The ZBA failed to consider that the application of the Growth Control Ordinance is properly directed at large spurts of growth, rather than at a pre-existing lot of record which at one time contained a dwelling.*

Chairman Daly stated that they board already addressed this issue.

*K. The board failed to adequately consider the hardship which will be imposed on applicant by having to 1) wait until 2002 to obtain a building permit and 2) be unable, pursuant to the requirements of the Article IX Section A of the East Kingston Zoning Ordinance, to transfer that building permit to a potential buyer of the lot and 3) force a potential buyer to wait until at least 2003 to obtain a building permit because 7 of the 14 building permits for the year 2002 approved by the Planning*

*Board are already spoken for. Additionally, it is unclear whether the Planning Board will approve the issuance of more than 14 permits for the year 2003 pursuant to Section E of the Growth Control Ordinance; therefore, it is uncertain exactly when a potential buyer might obtain a building permit.*

Mr. Freeman stated that the ordinance says you can't get a building permit for another person. It can't be sold with the lot to another person. They are non-transferable.

Chairman Daly stated that the applicant is stating that the board did not consider the hardship imposed on the applicant as a result of the application of the Growth Control Ordinance. He stated that he believes it was considered, the hardship the board found was not the type of hardship that is defined by the statutes or by the Supreme Court's definition regarding the Simplex case – it's not the same hardship.

*L. The ZBA erroneously characterized the administrative appeal solely as determining the validity of the Building Inspector's decision; in fact the board should have considered whether the Building Inspector was authorized to apply the ordinance given the procedural defects in the 2000 Planning Board review, and the ZBA should have considered whether, even if the ordinance was generally valid, whether it was appropriately applied in this instance.*

Mr. Ciardelli stated that he does not believe the Building Inspector reviews all background procedures when applying the Growth Control Ordinance. He said that he probably just takes the number of permits allowed that year and issues them – he is not evaluating all the background information.

Mr. Rowell stated that the alleged procedural defects goes beyond his reasonable expectation when doing his job.

Mr. Freeman stated that it's not up to him (building inspector) to determine whether the planning board did their job, that is out of his jurisdiction.

Mr. Cook added that the Building Inspector's function is to perform his duties according to the Zoning Ordinance. It is not up to him to question the authority that gives him this job. If the planning board erred, it should be taken up with them.

Chairman Daly stated that that would have to be taken up with the Superior Court.

*M. The ZBA erroneously stated that there was no presentation on the impact on abutters.*

Chairman Daly responded that his recollection and the minutes do say that. Abutters were present but specific impact to them may not have been discussed. Comments were made by abutters but none specifically for or against the proposal.

Having reviewed each of the arguments submitted in the Motion for Rehearing, Chairman Daly stated that the board must now consider granting the motion as presented by the applicant, or denying the motion.

***MOTION: Mr. Freeman motioned to deny Suzanne J. Ryan's Motion for Rehearing. Mr. Ciardelli seconded.***

DISCUSSION: None.

**Chairman Daly called the vote. The motion to deny the motion for rehearing carried 5-0.**

OTHER BUSINESS

**Chairman & Vice Chairman Positions:** Chairman Daly opened the nominations for Chairman. He stated that he would welcome nominations of other people besides himself.

***MOTION: Mr. Ciardelli motioned to nominate John Daly to the position of Chairman of the Zoning Board of Adjustment for the term of one year or until a successor is elected. Mr. Freeman seconded. The motion carried 4-0 (Mr. Daly abstaining).***

Chairman Daly then opened the nominations for Vice Chairman. Mr. Ciardelli also stated he would be happy to see another member nominated to the position.

***MOTION: Chairman Daly motioned to nominate David Ciardelli to the position of Vice Chairman of the Zoning Board of Adjustment for the term of one year or until a successor is elected. Mr. Freeman seconded. The motion carried 4-0 (Mr. Ciardelli abstaining).***

Minutes: The board reviewed the minutes dated May 24, 2001.

*MOTION: Mr. Boudreau motioned to approve the May 24, 2001 Zoning Board of Adjustment minutes as presented. Mr. Ciardelli seconded. The motion carried 5-0.*

Article XVIII: Discussion then transpired on the intent of the Section D, which states that in the event of fire, damage, etc. any building not conforming to the ordinance may be rebuilt back to the nonconformity within a year of the fire, damage, etc. Although members interpreted this to include conforming uses too – after one year a “new” dwelling permit would need to be applied for and the Growth Control Ordinance would need to be applied, it was not specifically written. Chairman Daly agreed to draft a memo to the Planning Board suggesting this be clearly defined.

With no further business the meeting adjourned at 8:18pm.

Catherine Belcher,  
Secretary

Minutes completed and on file July 13, 2001.

*approved 11/13/01*