

TOWN OF EAST KINGSTON, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT MEETING MINUTES
August 13, 1998

FILE

AGENDA

- 7:30 Sandra Bianco – Rowell Cove Road – Variance from Articles IV.D.2, IV.D.6, IV.D.7.B.2, VI.C, VI.E and VIII.E.3 (1998-09)
- 8:00 Nextel Communications – 21 Burnt Swamp Road – Appeal from Administrative Decision (1998-09)

Members attending: Chairman John V. Daly, David Ciardelli, Norman Freeman, David C. Boudreau, Ed Cardone and Alternate Peter A. Riley.

Absent: Alternate Charles F. Marden.

Others attending: Glenn Clark – Building Inspector, John L. Fillio – Selectmen, Chip Dodge, Alan Mazur, Mike Procopio, Frank Brancato, Robert & Vicky Mello, Kathleen Clark, Dennis Quintal, Suzanne Ryan, Atty. Keri Marshall, Atty. Peter Hurd, Joe & Sue St. Martin, Lee Stone, Richard Friese, David Toothaker, Robert Carter, Mark Cook, Clint Furnald, Mark & Paula Brinkerhoff, Malcolm & Pauline McLeod, Atty. Michael Cormier, and Sandra & Don Bianco.

Sandra Bianco- Rowell Cove Road – Variance from Articles IV.D.2, IV.D.6, IV.D.7.B.2, VI.C, VI.E and VIII.E.3: Chairman Daly opened the public hearing at 7:45 p.m. for Sandra Bianco's request for variance. It was noted the owners of record for this parcel are Lorraine McLellan and Paul Bartlett. The applicant seeks variances from the following articles of the East Kingston Zoning Ordinance:

IV.D.2– Minimum size of leach field to accommodate a three bedroom dwelling.

IV.D.6– Septic system leach field boundaries shall be located more than 20 feet from any property boundary...

IV.D.7.B.2– Receiving layer: shall be a minimum of 100 feet from Hydric A soils, 75 feet from Hydric B soils...

VI.C– ...Every residence shall be at least 25 feet from adjacent side and rear property lines....

VI.E– All residents, including manufactured housing, shall have a minimum floor area of 800 square feet, outside measurement of foundation and excluding open porches and garages.

VIII.E.3– Permanent facilities (septic systems, buildings, roads, driveways, etc.) shall be located no closer than 100 feet from Hydric A soils, or 75 feet from Hydric B soils, with the exception of driveway or road crossing necessary to access buildable land.

The applicant proposes to construct a seasonal dwelling with less than 800 sq. ft. of floor area, less than 25 ft. from side property lines and less than 75 ft. from Hydric B soils, with only a two bedroom septic system also located less than 75 ft. from Hydric B soil, and (septic system) less than 20 ft. from property lines.

Representing the applicant is Atty. Michael Cormier of Portsmouth, and Civil Engineer Dennis Quintal. Atty. Cormier stated that a small camp, typical of 1930's or 40's design, erected up on blocks without foundation, and in great disrepair currently exists on the property. The camp has been unoccupied for 20 years and has no septic system. The applicant proposes to raze the camp and construct a residential dwelling on the lot. He then noted that the original plan submitted with the application has been altered. The proposed house location will now reflect a rotation of 90° to maximize the distance from the house to the wetlands. This will increase the distance from 22 ft. to 25 ft. (from Hydric B soils) and it will also increase the distance from the house to the lake by 7.3 ft.

He went on to say that the proposal of the applicant is to make the new dwelling a year-round livable unit. He then addressed the five criteria.

- 1. The proposed use would not diminish surrounding property values because it will increase the parcel's property value, thus reflecting on abutter's parcels. The applicant wishes to be a full-time member of the community. The camp in its current uninhabitable state diminishes the surrounding property values.*
- 2. Granting the variance would be of benefit to the public interest because the owner would be a year-round taxpayer and because the camp is in such disrepair, its removal will increase the public safety of residents. The building is now a health hazard.*
- 3. Denial of the variance would result in unnecessary hardship to the owner because of the following circumstances of the property that distinguish it from other properties similarly zoned because the property is not useable as a camp because*

of how the character of the neighborhood has changed to year-round residences. Keeping the parcel a camp will only hinder the neighborhood's process.

Chairman Daly inquired if it is the applicant's position that there is no other use of the property.

Atty. Cormier responded that the building on the property must be torn down and replaced and it is a hardship to the owners to force the property to remain as it is. Its property value has diminished to practically nothing. Its nature is not in keeping with the neighborhood.

4. *Granting the variance would do substantial justice because since the neighborhood has been progressively changing to year-round residences, it would be fair to allow this property to progress as well. Only 4 camps remain on the road.*
5. *The use is not contrary to the spirit of the ordinance because the ordinance is written to prevent this type of camp scenario with no septic and foundation. The proposed dwelling would be located further away from the wetlands than the current building is. This new proposal is not in any way a burden to the surrounding area.*

Civil Engineer Dennis Quintal offered the following: He was employed to design a septic plan for the lot. The building had not been touched in years and it is ready to fall down. The proposed septic design is the best that he could do to accommodate the Town's requirements. Jaime Long from NH Soils was called in to flag the wetlands. The location of the wetlands pretty much directed where the septic could be located. All State septic setbacks can be met but, not the Town's.

He went on to say that he is not sure why the Town's setbacks are more strict than the State's and that these higher restrictions should be directed towards new lots, not existing smaller lots. The smallest leach field has been designed to accommodate a two-bedroom dwelling. Again, the Town requires a minimum of a three-bedroom system and he is not sure why if only a two bedroom home is built. Placing the septic system in another position would minimize the distance to wetlands.

Mr. Quintal also stated that he does not expect any problems with receiving State approval as all State requirements have been met. He said that he is not sure if the existing well is operable and it would need to be tested. If needed, a new well could be drilled in the same location.

At the inquiry of the Board as to why the plan indicates a seasonal dwelling when a year-round dwelling is being proposed, Mr. Quintal stated that the plans for septic design must reflect the *current* status of the parcel, which is seasonal. A year-round dwelling may be constructed but the State requires current status on the septic design plan.

Atty. Cormier stated that the applicant proposes the construction of a year-round dwelling. The sale of the property to the applicant is contingent on the variance approval.

Mr. Don Bianco presented a rough model (picture) of the proposed dwelling. It would be a 24'x36' two-story home with a floor area of 1200 ft.

Chairman Daly opened the meeting to questions or comments from abutters.

Mr. Chip Dodge, direct abutter, stated his opposition to this proposal. He said that his neighbor on the other side has recently received a variance to replace his septic system. He continued to say that when combining his lot, his neighbor's lot, and the lot in question, the minimum 2-acre requirement for a single lot cannot be met. Now, consider that three septic systems will be placed in this area where the ordinance will not even provide for one.

He further stated that the camp has been used as a camp and because of its current condition, it should be razed and the lot deemed unbuildable. What will stop the applicants from adding a bedroom to the proposed dwelling in the future? The Town needs to plan for future additions.

Mr. Robert Mello of 1 Rowell Cove Road, stated that he has been an abutter for 18 years and the camp has been vacant. He inquired what is to prevent the owners of the vacant lot abutting this lot in question from acquiring a variance and building a house, too.

Mrs. Vicky Mello of 1 Rowell Cove Road stated that all the variances before the Board may set precedence for other parcels in town to do the same.

Mr. Dodge brought up a similar situation where a lot over on Powwow River Road needed 35,000 square feet of soil to be deemed a buildable lot. The proposal couldn't meet this requirement and was denied. He then inquired if the lot in question has the required soil.

Mr. Quintal responded that this proposal does not have 35,000 square feet of soil and that the reference by Mr. Dodge was for a new subdivision, which is different from a pre-existing nonconforming lot.

Building Inspector Glenn Clark stated that all the variances must be granted prior to the issuance of a building permit.

Discussion of relocating the house and septic on the lot resulted in the determinations that they were presented in the best possible locations. Also discussed was what determines a comfortable camp with up to date plumbing, heating, electrical, and full foundation, from a year-round dwelling.

Atty. Cormier stated that the applicants do not consider this proposal to be of a seasonal nature. They do not want to build a camp on blocks.

It was noted that seasonal dwellings are not addressed in the East Kingston Zoning Ordinance.

Mr. Quintal stated that the State does not recognize a seasonal home v. a residential home. Both need to meet the same standards.

The Board reviewed the five criteria:

1. It is clear the proposal would not diminish surrounding property values.
2. Although an improvement to the property's value, it is not clear the proposal is in the overall public interest as so many variances are requested.
3. No hardship has been proven, as this year-round dwelling proposal is not the only option for this parcel.
4. Substantial justice has not been done because so many variances are needed.
5. The intent of the ordinance has not been met.

Chairman Daly stated that the Board can grant a variance when the proposal is reasonable. There are too many variances requested for one piece of property.

MOTION: Mr. Cardone motioned to deny the application for variance from Articles IV.D.2, IV.D.6, IV.D.7.B.2, VI.C, VI.E and VIII.E.3. Mr. Ciardelli second.

DISCUSSION:

Members expressed their concerns with the applicant's proposal to modify the ordinance and call the plan seasonal, when the intention is to change it to year-round.

Mr. Riley recommended that each variance request be voted on individually so the applicant is clear to the status and outcome of each request. It is the applicant's right to understand each request's denial or acceptance.

Chairman Daly stated that the motion on the floor is to deny the application. This motion will be directed toward each variance request.

The motion was made and seconded to deny the variance request from Article IV.D.2 – Minimum size of leach field to accommodate a three-bedroom dwelling. The motion passed 4-0.

The motion was made and seconded to deny the variance request from IV.D.6 –Septic system leach field boundaries shall be located more than 20 feet from any property boundary... The motion passed 4-0.

The motion was made and seconded to deny the variance from IV.D.7.B.2 – Receiving layer: shall be a minimum of 100 feet from Hydric A soils, 75 feet from Hydric B soils... The motion passed 3-1.

The motion was made and seconded to deny the variance from VI.C – ...Every residence shall be at least 25 feet from adjacent side and rear property lines.... The motion passed 4-0.

Citing the proposed floor area of 1200 sq. ft., the applicant withdrew the request for variance from VI.E – All residents, including manufactured housing, shall have a minimum floor area of 800 square feet, outside measurement of foundation and excluding open porches and garages.

The motion was made and seconded to deny the variance from VII.E.3 – Permanent facilities (septic systems, buildings, roads, driveways, etc.) shall be located no closer than 100 feet from Hydric A soils, or 75 feet from Hydric B soils, with the exception of driveway or road crossing necessary to access buildable land. The motion passed 4-0.

Chairman Daly stated that the hardship criteria and the totality of the proposal resulted in this outcome.

Nextel Communications—21 Burnt Swamp Road—Appeal from Administrative Decision: Chairman Daly opened the public hearing at 8:45 p.m. for Nextel Communications' Appeal from Administrative Decision in relation to the July 16, 1998 Planning Board decision to deny the application to construct a 180 ft. telecommunications tower on Morse Hill (Bean's Hill).

Chairman Daly stated that ZBA Member Norm Freeman has had past representation by Atty. Keri Marshall, who is acting as representation to the applicants in this case. Because Mr. Freeman does not have a personal interest in the outcome of this case, it is his opinion that Mr. Freeman's voting participation is not a conflict. He then read an excerpt from Peter NH Practice Series:

... It is not uncommon for board members to have been represented at one time or another by one or more of the attorneys involved in the case before them. In such an instance, a disqualification standard is not whether there has been representation by the attorney in the past, but whether the board member is presently being represented by the attorney in an action in court. The key element in any consideration regarding the disqualification is whether or not the board member can be indifferent.

If uncertainty arises as to whether a member has a conflict, the ZBA must, upon the request of the member or another member of the board, vote upon the question of whether that member should be disqualified
(Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning, 2nd Ed., Section 20.07 at p. 214)

Mr. Freeman stated that he can be indifferent to the case, however, he requested the board as a whole to vote on this issue.

Atty. Marshall stated for the record that Mr. Freeman's daughter has been employed by her for the past 10-12 years.

On the motion to disqualify Mr. Freeman from voting in this case, Mr. Ciardelli, Mr. Boudreau and Chairman Daly voted he NOT be disqualified. Mr. Cardone voted he should be disqualified. The motion to disqualify Mr. Freeman from voting failed 3-1.

It was also noted at this time that Mr. Cardone would not be voting on this case as he and his business partner have a financial interest in the outcome of this hearing.

Atty. Marshall stated that she was appearing on behalf of the Clark's and Nextel representatives Mike Procopio and Frank Brancato were representing the applicants. She then went on to explain that Nextel hopes to lease a plot of land on the Clark's property located at 21 Burnt Swamp Road, and construct a 180-ft. telecommunications tower. She submitted letters from East Kingston residents and abutters in favor of this proposal. She noted that on this 41-acre parcel, there is a pre-existing grandfathered commercial gravel pit, which predates Mr. Clark's ownership of the property. She then directed the meeting to Mr. Procopio to address the technical aspect of the proposal.

Mr. Procopio stated that Nextel is seeking to lease a 30'x30' spot on top of Morse Hill (Bean's Hill) to construct a 180' ladder style tower. This spot will also accommodate a 10'x20' equipment shelter to enclose the electronics. The antenna will be connected by co-axial cable and the tower will service up to 4 carriers, which will conform to federal laws regarding co-location. Site preparation will include constructing a gravel road to the site and clearing out trees (at the site). The site will be alarmed and fenced. The sites are unmanned, therefore, there is no traffic, no noise, no hazardous substances or water. Only electricity and telephone service will be needed. The site will require monthly maintenance trips (more frequent during first couple of months).

Atty. Marshall added that there will not be any light on top of the tower, it would be properly maintained, and not intrusive. Mr. Procopio submitted a picture of a Massachusetts site as a model of what is proposed for East Kingston. She stated that this project is a benefit to the community at large.

Mr. Brancato stated that Nextel currently has towers located in Exeter, Epping and Plaistow.

Atty. Marshall went on to say that the fencing will not be seen from the street. She further stated that the East Kingston Zoning Ordinance regarding telecommunication is flawed. Carriers who propose to install a 180' tower in a commercial zone must meet the 125' setback. Given all the commercial zones in East Kingston, none can accommodate this setback requirement. She stated that the book has typographical errors and that the applicant and every resident is entitled to rely on it, errors and all.

Atty. Marshall also stated that the property in itself is quite unique. The gravel pit has more impact on the property and town than a tower. The tower lease is also a close-ended agreement. The Town and Mr. Clark can require the structure be removed. Mr. Clark has a vested interest in his land. In allowing the tower, the section of the pit area where the tower will be constructed, will not be excavated. Other utility easements are allowed in town in residential zones, i.e. gas pipeline, telephone poles, telephone switching stations, and electricity. She stated that these services are no different from telecommunication services.

She stated that the Planning Board was wrong in denying the proposed tower because:

1. The ordinance is flawed. There can't be an ordinance that prohibits towers and essentially, this one does just that.
2. There is a pre-existing commercial use of the property. The ZBA can consider which commercial use is more beneficial to the community, gravel pit v. tower.

Discussion of when the gravel pit and its conditions for operation transpired. It was noted the pit was originally established in the 1960's.

Atty. Peter Hurd, representing abutters Joe and Sue St. Martin expressed his opposition to the proposal. He stated that he and his clients were under the impression this was request for variance. When advised this was a hearing on an appeal from administrative decision, he offered the following:

The proposed use is specifically addressed and prohibited by the ordinance. Whether the ordinance is flawed or not, that is up to the legislative body to consider. This should not affect its validity, as it is noted by the Planning Board in the July 16, 1998 minutes that the construction of a telecommunications tower is prohibited in residential zones under Article XV.D.2. He stated that this parcel is clearly residential.

He also stated that even though the parcel has a grandfathered gravel pit, expanding its commercial use to a different nature is prohibited. The nature of a nonconforming use, even if it is less obtrusive to the land, cannot be changed. He stated that there is no hardship to the property as it is zoned residentially and can be used residentially. He then asked the Board to consider the St. Martin's position and their house location and deny the application for appeal.

Mr. Richard Friese of Ashlie Road stated that there are several small air crafts in the area. This is a safety issue the town needs to consider.

Mr. Procopio responded that the FAA says that towers under 200 ft. high, do not need lighting unless in the direct proximity of an airport. He then addressed the benefits to the town as the increase of competition of telecommunications, thus resulting in lower prices, and the enhancement of two-way radio response and clarity. This is beneficial to anyone using two-way radios, i.e. fire departments, police, plumbers, ambulances, and construction companies.

At the inquiry of residents, Mr. Procopio stated that there was no financial benefit to the Town other than the increase in the parcel's property value. He stated that the lease is for 30 years with a 5-year base lease.

For the record, letters in favor of the proposal were received from Keegan Concrete, R.L. Rossi, Inc., Bodwell's Septic Service, abutters Holly Hanscomb, Russ McKane, and Malcolm & Pauline McLeod, and Caldwell Banker. One letter of opposition was submitted by Clint Furnald.

Atty. Marshall directed attention to page 48 of the East Kingston Zoning Ordinance re: use districts. There is no definition of a use district and no other reference to one. She stated that Mr. Clark can argue that he has a valid commercial use. It doesn't say "zone area", it states "use district".

Mr. Mark Brinkerhoff of 10 Burnt Swamp Road, stated that this issue is not about a gravel pit, it's about a tower. This grandfathered use is for a specific use, does this mean the parcel is open to other commercial uses? He inquired about the reclamation to the existing gravel pit and argued that the water from the pit washes down to his and other abutter's properties.

At the request of Suzanne Ryan, Chairman Daly read the July 16, 1998 Planning Board motion regarding this proposal.

Pursuant to RSA 676:4, Catherine George motioned to accept jurisdiction on the application for Site Plan Review presented for MBL# 10-04-08. The motion was seconded by Beverly Fillio and passed 5-0.

Beverly Fillio motioned to deny the Site Plan Review application to construct a 180-ft telecommunications tower on Morse Hill located at 21 Burnt Swamp Road, M.B.L# 10-04-08 predicated on Article XV.D.2 of the East Kingston Zoning Ordinance, which states that telecommunications towers are prohibited in residential zones. Ed Johnson second. The motion passed 5-0.

Chairman Daly stated the issue is that the ordinance appears to prohibit towers in residential zones. The applicant argues the use of the parcel is commercial.

Atty. Hurd stated that the only way this proposal could be granted is by a variance or a special exception. The expansion of a nonconforming use can't change the existing use.

Atty. Marshall responded that the ordinance is so flawed that the ZBA can grant the use of the land.

Mr. Boudreau stated that the land is residential. If there was no gravel pit, then there wouldn't be an issue of commercial use. A grandfathered use cannot be expanded to another use.

Mr. Ciardelli stated that the ZBA is here to revoke the Planning Board's decision.

Atty. Marshall stated that the ZBA has different powers than the Planning Board. They are to determine if the Planning Board made the right decision. The applicant has the right to seek a variance or go to Supreme Court.

Chairman Daly stated that the Board has the choice of accepting the appeal and overruling the Planning Board's decision or upholding the Planning Board's decision.

Mr. Freeman stated that the Planning Board could not make any other decision than what they made. Mr. Ciardelli admitted that there are flaws in the ordinance, use districts v. use zone. In his opinion, the spirit intended is residential use.

Mr. Riley added that the ZBA will make their decision on their (ZBA's) interpretation of the ordinance. The Planning Board's decision was based on whether or not the proposed use is an allowed use. The Planning Board found the use was not allowed and he (Riley) doesn't see how a telecommunications tower is consistent with a gravel pit.

Chairman Daly stated that he does not buy the towers use as an expansion to the existing nonconforming gravel pit. The issue of the overall validity of the ordinance is up to the voters or the Supreme Court to address.

MOTION: Mr. Boudreau motioned to uphold the Planning Board's July 16, 1998 decision and deny the application based on Article XV.D.2 which states that telecommunication towers are prohibited in residential zones. Mr. Ciardelli second.

NO DISCUSSION

The motion passed 5-0.

At this time, Atty. Marshall requested a copy of the minutes.

July 23, 1998 Minutes: With out objections, the board approved the July 23, 1998 Zoning Board of Adjustment minutes as presented.

Joint Board Meeting: Chairman Daly advised the board that a joint meeting with the planning board and selectmen may be scheduled for the last Thursday in October (October 29th) to discuss points of view and enhance board communication. He requested members keep that date open.

With no further discussion, Chairman Daly closed the public hearing and this August 13, 1998 Zoning Board of Adjustment meeting adjourned at 9:45 PM.

Catherine Belcher

Minutes completed and on file August 17, 1998.