TOWN OF EAST KINGSTON ZONING BOARD OF ADJUSTMENT

MEETING MINUTES

August 24, 2021

Pound School
41 Depot Road
East Kingston, New Hampshire

Tim Allen, Chair
Ed Robbins, Vice Chair
7:00PM

The Town of East Kingston Zoning Board of Adjustment met at the Pound School in East Kingston, August 24, 2021 at 7:00 PM. The meeting was also available via Zoom. Chairman Allen opened the East Kingston ZBA Meeting at 7:01PM.

Chairman Allen conducted role call: Tim Allen Chairman, Paul Falman, Ed Robbins, and Nate Maher were present. Dave Ciardelli and Frank Collamore were not present. Chairman Allen designated Alternate Nate Maher to vote in the absence of Dave Ciardelli.

BOARD BUSINESS

The board reviewed the meeting minutes of July 2021.

Mr. Falman made a motion to accept the July 2021 minutes as published in draft format. Mr. Maher seconded. The motion passed unanimously.

REHEARING

Chairman Allen opened the discussion on the Rehearing Request received from Brian Graham, 128 Newton Road, Plaistow, NH who was requesting a rehearing of four (4) variance decisions for property located at 4 & 6 Cove Rd, East Kingston NH (MBL 02-01-32 and MBL 02-01-32) during the Case # 21-02 & 21-03 hearings, specifically:

Article VI.E.3 septic leach field setbacks from poorly/very poorly drained soils;
Article IX.A.1 Lot area and yard requirements - for contiguous frontage requirement;
Article IX.A.2 Lot area and yard requirements for min area requirements; and
VI.D.1 - wetland Conservation District, Special Provisions for minimum non-wetland area / minimum upland.

Chairman Allen explained that the board would discuss the rehearing request and determine if any mistakes were made and whether a rehearing was justified. The board would not be taking input from the applicant or the public. He further explained that they would vote on each individual variance rehearing request.

Chairman Allen read aloud the following statutes to ensure they were part of the record:
677:2 Motion for Rehearing of Board of Adjustment, Board of Appeals, and Local Legislative Body Decisions. – Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, may grant such rehearing if in its opinion good reason therefor is stated in the motion. This 30-day time period shall be counted in calendar days beginning with the date following the date upon which the board voted to approve or disapprove the application in accordance with RSA 21:35; provided however, that if the moving party shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA.

677:3 Rehearing by Board of Adjustment, Board of Appeals, or Local Legislative Body. –

I. A motion for rehearing made under RSA 677:2 shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.

Chairman Allen commented that the applicant's rehearing request stated that the Board's decision was not in line with the law. He asked if all board members reviewed the rehearing request. All members said they did.

Chairman Allen reviewed the rehearing request noting some of the key points/comments made by the applicant within the rehearing request to initiate the discussion. He stated he was not going to read the full document, as everyone just stated they had already read the document. The text below in *ITALIC* is the applicant's rehearing complaints and the text in **BOLD** was read aloud by Chairman Allen.

The Board's findings in this matter were unreasonable the Board made errors of law:
The Applicant asserts that the Board's action was unreasonable in that the applicant submitted sufficient evidence to demonstrate that his applications met all variance criteria in each instance. As is detailed below, the Board made unreasonable findings, and misconstrued New Hampshire law in considering the Applicant's applications.

In several instances, ***the Board found that the Applicant's requests would be contrary to the public interest, and would violate the spirit and intent of the Zoning Ordinance.*** *The Supreme Court has held that these two (2) criteria are related. (See, Farrar vs. City of Keene, 158 N.H. 684, 691 (2009)), and judged by the same general standards. Harborside Associates vs. Parade Residence Hotel, 162 N.H. 508 (2011). In order "for a variance to be contrary to the public interest and inconsistent with the spirit of the Ordinance, its grant must violate the Ordinance's basic zoning objectives." Id. at 514 citing, Chester Road & Gun Club vs. Town of Chester, 152, N.H. 577 (2005).* ***This, in turn, is judged in two ways:***

1. ***Whether or not the variances would alter the essential character of the neighborhood.***
2. ***Whether the variances would threaten the public health, safety or welfare.***

It is not entirely clear which basis the Board found that the variances failed these tests. *A review of the neighborhood shows that the neighborhood consists almost entirely of small lots occupied by homes. Twenty-seven (27) lots are developed with houses and only three (3) lots do not have residential structures. The addition of one house would demonstrably not change the "essential character" of the neighborhood, a fact reinforced in that there is already a storage structure on one (1) of the two (2) Applicant lots proposed for merger.*

With regard to a threat to health, safety or welfare, there were comments in the minutes suggesting that Board members misconstrued this concept, in some of the deliberations with respect to the septic setback and upland area variances. Given the clearly comparable dimensions in many of the surrounding lots, it is not entirely clear what evidence the Board relied upon. *At the July 22nd hearing there was some evidence/testimony regarding visible water on the property, but that was primarily in the wetland areas, and it followed significant rain.*

On the lot size variance, Board members observed that the request was "not close" to the required two (2) acres. By itself, this does not suggest that there was a threat to public health, safety or welfare. The fact is the two-acre lot size, frontage requirement and upland requirement were all enacted after the lots in this area were laid out. Zoning generally must reflect the character of the area. 15 N.H. Practice (Loughlin) 4th Ed. citing RSA 674:17(II). The fact is, this "neighborhood" which is nearly fully "built out", is not consistent with two (2) acre lot sizes, or 200 feet of frontage. The Board failed to apply this reality in its rulings on the various variances related to the "spirit and intent" of the Ordinance.

Further, the granting clearly is in the public interest where it involves the combining of two (2) significantly undersized lots into one lot that is more closely conforming, and would exceed much of the neighborhood in size and frontage. Even with regard to the upland area variance, the facts disclose that measured by square footage, the "upland area" is comparable to the entire area of numerous developed lots, not allowing for the existence of wetlands on any of the lots. See, Table attached.

With respect to the Septic System Setback, the Board Members simply concluded that the variance request was "less than required." As has been noted, all variances involve some level of "contrary to spirit and intent."

See, Chester Rod & Gun Club, supra. ***The Board did not conduct any analysis which actually determined the possible "threat" the 4' of relief requested by the Applicant would occasion****. The Applicant would have still required a final septic design approval from the State. [NOTE: The Applicant could not submit a State Septic Design Application without the local variance approval). The State approval process would help assure full protection of the public interest.* ***The Board position on this subject appears to be without basis and contrary to the Applicant's representation that the waiver would not jeopardize public interest.*** *The speculation related to the possible "threat" from the four (4) foot waiver is without sufficient basis to support denial. Cf, Continental Paving, Inc. vs. Town of Litchfield, 158 N.H. 352 (1981). This is particularly the case when considering the self-evident fact that other existing septic systems in the neighborhood may not meet such a setback.*

On the issue of Substantial Justice, the Supreme Court has held that any loss to the individual that is not outweighed by a gain to the general public is an injustice. Harborside Associates, supra, citing, Malachy Glen Associates vs. Town of Chichester, 155 N.H. 102, 109 (2007). This criterion also requires an examination of whether the proposed use is consistent with the area's present use. Harborside Associates, supra at 515. Certain of the comments by members indicate that they felt the applicant should not be viewed as entitled to "substantial justice" because he acquired the small lots with knowledge of the zoning restrictions. This concept of "self-created hardship" has been rejected by the Supreme Court. See, Chester Rod & Gun Club, supra.

Some members also commented that allowing construction of the dwelling, based on a septic design that required certain restrictive devices (e.g., low flow shower fixtures), somehow would translate into a "gain" by the Town through denial. This assumption that the Applicant (or future purchasers) would somehow violate requirements is not sufficient to support a "gain" to the Town by denial. Most of the comments related to this topic have related to the septic system and upland land requests. On both the frontage and lot area requests, the Board found substantial justice would be done. The Board's findings on these variances would appear inconsistent with the discussion on the minimum upland area. In addition, certain abutters observed that the development would result in trees being removed. While true, there is no obligation on the part of the Applicant to maintain trees which benefit abutters. ***The "gain" required under the Substantial Justice test must be for the entire community, not just immediate abutters. Comments by Board Members which reflected a desire to deny based on neighborhood opposition, disregard the statutory duty to evaluate the required criteria.***
The Board's findings on the issue of diminution of surrounding property values were nearly unanimous in finding there would be no diminution of value by construction of the proposed new home. This would appear to contrast with certain findings on the question of "contrary to public interest." If the proposals would not impact property values, what is the true harm to the public interest?

With regard to the "hardship" requirement, the Applicant believes that the Board made an "error of law" in the interpretation of this provision. ***By statute, an applicant must demonstrate that the property must have "Special Conditions" which distinguish it from others in the area.*** *Certain of the comment suggest that members examined the lot area and frontage, compared those criteria to other surrounding lots, and concluded that the Applicant's proposed lot was not unique.* ***The clear "Special Conditions" of the property is that it is, in fact, vacant land, when nearly all the other lots in the entire are developed.*** *See, Map and Tables submitted. In one instance, the Chair noted that the property "had a use" for a storage garage. This is only a half-truth, since one of the two lots to be merged is totally vacant. Additionally, the proposal takes a "non-conforming use" (a free-standing storage garage, which* ***The Board's finding that the Applicant's property does not have "Special Conditions" reflects a misunderstanding of the legal principals related to hardship. Further, the Board failed to consider the language in RSA 674:33(1)(5)(B), the so called "alternative test" for hardship. Under that provision, a hardship exists if a property cannot be "reasonably used" in strict conformance of the Ordinance.*** *In the case of the combined lot, it cannot be used in any reasonable fashion in conformance with the Ordinance. The premises currently exist as two (2) lots, one totally vacant, and one with a storage garage. While the Applicant understands and agrees that not every lot in a community is buildable, in this instance, the construction will not result in a threat to the health, safety or welfare to the community, and as such, the Applicant is entitled to a finding of hardship because without tit, the land has no available use. For all the foregoing reasons, the Applicant respectfully requests a rehearing on the denied variances.*

Chairman Allen instructed the board to determine if the board made an error in the law, technical error, or mistake that justifies a rehearing.

Mr. Falman noted the statement that the didn't follow the law is a very vague statement. There were no specific laws referenced. Our zoning requirements are our base documents and there's interpretation of those requirements. There is an interpretation of the basis for each of the zoning ordinances. Reviewing the zoning document as a whole gives us the interpreted basis for the reasoning behind each zoning law and how they apply to the request for a variance. Without a specific example as to how we violated a specific law I just don't see how there is a basis for a rehearing.

Mr. Robbins stated that he reviewed much of the case law the applicant's attorney referenced and it seems to him that most of it was quite a stretch and the relationship was weak at best. He's been here for all meetings, except for the last one, and he can't see how the board has misapplied the zoning ordinances or law. They have been around a long time and are not looking at anything new. It's our interpretation that we have followed the meaning and interpretation of the ordinances and the spirit thereof. I don't see anything here that would make me want to change any of my decisions.

Mr. Maher stated he largely agrees with Mr. Falman and Mr. Robbin that there is little to no merit in the applicant's request for a rehearing in that we somehow violated the laws, spirit, or have misconstrued the intent of the ordinances. From the beginning the board has had significant concerns with the septic system. The applicant has at no time provided any substantive additional information that has left the board to believe there is an unenforceable design provision within the design of the system. This claim that somehow the strict adherence to the minimum design requirements (setbacks) and the removal of flexibility by the board was somehow an error of the board, is false. For me, this was driven by the fact that the system was designed to the absolute minimum and was incumbent upon the owner of the house to perpetuity only use low flow plumbing fixtures in order to maintain proper operation of this system from day one. And for that, I feel this is a very real threat to public safety. It's a system that is on the brink of failure from day one. There were statements made that the system was capable of more than it was being used for, but, as a professional engineer, I understand how this all works. The engineer that designed this felt that the low flow plumbing fixture requirement was so important it was one of the four primary design notes. For me, that is full stop, we have an issue.

Mr. Robbins stated that there is no way to ensure that future owners of the house will abide by the requirement or even know it exists. Mr. Falman stated there is no way the town could even enforce this requirement.

Mr. Maher stated that this issue would just kick the can into the future and possibly affect the surrounding properties. As stated by neighbors and not disputed by the applicant, this property is extraordinarily wet and as was demonstrated within the hearing the applicant was unable to meet the absolute minimum design standards.

Mr. Falman stated that area is a sensitive area due to the wetness.

Chairman Allen stated he wanted to touch on a few key parts of the applicants rehearing request to ensure we agree that we didn't make any missteps. He stated with regard to the Contrary to Public Interest objections and statement that we misinterpreted the spirit of the ordinance prong regarding septic setbacks and the minimum upland area. On numerous occasions during the hearings the point was made that the neighborhood area was extremely crowded already, very low land with high water tables. We discussed at length the fact that the pre-existing houses and septic systems already overcrowded the area and that the addition of yet another system to the area would be irresponsible and, in our opinion, threaten public health and safety and thus be contrary to public interest. As a licensed Septic System designer, I feel that adding another system to that area, an area with poor Perc rates, and high-water tables, on a lot with significant wetland area, would be a threat to public safety and create an unnecessary threat to the neighborhood, a threat of septage contamination to wells, runoff issues, and wetland contamination due to close proximity of septic system to wetland. These points were mentioned numerous times during the hearing. I do not believe there was any misinterpretation of the law in this case. We as a board were

clear there were multiple public health and safety concerns of adding another house and another septic to the already crowded area.

Chairman Allen: *T*he applicant made reference to the fact that we didn't specify whether our objection was to public interest or spirit of the ordinance and how that tied together. My objection to that wicket was always surrounding public health and safety. In the record this was mentioned numerous times. Does everyone agree? All board members agreed.

Chairman Allen: With respect to the applicant's comments regarding septic system setback, and the applicant's comments that "*board members simply concluded that the variance request was "less than required." As has been noted, all variances involve some level of "contrary to spirit and intent." "The Board did not conduct any analysis which actually determined the possible "threat" the 4' of relief requested by the Applicant would occasion. The Board position on this subject appears to be without basis and contrary to the Applicant's representation that the waiver would not jeopardize public interest."* In this particular case I believe the board made it very clear that their local knowledge of the lot, the extremely wet conditions, and high neighborhood density made the setback to wetland a real risk. As part of the public interest criteria the applicant must merely must show that there will be no harm and will not be contrary to the public interest if granted but in this case that was not met. The board believed that the proximity to wetland, density, and wet soils all generated a public health risk that would do harm by adding more septage to the area. Chairman Allen asked if everyone agreed with his comments? All board members agreed.
Chairman Allen: With regard to the applicant's comments "*The 'gain' required under the Substantial Justice test must be for the entire community, not just immediate abutters. Comments by Board Members which reflected a desire to deny based on neighborhood opposition, disregard the statutory duty to evaluate the required criteria."*

Mr. Falman stated he doesn't believe the board made its decision based on the neighborhood opposition. Chairman Allen stated that was exactly his feeling. I don't believe the board made it's finding based solely on comments of abutters. Abutters were allowed to give testimony and ask questions during the case but that doesn't mean the board's decision was swayed by their testimony. The record reflects that the board heard the neighbors 'concerns but nowhere in the record is it stated that the denial was driven by neighborhood concerns.

Mr. Falman stated he keeps referring to the town zoning ordinances. Mr. Robbins stated we did consider not only neighbors but abutters, we considered all of it. It wasn't just neighbors but a group of people all had concerns about the addition of another house.

Chairman Allen reiterated that variances are approved or denied based on the five criteria and whether or not the situation meets those criteria and thus justifies relief from the ordinance. Just because something is in the ordinance does not mean it can never be given relief. This board exists for exactly that reason, we provide relief from the ordinances when it is justified and meets the five criteria. One of their key points was that we didn't interpret the spirit of the ordinance test because one of the requirements is whether this would alter essential character of the neighborhood. What I tried to convey earlier (referring to Health and Safety concerns) is that we probably discussed those points regarding spirit of the ordinance and contrary to public interest a bit inter-twined. I believe we interpreted the culmination of the ordinance and the spirit behind it accurately.

Ed Robbins gave generic examples of how things have been interpreted in the past.

Chairman Allen reiterated applicants comments surrounding hardship. *"The Applicant believes that the Board made an 'error of law' in the interpretation of this provision. By statute, an applicant must demonstrate that the property must have 'Special Conditions' which distinguish it from others in the area. The clear 'Special Conditions' of the property is that it is, in fact, vacant land, when nearly all the other lots in the entire are developed. The Board's finding that the Applicant's property does not have "Special Conditions' reflects a misunderstanding of the legal principals related to hardship. Further, the Board failed to consider the language in RSA 674:33(1)(5)(B), the so called 'alternative test' for hardship. Under that provision, a hardship exists if a property cannot be 'reasonably used' in strict conformance of the Ordinance."*

Chairman Allen went on to describe that the board spent significant time discussing the special conditions criteria. I don't believe there is any error or misunderstanding of the law in this case. The board discussed at length for considerable amounts of time whether the property had unique characteristics that justified relief from the ordinance. The fact that it's vacant does not in the eyes of the board constitute a unique characteristic to justify relief from the four variances being discussed here. There are other lots in the area that are also vacant. The board fully understands the criteria necessary to meet the special conditions test. During this same hearing the board granted a variance of septic system to property line setback because it met the unique condition test. However, these other four variances did not. There were no characteristics found that distinguished this lot from others in the area that justified relief for the four contested variance requests in question. The applicant's assertion that the board did not consider the reasonable use criteria is unfounded. The board discussed on multiple occasions the fact that the property has a reasonable use. The same reasonable use that was in existence when the applicant bought the property, it has a storage garage that is fully functional and a reasonable use of the property. The board does not agree that the reasonable use of the property ceases simply because the applicant wishes to merge two parcels. The property has a reasonable use now and would continue to have a reasonable use if merged; it has a storage garage that it always has. We discussed at length whether the lot was oddly shaped, had a giant boulder in it, was uniquely situated, had any characteristic that set it apart from others and we found nothing different or unique about this property from others in the area.

Chairman Allen asked if everyone still agrees and feels the same way. All board members agreed. Mr. Maher stated that the applicant bought an existing condition and now wishes to change that condition. But, it's still under the umbrella of having an existing use. Mr. Falman agrees the lot is not unique because there are other lots in the area that are also undeveloped. Mr. Robbins agrees and could not see any reason to change.

Mr. Maher stated the applicant themselves submitted an exhibit that clearly shows that the lot is not unique and is very consistent to all the other lots in the area. Chairman Allen asked if everyone was ready to vote. All agreed.

VOTING

Vote 1: With regard to granting a rehearing for Article IX.A.1 Lot area and yard requirements - for contiguous frontage requirement:

Tim Allen - Denied
Ed Robbins - Denied
Paul Falman - Denied
Nate Maher - Denied

Mr. Falman made a motion to deny the rehearing of the variance request for Article IX.A.1 Lot area and yard requirements - for contiguous frontage requirement. Mr. Robbins seconded the motion. The motioned passed by unanimous vote with all four members in favor.

Vote 2: With regard to granting a rehearing for Article IX.A.2 Lot area and yard requirements for min area requirements

Tim Allen - Denied
Ed Robbins - Denied
Paul Falman - Denied
Nate Maher - Denied

Mr. Robbins made a motion to deny the rehearing of the variance request for Article IX.A.2 Lot area and yard requirements for min area requirements. Mr. Falman seconded the motion. The motioned passed by unanimous vote with all four members in favor.

Vote 3: With regard to granting a rehearing for Article VI.E.3 septic leach field setbacks from poorly/very poorly drained soils:

Tim Allen - Denied
Ed Robbins - Denied
Paul Falman - Denied
Nate Maher - Denied

Chairman Allen made a motion to deny the rehearing of the variance request for Article VI.E.3 septic leach field setbacks from poorly/very poorly drained soils. Mr. Maher seconded the motion. The motioned passed by unanimous vote with all four members in favor.

Vote 4: With regard to granting a rehearing for Article VI.D.1 - wetland Conservation District, Special Provisions for minimum non-wetland area / minimum upland:

Tim Allen - Denied
Ed Robbins - Denied
Paul Falman - Denied
Nate Maher - Denied

Mr. Maher made a motion to deny the rehearing of the variance request for Article VI.E.3 septic leach field setbacks from poorly/very poorly drained soils. Chairman Allen seconded the motion. The motioned passed by unanimous vote with all four members in favor.

Chairman Allen closed the discussion of the rehearing request of cases 21-02 and 21-03.

Chairman Allen asked if there was any additional board business? Chairman Allen thanked everyone.

Mr. Falman made a motion to close the meeting. Mr. Robbins seconded the motion. The motion passed unanimously and the August 2021 meeting of the East Kingston ZBA was closed at 7:42PM.

Respectfully submitted,

Tim Allen, Chair
East Kingston Zoning Board of Adjustment

Minutes approved on May 4, 2022.