

Town of East Kingston, New Hampshire
Zoning Board of Adjustment Meeting Minutes
October 23, 2008
7:00 pm

AGENDA

Members Attending: Chairman John Daly, Vice Chairman David Ciardelli, Catherine Belcher, Paul Falman
Alternate Members: Tim Allen
Also present: Mr. Musso Sr. and Mr. Musso Jr., applicants.
Roberta Converse, 74 Main Street; Nancy Reis, 76 Main Street;
Gary Hinz, 76 Main Street, abutters

Mr. Daly opened the meeting of the East Kingston Zoning Board of Adjustment (ZBA) at the Pound School, 41 Depot Road on October 23, 2008 at 7:00 PM.

Election of Officers

Mr. Daly noted it was time to elect new officers. He asked for nominations for the positions of Chairman and Vice Chairman.

- Mr. Falman nominated Mr. Daly for Chairman. Board members voted and the vote was unanimous.
- Mr. Ciardelli nominated Mrs. Belcher for Vice Chairman. Board members voted and the vote was unanimous.

Mr. Daly will serve as Chairman and Mrs. Belcher will serve as Vice Chairman.

Public Hearing 08-03

Dan Musso, 71 Main Street (MBL 14-02-03), East Kingston, NH. . The applicant is seeking a use variance from Article VIII - USES PERMITTED for a business in a residential zone.

Mr. Daly opened this public hearing and acknowledged that Mr. Musso and his son Dan Jr. were in attendance. Mr. Musso was before the Board tonight because he would like to operate a business in a residential zone.

Mr. Daly recognized that although Mr. Musso had submitted his application under Article VIII – USES PERMITTED, he would also need to apply under Article III - DISTRICTING. The Board would consider both the articles in their review tonight.

Mr. Daly reviewed procedures for the hearing. He asked abutters to wait to be recognized and to address the Chair directly, and not other members of the Board or the applicant. He also asked that they state their name and address for the record.

Mr. Daly turned the floor over to Mr. Musso to explain what it was that he proposed.

Mr. Musso explained that he presently runs a repair shop in Brentwood, and it is really too small. His two sons were back from serving in Iraq, and they all wanted to operate a business together at the 71 Main Street location. Mr. Musso had purchased the property, which has a garage at the rear with two lifts, and he was looking to utilize that garage and run his business with his sons from that location.

He wanted to run a general repair shop, and also perform welding and NH State Inspections. He noted that for years before he purchased the property, both Merrill Damon and Marshall Merrill, Jr. had operated a business from the location.

Mr. Daly reviewed the Criteria with the Board and asked Mr. Musso to address each one as he read the criteria.

Criteria 1. The proposed use would not diminish surrounding property values because:

Mr. Musso explained that they would be utilizing the footprint of the existing garage and making no changes to that footprint; there was no expansion of the building planned. He noted it had been a repair facility for as long as anyone in the town could remember, and the garage is already equipped with two lifts. He and his sons had been cleaning up the property and are intending on fixing up the building. Mr. Musso also noted he had applied to the state to move his driveway to the other side of his house as it was dangerous to enter the roadway from where it is presently located. According to Mr. Musso, he had received that permission from the state and is in the process of moving the driveway to the new location and blocking off the present driveway.

Mr. Daly noted he was not sure Mr. Musso's reply addressed how his proposal would have an impact on property values, and asked him to explain further.

Mr. Musso stated his proposed business would not change the traffic on the road; the traffic was already heavy as it is a state road. The only changes would be what he and his sons were doing to increase the looks of the property by cleaning up and landscaping. There would be no junk cars on the property, and any cars would be in the garage or behind a fence and not seen. He did not intend to have a sign in the front of the property, and was going to paint the roof of the garage so it would look better from the street.

Mr. Ciardelli stated that what Mr. Musso proposed on doing to enhance the appearance of the property was a good thing, but what the Board needed to know is the effect the business would have on property values.

Mr. Musso stated that he would like to operate from Monday to Friday, and the Town could set the hours he could operate the business and he was fine with whatever they wanted him to adhere to.

Mr. Ciardelli asked about noise and smoke.

Mr. Musso stated there would be minimal to no noise, as all work was to be done in the shop, which was ventilated and muffled the noise of the air compressor. He knew that there had been problems with noise with the prior businesses, but he did not want that problem with his business, and would make sure it would not be a problem. He was sure when he installed the fence, it would also help further with any noises.

Mr. Daly asked if Mr. Musso thought there would be any impact on property values if his business were located in the residential area.

Mr. Musso stated he did not think there would be any impact. There were businesses already located along that road, and there was Carmen's Restaurant and the facility further down North Road, and he did not think his business would affect the area at all.

Mr. Falman asked if Mr. Musso intended on putting a sign on the building or installing exterior lights.

Mr. Musso replied there is presently an inspection sign on the telephone pole that was there from previous owners, and he did not intend on installing any other signs. He stated that the garage had two bays, and his intention was to utilize the larger bay for business and use the smaller one to work on his personal vehicles. There are not many windows in the garage and they face away from the road. He thought he might install a security light in the back, and replace the lamppost that was in front of the house. He was not proposing on installing any type of spotlight that might bother the neighbors, and if any problems did come up, he would change it.

Criteria 2. Granting the variance would not be contrary to the public interest because:

Mr. Musso stated that a) no hazardous materials would be used; b) his insurance does not permit customers to go into the work area, c) there would be no traffic impact as Main Street is a state road and already had tons of traffic traveling on it; d) there is a large parking area down in the back, away from the road, and e) what he was proposing was not a permitted use as the town had previously changed the home occupation ordinance.

Mr. Allen asked how Mr. Musso would handle disposing of oil and other hazardous waste he might have.

Mr. Musso stated that at the present time, he utilizes the services of a company that comes to pick up his waste oil. He would have no paint on the premises, and if required, he would get a dumpster. He stated that there had never a permitted home occupation there, and that previously the owners kept running their businesses after being denied a permit. Mr. Musso presently works on the Police cruisers and would like to work on the Fire Department vehicles as well. He thought it would be a benefit for both the Police and Fire Departments to have his services so close. He does not think that granting the variance for his business would be contrary to public interest.

Criteria 3. Denial of the variance would result in unnecessary hardship to the Owner because:

Mr. Musso stated it would take income away from his family; there are no jobs out there and times are tough.

a. The zoning restriction as applied to the property interferes with the reasonable use for the property, considering the unique setting of the property in its environment such that:

Mr. Musso stated the property has an existing repair shop/welding shop that has been there for years and both the previous owners used the shop for repairs and welding.

Mr. Musso stated he would follow whatever the town called for, like working hours. And he would keep all materials in a lock box or a certain area (like he does in his shop in Brentwood) so the Fire Department would have that information.

Mr. Daly stated that this is a difficult criteria to satisfy. He asked Mr. Musso what was it about the property that was unique? Mrs. Belcher asked "what is different with your property in comparison with your neighbors property? What makes it different?"

Mr. Musso stated the garage was already there and set up to do business; he has 13 acres. He is not intending on any major excavation. The garage is located at the back of the house and not on the road. It is situated so he could have a business in the rear and have it still look residential from the front.

Mr. Ciardelli commented that those things made it more advantageous and easier to do what he wanted to do, but they do not necessarily make the property unique. Mrs. Belcher stated, for example, that a property might have 5 acres, but have a steep slope or water running through it. What could he tell the Board that was unique to his property?

Mr. Musso Jr. stated the rear of the property is set much lower than the surrounding properties, and other than the area where the garage is, the rest is mostly wetlands. It holds water when it rains and stays wet. They are clearing out brush and such and hoping they can get the area to dry out some.

Mr. Daly asked for example, if the Board granted Mr. Musso what he wanted to do, and next week his neighbor wanted to do the same thing, why would Mr. Musso's property be more unique that the Board should grant the variance to him and not to his neighbor? Mr. Allen added if the property were too small for well and septic setbacks and a house could not be built on the property, that type of situation could make it unique. Mr. Falman

stated that there is already a house on the property with a certificate of occupancy, which shows there is already a permitted use.

b. That no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property because:

Mr. Musso answered that the previous owners of the shop used it for repairs, welding and a NH State inspection station.

Mr. Daly said the Board would need to be convinced that there is no fair and substantial relationship. Mr. Ciardelli noted that the general restrictions have an impact on the specific property, and the restrictions have exactly the intended effect. When he looked at the restriction and the ordinance, there was a fair and substantial relationship.

Mr. Allen asked how far Mr. Musso's nearest neighbor was.

Mr. Musso answered he thought perhaps 200' on one side and 300' on the other side, and more than that to the properties across the street. He would install a barrier of trees and shrubs to help with the view.

c. The variance would not injure the public or private rights of others since:

Mr. Musso stated they would be following the town's business laws.

Mr. Falman stated that the intent of the application was so Mr. Musso would be able to operate a business in a residential area. He asked Mr. Musso to address the rights of others with residential property. Mrs. Belcher asked what argument Mr. Musso would use to prove that operating a business on his property would not affect the public and private rights of his neighbors.

Mr. Musso answered that the way the property is set up, with the structure of the garage in the rear, it would not even be noticeable that there was a business back there when he finishes with the changes he is implementing. He would conform to whatever hours the town would set for his business, and noise would be held to a minimum. He intended on planting shrubs in front and possible adding a fence in front of the garage. He would do whatever was necessary to make sure it looked like only a residence all the time.

Mr. Allen asked Mr. Musso to show him on the photos of the garage, just where it was that he intended to install the fencing. Mr. Musso showed him the location.

Mr. Musso stated he was moving the driveway to the other side of the house for the sake of safety, and when he installed the fence, you would only be able to see the roof and some of the windows of the garage. All cars would be in the garage, or behind the fence away from the public view.

Criteria 4. Granting the variance would do substantial justice because:

Mr. Musso stated that they would be able to run a family business and would be able to provide each other with jobs in these tough times.

Mr. Ciardelli asked if there would be a loss to Mr. Musso, and would the general public gain if his business were not located there.

Mr. Musso stated that if the general public thought that would be the best for him not to use the garage, he felt they would be taking away from he and his family as the garage is their livelihood

Criteria 5. The use is not contrary to the spirit if the ordinance because:

Mr. Musso stated the proposed use would not diminish surrounding property values, and that the previous owners had used it for repairs, welding and a NH State Inspection station.

Mr. Daly stated Mr. Musso's answer did not fully answer that question. The area was primarily farms and residences. The question was why was the fact that Mr. Musso wanted to have a business in that area not contrary to the spirit of the ordinance?

Mr. Musso answered that they were not planning on adding any more structures, and would be keeping to the original footprint. He is located on a main road and there are already businesses up and down the street.

Mr. Allen noted that his existing structure is a benefit and his garage is not a grandfathered use. As he sees it, it is no different than if it were an empty lot and he wanted to build his business there.

Mr. Daly opened up the floor to public comment.

Ms. Roberta Converse, 74 Main Street. Ms. Converse stated she disagreed with some of the things Mr. Musso had said. What he wants to do does go against the fact that the area is zoned residential for farms and residences. Carmen's had been grandfathered as it had formerly been a teahouse. She disagreed with the distance Mr. Musso stated her house was from his; she said she was closer. Mr. Musso clarified that he was stating the distance from the garage to her property, and not from the house to the property.

Ms. Converse is concerned with property values, since it is her belief that anyone showing property for sale would need to disclose the fact that there was a business amongst the residences. She does think it would make an impact on her property value. She agrees that Mr. Musso's changing the driveway is a good idea. She also knows people travel fast on Main Street since it is a state road, but she is certain his having a business there will make even more traffic. She asked if he were to open a business there, what protection would the neighbors have that he would not expand it, even though he says he has no plans to do so at this time? The previous owners expanded it without permits. She is concerned with fire trucks going up and down the driveway; and what about any other large trucks? She stated she could see most of his property from her front window at the present time, and acknowledge the fact that a fence would cover up a certain amount of what she sees, but not necessarily all of it.

Mr. Daly ensured Ms. Converse that if Mr. Musso's variance were to be approved, the Zoning Board could attach conditions to the variance covering most of the concerns she had addressed.

Mrs. Nancy Reiss, 76 Main Street. Mrs. Reiss thought that the intent of the town was to be a rural agricultural town, and a business in the midst of the residential area did not fit that description. She would have no problem if Mr. Musso were intending on having an invisible business, such as an office to do the bookkeeping for his business in Brentwood. She did have a problem with trucks going in and out of his driveway and instigating more traffic than what was already on Main Street. She was concerned about large fire trucks going in and out of the driveway. She recognized that although the previous owners had been operating an unapproved business, it was generally known that the town turned their back on the fact since they had worked on town vehicles.

Mr. Gary Hinz, 76 Main Street. Mr. Hinz asked what Article III Mr. Daly had referred to was, and Mr. Daly reviewed that ARTICLE III – DISTRICTING states: *“For the purpose of regulating the use of the land and the location and construction of buildings, the Town of East Kingston shall be considered as one district of residential, agricultural or forestry use only. Business, commercial and industrial uses are prohibited except as hereinafter provided.”*

Mr. Hinz noted that the map Mr. Musso had turned in with his application had not indicated where the new driveway or landscaping would be. Mr. Falman answered that the town has nothing to do with the changed driveway; the state controlled those permits. Mr. Musso had applied directly to them and had obtained a permit to change the location. Mr. Musso stated he was considering on putting up a fence or shrubs to hide the cars, but was not sure just where they would be located.

Mr. Hinz stated he had not seen anything on the application about the hours of operation. Mr. Musso indicated he would adhere to any hours the town would like him to, although he works from 8:00-5:00, Monday through Friday at the present time in Brentwood. Mr. Daly stated if the application were to be approved, hours of operation was one of the items that could be a condition of approval. And if they were not adhered to, the Police could enforce it if needed.

Mr. Musso rebutted Ms. Converse's comment regarding traffic. He stated the traffic is increasing on Main Street because it is a state road. His business would not make the traffic any heavier than it was already. He also stated that for the most part, he would be working on the fire trucks at the fire station and not at his garage, unless they needed some major work.

He reiterated that he was thinking of whether or not to put in a fence or a row of shrubs, as he wanted to shield the view from the road. He was trying to make it look only like a residential area. He would work out hours of business with the town; whatever they wanted was fine with him. He wanted to be able to have his sons work with him in the business, and his garage in Brentwood was not large enough to do that. He could fit 10 cars in the garage at 71 Main Street. He planned on no expansion; he was getting older and wanted his business to be small and simple so the profits would be bigger. The only lights would be the one in the front of the house on the lamp-post, and perhaps a security light by the garage. He was not planning on any bright spotlights.

Mr. Musso wanted it known that he was not trying to bait the town when he had stated he would give them a break on their repairs of town vehicles. He offers that same discount to all municipal vehicles that come to him.

Mr. Daly asked about deliveries, and Mr. Musso stated any deliveries would be by small pickup truck delivering car parts or UPS delivery truck. He was not intending to work on tractor-trailers, as his sons would need to go to school to learn how to work on them. He thought it would be a plus for the community to have a garage right in town. He also thinks it could increase property values to have the business there. His thought was that his sort of business could entice people to want to buy in the neighborhood.

Mr. Musso extended the offer to the Board members and the abutters present to come and take a look at his garage and ask him any questions they had. It was not his intent to make his neighbors mad.

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

Criteria 1. The proposed use would not diminish surrounding property values because:

Mr. Daly stated that he could go either way on this criteria. Granting the variance could increase Mr. Musso's property and decrease the surrounding properties; on the other hand, it could increase them. Mr. Ciardelli noted that the property does slope down in the rear, and that Mr. Musso could fix it up with landscaping and fencing so it would appear as a residence and not a business. He opined it would not change the surrounding property values. Mr. Falman stated it was not as if Mr. Musso was intending on building a new structure; the garage was already there. He opined that surrounding property values would not be affected. Mr. Allen noted if Mr. Musso were intending on constructing a new building, it would be a cut and dried decision for him. But the building is already there, and shrubs and fencing would hide everything connected with the business and allow it to look residential. He opined it would not change the surrounding property values.

Mrs. Belcher agreed that the location of the garage on the property would allow it to be almost invisible, but she was most concerned with the traffic pulling in and out of the driveway on that dangerous curve in the road. It was her opinion that some of the surrounding properties already have diminished values because of

that curve of the road and the aspect of danger it has. Creating more traffic, that in essence would be slowing and stopping just on the outside of that curve, poses greater danger to general traffic and to the neighbors pulling in and out of their own driveways. Increasing compromised traffic conditions does, in her opinion, negatively affect surrounding property values. She is pleased Mr. Musso is changing the location of the driveway, and considers it to be a very wise decision on his part to do so. She does think granting the variance it would affect property values.

Mr. Allen, Mr. Ciardelli and Mr. Falman, opined that there *would not* be any diminution of property values. Mrs. Belcher and Mr. Daly opined there would be diminution of property values. The vote was 3 (*would not*) and 2 (*would*). The Board voted 3 to 2 that the criteria was satisfied.

Criteria 2. Granting the variance would not be contrary to the public interest because:

Mr. Ciardelli opined that granting the variance would not be contrary to the public interest. Mr. Allen agreed, as did Mr. Falman. They agreed that any problems such as oil spills, storage of antifreeze, tire storage, etc. were concerns that could be controlled by the town. Mrs. Belcher noted that because of the limited sight distance out of the driveway onto the road, she felt it would be a danger to allow more traffic in and out of the driveway that what would happen with ordinary family living. She opined it would be contrary to the public interest because of this fact.

Mr. Allen, Mr. Ciardelli, Mr. Daly and Mr. Falman, opined that it *would not* be contrary to the public interest to grant the variance. Mrs. Belcher opined it *would be* contrary to the public interest. The vote was 4 (*would not*) and 1 (*would*). The Board voted 4 to 1 that the criteria was satisfied.

Criteria 3. Denial of the variance would result in unnecessary hardship to the power because:

a. The zoning restriction as applied to the property interferes with the reasonable use for the property, considering the unique setting of the property in its environment such that:

Mr. Ciardelli opined that even with all the good things Mr. Musso has planned for the property, the question is if the use he proposes is a reasonable use for the property. He noted that there were many other things Mr. Musso could do with the property other than operated a business there, and does not feel that the zoning restriction interferes with the reasonable use of the property. Mr. Falman opined that the fact that there is already an occupied residence on the property shows that there is an existing use for the property. He also noted that there is no unique setting of the property that would distinguish it from any other property in the neighborhood.

Mrs. Belcher noted that Mr. Musso does not need to prove there is no other use for his property, as his request is reasonable, but that there is something unique about the property that would create a hardship. She does not feel there is anything unique with the property. Mr. Allen opined that the slope at the rear of the property does not really make it any more unique than the property of Mr. Musso's neighbors.

Mr. Allen, Mrs. Belcher, Mr. Daly, Mr. Ciardelli and Mr. Falman, opined that denial of the variance *would not* interfere with the reasonable use for the property and that there were no unique characteristics of the property. The vote was 5 (*would not*) and 0 (*would*). The Board voted 5 to 0 that the criteria was not satisfied.

b. That no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property because:

Mr. Allen noted the zoning ordinance was put in place to avoid businesses or industry in residential zones. Mr. Falman agreed and noted that the fact there was a pre-existing business there does not apply. Mrs. Belcher, Mr. Ciardelli and Mr. Daly and agreed. The collective opinion is that there is a fair and substantial relationship between the purpose of the zoning ordinance and the restriction on the property. The vote was 5 (*is*) and 0 (*is not*). The Board voted 5 to 0 that the criteria was not satisfied.

c. The variance would not injure the public or private rights of others since:

Mr. Daly explained that this criteria goes hand-in-hand with criteria #1. Mr. Musso's neighbors have the right to not have a business located in their neighborhood. Mr. Allen, Mrs. Belcher, Mr. Ciardelli, and Mr. Falman agreed. The collective opinion was that the public or private rights of others would be injured. The vote was 5 (*would*) and 0 (*would not*). The Board voted 5 to 0 that the criteria was not satisfied

Criteria 4. Granting the variance would do substantial justice because:

Mrs. Belcher noted that substantial justice would be done if Mr. Musso could use his property for the purpose that he bought it. Mr. Allen, Mr. Ciardelli, Mr. Daly and Mr. Falman agreed. The vote was 5 (*would*) and 0 (*would not*). The Board voted 5 to 0 that the criteria was satisfied

Criteria 5. The use is or is not contrary to the spirit if the ordinance because:

Mr. Daly noted that this criteria was as difficult to meet as the hardship criteria. What is the purpose of the ordinance and would the proposed use be contrary to that ordinance? Mr. Ciardelli, Mr. Daly, and Mr. Falman agreed it would be contrary to the spirit of the ordinance. Mrs. Belcher stated she had concern with the dangerous corner and in her opinion, it would be against the health and safety of the community to grant the variance. Mr. Allen agreed with the other Board members. He stated that the Board was directed by the rules to only grant variances to those that prove all the points of the criteria. Mr. Allen, Mrs. Belcher, Mr. Ciardelli, Mr. Daly, and Mr. Falman opined the use proposed would be contrary to the spirit of the ordinance. The vote was 5 (*is*) and 0 (*is not*). The Board voted 5 to 0 that the criteria was not satisfied

Mr. Daly reviewed that criteria 1,2, and 4 were satisfied; criteria 3 and 5 were not satisfied.

Mr. Daly asked for a motion on the application.

MOTION: Mr. Falman **MOVED** that the variance be **DENIED** for the application of Mr. Dan Musso seeking a use variance from Article VIII - USES PERMITTED and a variance under Article III - DISTRICTING for a business in a residential zone. Mr. Ciardelli seconded. The vote was five "ayes" and the motion carried.

Mr. Daly closed the public hearing.

Messers Musso thanked the Board for their time.

Mr. Daly informed the applicant that he had 30 days in which to apply for a rehearing.

Board Business

Mr. Daly polled Board members to ascertain when to meet in the months of November and December, as the regular meeting dates fall on Thanksgiving and Christmas. The Board chose November 18th and December 30th as alternate dates to meet. Mrs. White will check if these dates are available with the Selectmen's Office.

The meeting was adjourned at 9:20 PM.

Respectfully submitted.

Barbara White
Recording Secretary

John Daly
Chairman