

BOARD OF ADJUSTMENT

EAST KINGSTON

October 26, 1989

Members present: William DiProfio, Alt. Interim Chairman; David Ciardelli, Richard Smith, John Daly, and Joseph Conti

Mr. DiProfio called the meeting to order at 7:20pm.

Mr. DiProfio identified himself as a Selectmen and notified the public that there was no appointment of a new Chairman to date. Mr. Donald had requested that Mr. DiProfio chair the meeting this evening. He further stated that Mrs. Patricia Keans is a member of the Board of Adjustment, however, she will not participate because she is an abutter of the Carsan Development Corp. property in question this evening.

Mr. DiProfio read the entire Public Notification and stated that it has been published in the Exeter Newsletter, abutters have been notified, and posted at the East Kingston Post Office and Town Hall. (1989-04)

Mr. DiProfio recognized Atty. Francis F. Lane, Jr. of Aeschliman & Tober, P.A. who is representing Carsan Development. Mr. Lane registered an objection to the seating of John V. Daly at this hearing. Atty. Lane has determined that Atty. Daly is a member of the law firm serving East Kingston. With recognition that Ann Thompson is directly servicing the town as counsel, Mr. Lane feels there could be a conflict of interest.

Mr. DiProfio noted the objection and ruled that Atty. Daly would serve on the Board this evening and have his vote cast as a regular member.

Atty. Lane gave a brief background of this case. Carsan Development purchased the 7 lots on Pinewoods Road from E. Melvin Bowley. Seven residences were constructed on these lots. Certificates of occupancy were issued for Lots 1, 4, 5, 7, and 10. These lots were subsequently sold and have occupancy permits. Lot #6 received a building permit and a driveway permit, a common driveway permit. The original driveway permit was requested.

Mr. Joseph Conti produced the original driveway permit and gave it to Atty. Lane.

Atty. Lane noted the driveway permit was signed by Richard Smith, Jr. This plan shows a common driveway for Lots #5 and #6. A copy of this plan is attached. [EK-A]

A subsequent Subsurface Disposal System also shows this common driveway. A copy of this plan is attached. [EK-B]

Atty. Lane stated that all plans show the common driveway, Lots #5 and #6 show construction underway and an occupancy permit was issued with the common driveway shown clearly on plan [EK-C]. Referring to [EK-A] Final Subdivision, an application of variance to Article VI, Section E to permit construction of a common driveway was submitted to the ZBA. This resulted as Joseph Conti, Building Inspector said an occupancy permit could not be issued because of the common driveway.

Atty. Lane then addressed the five criteria that must be met in order to obtain a variance as they relate to Carsan Development's request:

1. No diminution in value of surrounding properties would be suffered. Answered in negative as the body of water in front of Lot #5 & #6 enhanced the design of one driveway and one bridge to accommodate the access to these lots. The owners of Lot #5 were aware and the residence on Lot #6 was completed.
2. Granting the permit would be of benefit to the public interest. Answered in affirmative as this configuration best accommodates the wetlands, making the traversing of the wetlands necessary only once. The state favors the construction of common drives on public ways in such cases as well as for safety reasons.
3. Denial of the permit would result in unnecessary hardship to the owner seeking it. Answered in affirmative as denial would result in a hardship because of the configuration of the existing body of water. There are special features of the land where enforcement would serve no constructive purpose. This distinguishes this property from other parcels without water in the area.
4. By granting the permit substantial justice would be done. Answered in the affirmative as it constitutes the best use of the land without interference with other property owners and unnecessary intrusion of other natural features of the land.
5. The use must not be contrary to the spirit of the ordinance. Answered in the affirmative as the construction of the common driveway represents practical means of access considering the features of this land.

Atty. Lane explained that a variance introduces some flexibility in terms of an ordinance. This is a special parcel of land and an unnecessary hardship would result and a variance would be appropriate.

Atty. Lane stated in summary that the Residences on Lots #5 and #6 were built in accordance with the building and driveway permits showing a common driveway. The construction was done and progressed with the knowledge of the Building Inspector. Lot #5 was clearly conveyed with an easement. [EK-E] Lot #6 owner is and has been held up for some time. The request for a variance comes within the criteria and there is sufficient evidence to support the granting of this request.

Mr. DiProfio asked for abutter's remarks.

Mrs. Keans stated that she is the abutter most directly concerned with this situation as she is the owner of one of these lots.

Atty. Lane objected to Mrs. Keans input at this time stating that she is a member of the Board of Adjustment and may exert undue influence over the Board; she has a direct monetary interest in this situation and he questioned that she should be present at this hearing.

Mrs. Keans also objected to the remarks and objection of Atty. Lane.

Mr. DiProfio stated that Mrs. Keans would be allowed to participate in this hearing. He said that she would be acting as an abutter. Mr. DiProfio stated that her statements would not influence him and he cannot imagine a case law that would support such action. Mr. DiProfio stated that Mrs. Keans has excused herself from voting and that as an abutter she will have her say.

Mr. Daly stated that Mrs. Keans will influence the Board only with facts about this hearing. She has issues that will be clearly set out. Mr. Daly asked if these issues are in direct conflict to her contract.

Mr. DiProfio stated Mrs. Keans influence would be as any other abutter on this Board.

Mrs. Keans stated that she takes issue with the 20 day appeal for rehearing process. She noted that more than 20 days have passed since the first decision. Regarding the wetlands she stated that the hardship to put in another driveway was in error. She feels the diminution of value to her property exists as the resale with a common driveway is definitely a hindrance. She stated the wetlands is a swamp, not a stream. Seven photographs showing the area were given to the Board. She stated that these were taken after a very heavy rain and that there is a very little stream. She suggested that putting in a second driveway would necessitate removal of a couple of trees, some of which are dead anyway, and this would be relatively easy. She expressed the liability concerns over her ownership of the common driveway should her dogs or future children be in danger; or her liability for traffic to the other lot.

Mrs. Keans stated that she was aware of the common driveway when purchasing the property, but didn't like it. She was told the correct procedures were adhered to and the brokers told her there was nothing that could be done about it. They said that it called for this easement. [EK-E]

Mr. Daly asked Mrs. Keans if her deed calls for the easement as stated.

Mrs. Keans answered "yes". She then asked if the proper variance was obtained to put the driveway there.

Mr. Keans stated that he still has problems with the proper application of the 20 days for filing for a rehearing. He also noted that the RSA states that a rehearing will have substantial new evidence. Mr. Keans has concerns about the resale value of his property. He stated that after the original decision, the driveway was repaved. He feels it seems like a case of "it is done, now get a variance to justify the deed", he feels it is working from bottom up instead of top down.

Mr. DiProfio asked Atty. Lane to address the 20 day appeal process.

Atty. Lane explained there were a series of defects following the first appeal. He said his client adequately shows the defects as attachments to the application. Namely: his client didn't receive a copy of the final decision, there were no minutes available until August 1989. Atty. Lane said they feel it is a conglomerate of minutes taken from notes of 3 different sets of meetings. He feels that the 20 day rehearing process is moot by the granting of this meeting.

Atty. Lane presented the Easement of Land [EK-E]. He noted that it references the conveyance of Lot #5 to the Keans. This is included in the deed and the original Purchase & Sales Agreement that was signed by the Keans. It was clearly set out and taken into consideration in the purchase price of the property. Atty. Lane stated they have entered into this contract and now they are coming by and saying the developer should place an additional driveway. He asked the Board to weigh the evidence in arriving at their decision.

Mr. DiProfio stated that because of administrative deficiencies and some big questions arising over the original application, and the conduct of subsequent meetings; given Carsan Development was not invited to the second meeting; the Board of Selectmen advised a rehearing, with no prejudgement on the decision to be made. The decision will be done tonight and will be published so that there will be no further question of not knowing the result by parties involved.

Mr. DiProfio asked for input from other abutters or concerned persons.

Mr. William Young, abutter and owner of Lot #7, stated that he came because of curiosity as to what this was all about. He asked if there would be another driveway and where it would be located.

Mr. Richard Smith stated there was a driveway and a culvert planned for both lots and this was changed to a common driveway.

Mr. Smith maintains that Carsan had a driveway with a temporary culvert. He asked where they got the dual driveway when the town doesn't permit them. The permit was issued to Mel Bowley.

Atty. Lane reminded that the Building Inspector had signed the driveway permit with the dual driveway. He stated it is clear the driveway permit was submitted for Lot #6. He referenced RSA 676:13, paragraph 1: "The building inspector shall not issue any building or occupancy permit for any proposed construction, remodeling, or maintenance which will not comply with any or all zoning ordinances, building codes, or planning board regulations which are in effect."

Mr. DiProfio stated that an occupancy permit was issued for Lot #5.

Atty. Lane stated it ties in with the Sewage Plan [EK-B]. With the configuration shown, the Building Inspector signed off and this would constitute a hardship itself to deny.

Mr. Ciardelli stated the permit was issued to Mr. Bowley to construct on Lot #6. He then asked at what point Mr. Bowley was when he sold.

Atty. Lane stated this is not the issue before the Board. The Building Inspector denied an occupancy permit and they are seeking the variance from Article VI, Section F, which is attached as an Exhibit to the motion. The applicant is required to get a variance, the issue of Mr. Bowley is not before the Board. The transfer of a Building Permit deals with Article IX, Section A - permit transfers between individuals or between lots - is not applicable in this case.

Atty. Lane addressed other questions in regards to the seven lots with residences:

- Lot 1 - Residence constructed & occupancy permit issued - April 87
- Lot 5 - Residence constructed & occupancy permit issued - April 87
- Lot 7 - Residence constructed & occupancy permit issued - April 87
- Lot 8 - Residence constructed & occupancy permit issued - July 25, 89
- Lot 9, 11, 12 Residence constructed & occup. permit issued - Jul 25, 89
- Lot 10 - Residence constructed & occupancy permit issued - Sep 88 after the first hearing.

Atty. Lane referred to RSA 676.13 for Building Inspector's obligations and stated that the Building Inspector is now imposing it, with one occupancy permit for a lot with a common driveway.

Mr. Smith stated that all other driveway permits are single lot driveways, the same as this was for Lot #6 (a single lot driveway).

Mr. DiProfio stated that Lot #5 was issued a driveway permit.

Mr. Conti stated that Lot #5 does not have a driveway permit.

There was discussion about the present owner being responsible for the error.

Mr. Keans stated that he feels they are being punished for the administrative mistake.

Mr. DiProfio stated that the Board would retire to the downstairs area for an Executive Session to deliberate the evidence heard this evening.

Atty. Lane objected to the Executive Session stating the procedure has not been followed and is not present for such a session.

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AT THIS TIME THE BOARD WENT TO THE LOWER HALL TO DETERMINE THE STATUS OF THE BOARD REGARDING EXECUTIVE SESSION. AFTER DELIBERATION AND REVIEW OF THE RSA GOVERNING SUCH SESSIONS, THE BOARD DETERMINED THERE WAS NO BASIS FOR THIS UNDER THE RIGHT TO KNOW LAWS BASED ON RSA 91-A:3.

THE BOARD RETURNED IMMEDIATELY TO THE UPPER HALL TO CONTINUE THEIR DELIBERATIONS OF THIS REHEARING IN PUBLIC.

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Mr. DiProfio addressed the public at this time, explaining that under RSA 91-A:3 an Executive Session could not be held and the Board would reconvene with deliberations of the Board to be conducted in public.

Mr. DiProfio stated they are charged with conduction of a hearing and to make a ruling from an Administrative decision by the Building Inspector. He referred to the occupancy permit denial of Lot #6 of Carsan Development Corp. because there was no driveway. The application provides the Building Inspector a requirement for a legitimate driveway which was not built. There is a driveway built on Lot #5 which is shown on the Subsurface Disposal System and signed by Patrick Marcoux. He maintains the plan was not signed for the shown driveway, only for the plan of septic. It does not state approval for two lots with one driveway.

Mr. DiProfio stated that in reference to diminution of value, the Keans purchased the property with full knowledge that the two lots would be served with one driveway, which would deny benefits of one driveway. They knew it was there when they purchased it.

Mr. DiProfio addressed the transfer of the Building Permit by stating this was not relevant to this issue, that it is a moot point. The houses are built, and an occupancy permit should exist.

Mr. DiProfio asked for any further facts or opinions from the Board, there being none, from the public.

Atty. Lane stated that the Building Permit for Lot #6 shows the common driveway.

Mr. DiProfio said it doesn't show any driveway.

Atty. Lane stated it shows a plan for a common driveway.

Mr. DiProfio stated that is not the way it was built.

Atty. Lane stated the line may not be correct, but the permit was for a common driveway.

Mrs. Keans stated, in her opinion, the description as read was not for a common driveway.

Atty. Lane said that the Town is taxing Lot #6 as an improved lot with a house [EK-D].

Mrs. Keans stated she does not see that as relevant.

Atty. Lane stated the building was done in accordance with the easement and with the permits, and it is not becoming confiscatory. He stated he does not feel the application is for an Administrative Decision Appeal, but a variance request from Article VI, Section F.

Mr. DiProfio agreed with the variance request and corrected his previous wording.

Mr. Ciardelli stated he studied each point in detail and concluded the following:

1. Keans purported reduction in value of property; being shared with Lot #6 by having the common driveway.
2. Questions the public benefit criteria; the channelling of two driveways on a cul-de-sac would make no difference to safety impact.
3. Questions hardship; no hardship is existing because of inability to sell the house, it might have been easier to put in the second driveway, rather than go through this.
4. Questions the spirit of the ordinance preservation; the spirit of the ordinance would be that each lot is to have its own driveway.

Atty. Lane stated a variance is intended to introduce some flexibility to the ordinance. There is a body of water in front of this lot. He questions the necessity to enforce strictly in this case since one could traverse the wetlands once, instead of twice. The best handling of this was to set out as a common driveway and it remains the best interest of the public. Since this driveway will never be a thoroughfare this is the most sensible way to handle this situation.

Atty. Lane stated that this is in a wetland. The abutters were fully aware at the time of purchase. There is no diminution of property values of Lot #6. The common driveway has been there more than one year, there is no diminution of values of surrounding properties. There are special features of this piece of land.

Mr. Ciardelli stated he has seen this property and feels that this could have been resolved prior to this by placing another driveway.

Atty. Lane stated the Keans did not have to buy the property. He feels the developer built a better quality bridge and placed a four ft. culvert and perhaps this would have been somewhat smaller had it served only one lot.

Mr. Smith asked how this would benefit the public interest.

Mr. Daly asked the amount of water that is there.

Atty. Lane stated the public interest was a malleable concept. A second traversing of the wetlands was not showing good planning technique for roads. The owners are making the best and most sensible use of the properties. Why require two driveways just to adhere to the ordinance. There is flexibility in the ordinance. This parcel of land has a well constructed bridge which is safe and aesthetically pleasing.

Mr. DiProfio stated that he agreed that the public interest is served with not crossing the wetlands twice.

Atty. Lane stated this is sensible as the DOT allows one entrance to cut down on unnecessary entrances especially with the second one located so close.

Mrs. Keans stated this is not the case, they would not be placed exactly side by side. There would be some distance between them.

Mr. Smith stated there is quite a distance between the driveway and the lot lines.

Atty. Lane stated to create two driveways, more trees would have to be removed and the wetlands would be disturbed as well.

Mr. Daly asked what the remainder of the soils were classified.

Atty. Lane showed the Board the plan with the test pits.

The Board was satisfied with the answer to Mr. Daly's question.

Mr. DiProfio motioned to grant the variance.

Mr. Daly second.

Mr. DiProfio polled each Board member for his vote. They were cast as follows:

Joseph Conti	Yes
David Ciardelli	No
John Daly	Yes
Richard Smith	Yes
William DiProfio	Yes

Mr. DiProfio then addressed the five criteria with respect to the outcome of this hearing:

1. Diminution of value: This is not the case, abutting property was bought at face value.
2. Benefit of public interest: Traversing over VPD soils over a wetland would not be in the best public interest.
3. Unnecessary hardship: The applicant has been trying for a legal hearing for many years, as the problem was created by the various members of the board, there has been added expenses and the town doesn't gain.
4. Substantial justice: There is no reason to incur added expense.
5. Spirit of ordinance met: This was not contrary to the spirit of the ordinance. The intent was to prevent this situation. Not every lot has this configuration and coming off a state road there are cases of two driveways coming off to one entrance. The spirit did not justify not granting the variance.

Mr. DiProfio declared the motion carried, 4-1.

Mrs. Keans added that she thought they should not have to bear the liability or hardship for the driveway.



This Public Hearing was closed at 9:45.

Mr. DiProfio read the letter from Ann Thompson regarding confidentiality.

Mr. DiProfio stated that there is no Board chairman at this time and that he finds it difficult to attend these meetings. He encouraged the members to try to resolve this problem by the next meeting.

Discussion was brief about the procedures to follow regarding Board hearings. It is felt that some written procedures should be drafted and followed to keep the members directed.

The meeting was adjourned at 9:55pm.

Respectfully submitted.

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Nancy J. Marden, Secretary/Clerk