

TOWN OF EAST KINGSTON, NEW HAMPSHIRE
JOINT MEETING OF THE SELECTMEN, PLANNING, AND ZONING BOARDS
October 29, 1998

FILE

PRESENT:

Board of Selectmen: James Roby Day, Jr. – Chairman, Donald C. Andolina, and John L. Fillio.

Planning Board: Richard A. Smith, Sr. – Chairman, Edward C. Johnson – Vice Chairman, and Alternate Beverly A. Fillio.

Zoning Board of Adjustment: John V. Daly – Chairman, David Ciardelli, Norman J. Freeman, Edward A. Cardone, and Alternates Charles F. Marden and Peter A. Riley.

Absent: *Planning Board:* Dr. Robert Marston, Catherine J. George, and Alternate Robert Nigrello. *Zoning Board of Adjustment:* David C. Boudreau.

OTHERS PRESENT:

Glenn P. Clark – Building Inspector, Deborah G. Gallant – Administrative Assistant, and Becky Hanna – Seacoast News Correspondent.

Board of Selectmen Chairman James Roby Day, Jr. opened this October 29, 1998 Joint Meeting of the Boards, held at the East Kingston Town Hall, at 7:06 p.m. He stated that in his opinion, he would like to see this type of meeting between the boards institutionalized. He then requested that each person present identify himself for the record.

Mr. Day went on to say that an agenda has been generated to give the meeting direction and that the interoffice memorandum distributed earlier lists items the Selectmen would like to see addressed. He then expounded on a matter of misunderstanding by the Selectmen's office regarding the zoning ordinance. He gave this misunderstanding as an example of why joint boards meetings should be encouraged – to attain clarification of the ordinances amongst the boards.

Mr. Day then requested that each board member state his/her expectations of this meeting.

John L. Fillio, both Selectmen member and ex-officio to the Planning Board, stated that since his coming aboard in March of 1998 he has seen disparity between the Planning Board and the Board of Selectmen. He stated that each board appears to interpret the ordinances differently and that this alerted him. He then questioned if the ZBA is supposed to be adversarial to the other boards.

He went on to say that joint meetings of the boards might help this problem. He asked if both the ZBA and Selectmen could/should be included in the Planning Board's work, (i.e., writing and amending the ordinances). He expounded on his inquiry by noting that the Planning Board writes an ordinance and the Selectmen, who are charged with enforcing it, may not or don't understand it.

Richard A. Smith, Sr., Planning Board Chairman, responded that at the present time there is a Selectman sitting on the Planning Board and that it may be a good idea to have one also sit on the ZBA. He stated that this would result in a direct communication between the two boards.

John V. Daly, Zoning Board of Adjustment Chairman, stated that a member of the Board of Selectmen already attends each ZBA meeting. He added that although one is usually present, there may not be enough discussion with him.

Mr. Smith stated that the law allows for a Selectmen to sit on the Planning Board and that there is no law that says a Selectmen can sit on the ZBA.

Mr. Fillio redirected the discussion back to the inclusion of joint boards reviewing the draft ordinances prior to their finalization. He asked if the three boards could get together and discuss the proposed ordinances or amendments before they are final.

Mr. Daly stated that the ordinances as written on the ballot and presented to the town are not always clear. Residents may not be sure what they are voting for or against.

Mr. Day responded that each amendment to the zoning ordinance gets a public hearing for such explanation and that the public's interest and attendance is very poor.

Mr. Fillio stated that his concern is with other board member's understanding, as it is difficult to act on an ordinance if you don't fully understand it and its intention. He added that because the ZBA has the ultimate and final decision on the ordinance's interpretation, it

would be in the best interest of all if the ZBA had a clear understanding of the ordinance and its purpose. He further stated that obtaining the ZBA's view on proposed amendments and ordinances would be helpful.

Mr. Daly replied that Mr. Fillio's suggestion has warrant if it helps members to understand the ordinance. He stated that although the ZBA's role is to interpret the ordinance, the ZBA spends little time doing so, as most cases before the board are requests for variances. He went on to say that variances have specific criteria and guidelines to satisfy. He stated that the ZBA only hears about one administrative appeal per year.

Mr. Fillio stated that the home occupation ordinance provision relating to the 1989 nonconformity is interpreted three different ways by three different boards.

Mr. Daly stated that each board member's interpretation and understanding is also a representation of the cross-section of the town. Some understand the ordinance in one way, others another.

Mr. Fillio responded that this must be sorted out for enforceability purposes.

Mr. Day redirected the meeting to member's expectations.

Charles F. Marden, Zoning Board of Adjustment Alternate member, stated that he perceives the ZBA as sort of a judge and jury of what is written in the handbook. He said that the Selectmen may understand the Planning Board's work but the Planning Board doesn't have to enforce it, thus the Selectmen have a tough job.

Donald C. Andolina, Board of Selectmen member, stated that the problem goes beyond that. He said that the ZBA may be having the same difficulty; as judge and jury they need to understand the ordinance and the law to fulfill their obligation. He stated that acquiring a mutual understanding of the ordinance is necessary for enforceability.

Norman J. Freeman, Zoning Board of Adjustment member, stated that he agrees with Mr. Marden and that because he (Freeman) has lived in East Kingston all of his life, he has a different perspective than of the other new resident board members. He explained that he has a different attitude and outlook than most of the other members.

He went on to say that the board is made up of five members with two alternate members and that the majority of the decisions made by the ZBA reflect a good cross-section of the community. He stated that if the ZBA had met with the Planning Board on other ordinance issues, much of the ZBA's work could have been avoided. He gave the example of septic system setbacks to both Hydric A and B soils. The town's setbacks exceed the State's recommended and scientifically proven setbacks. He stated that at the seminars that he has attended, the understanding was that the State's setbacks are more than adequate. The town's setbacks require an additional 25-feet without data to support it. He stated that he thought the additional 25-feet required by the town was the Planning Board's way to limit growth.

Edward C. Cardone, Zoning Board of Adjustment member, agreed that the board's should try to work closer together. He stated that he also thinks the town should drop the town regulations to State standards. He said the ZBA goes by the guidelines as provided by the State and they (ZBA) make the best decision they can as each case has the potential to end up in court.

Mr. Daly stated that the town's ordinance is more conservative than the State's setbacks.

Mr. Freeman added that there is no rational reason for this.

Mr. Day responded that local conditions allow towns to be more restrictive.

Glenn P. Clark, Building Inspector, stated that creating more restrictive standards gives the town more flexibility in their decisions. He said that when a property owner comes too close to the town's setback, or he can't meet the town's setback, the 25-foot difference allows the town to relax its standards without imposing on the State's setbacks. He stated that the resident just has to get a variance from the ZBA.

Mr. Freeman responded that the ZBA does not have the authority to waive State standards.

Mr. Daly stated that if there is a rational for stricter standards then everyone should know this.

David Ciardelli, Zoning Board of Adjustment member, stated that this additional 25-feet may be a more restrictive growth control tool and that the town goes one step further than the State.

Mr. Smith responded that the State standards come with more crowding and that towns have the authority to exceed the State's standards. He inquired if property owners have come to the ZBA for waivers from the State's setbacks.

Mr. Daly replied that the ZBA does not have the authority to grant a variance from a State setback; variances are granted from the town's zoning ordinance. He stated that the ZBA grants conditional approval that each applicant receives State approval and if that applicant can't meet the State's setbacks, then it becomes the State's problem.

Beverly A. Fillio, Planning Board Alternate member, described a scenario where a homeowner whose home dated back to the 1700's had a failed septic system but could not meet the current setbacks for replacement. She inquired if the town had a right to not permit the failed system's replacement because it did not meet the setbacks.

Mr. Freeman stated that the ZBA could permit replacement as long as the proposed plan was the best the applicant could do and it meets State approval.

Mr. Daly added that the use of the property as a residence would be considered grandfathered.

Mr. Marden stated that the State's DES is liberal in their approval if the engineer can come up with a viable plan.

Peter A. Riley, Zoning Board of Adjustment Alternate member, stated that having a Selectmen sit on each board for input purposes seems like a good idea. He went on to say that every decision he has been involved with on the ZBA has been individually based. He stated that he thinks this meeting tonight is a result of the role the ZBA played in an appeal made this past summer.

Mr. Day responded that the appeal issue Mr. Riley is referring to did trigger this meeting, but it was not the sole reason for it.

Mr. Riley stated that ZBA decisions are factually based and that ZBA members have a strong understanding of the law. He said that each decision is based on the information presented. He further stated that that Mr. Day disagreed with the ZBA's decision in the Young case and that that was a presentation issue.

Mr. Andolina inquired as to what criteria or guidelines are used to determine grandfathered status. He asked if a pile of invoices is it. He then stated that a clear checklist of requirements, like the ones in a variance request, should be used.

Mr. Riley responded that a grandfathered issue is a factual situation.

Mr. Daly added that a checklist is impossible and that there is no guidance from either the Supreme Court or Legislature. It comes down to what is reasonable to the board members and how each member views the evidence.

Mr. Riley stated that these types of appeals are hardest as they are factually and presentation based.

Mr. Ciardelli stated that the term "robust debate" defines what takes place many times on the ZBA. He said that he could only think of a few times when the whole board voted the same. He further stated that each case is given a lengthy debate process and that the ZBA's view may not be the same as the Selectmen's. This may be healthy for the town, as the ZBA is a cross-section of town representation. He stated that not all boards will share the same view and although this may be frustrating at times, it is healthy and the town is served well [when not all is agreed upon].

He went on to say that when the ordinance is not clearly defined at the voting booth, the problem begins there. It is important for the boards to know the source/intent or spirit of the ordinance, (i.e., where did its roots come from?).

Mr. Andolina replied that checks and balances are important.

Mrs. Fillio stated that she is frustrated with the home occupation ordinance and its reference to 1989. She said that when the ordinance was adopted in 1989, business owners had six months to come forward and register with the town. It is now ten years later and businesses are still coming forward claiming grandfathered status. She asked why these home occupation ordinance violators have not been fined, as provided for in 10.10 and how can the ZBA say the business is okay when the business owner never signed up in the first place? How long can alleged grandfathered businesses come out of the woodwork?

Mr. Daly replied that there is no limit on how long such alleged businesses can come forward.

Mrs. Fillio reiterated that the town passed the home occupation ordinance back in 1989 and business owners had a time frame in which to come forward and register. Those who did not are in violation of the ordinance, illegal, and shouldn't have rights. She stated that she would like to see some basic understanding on this issue with all the boards.

She went on to say that business owners who are in violation of the ordinance should be fined.

Mr. Cardone agreed that if a business owner were to come forward eleven years after the ordinance's adoption, they should be required to pay past permit fees with late charges.

Mr. Daly offered the analogy of a business owner who has been operating a business in town for fifteen years and finally comes forth claiming he didn't know he was supposed to get a permit back in 1989. This could be an estoppel case and can't be denied because the town didn't enforce the ordinance. He stated that maybe the ordinance should have provided for sanctions for not coming forward in time.

Mrs. Fillio replied that there seems to be no beginning or ending point to this issue.

Mr. Daly stated that the ordinance has not been consistently enforced.

Mrs. Fillio inquired that since the three boards have met, would it be possible to amend the home occupation ordinance in an effort to get all businesses in town registered. She stated that it is not fair to the rest of the business owners who are registered and pay permit and renewal fees.

Mr. Day stated that the New Hampshire Municipal Association says that there is no time limit on grandfathered issues. Anyone has the right to come forward and try to prove it.

Mr. Daly stated that 15-year instances strain credibility. He said that only two cases have come before the ZBA in the past few years.

Mrs. Fillio asked if something could be put in place to collect the past fees and collect a penalty.

Mr. Riley stated that in the Young case, he didn't agree with the estoppel idea. He said that he thought the estoppel claim would fail in court.

Mr. Clark stated that he takes his lead from all three boards and that he feels stuck between the ZBA and the Planning Board. He stated that there should be more communication between the two boards although he is not sure how to do it. He asked if a Planning Board member could sit on the ZBA.

Edward C. Johnson, Planning Board Vice Chairman, stated that he agrees with the ideas presented and that it is difficult for the Planning Board to look at the individual cases on merit. He said that the Planning Board can't keep picking and choosing who fits into the provisions. The home occupation ordinance needs to be cleaned up. He stated that this business of coming forward now and not earlier is very frustrating.

Mr. Andolina stated that the enforcement issue is a difficult one and not clearly understood. He explained that the first step in processing a violation is discovering it, which takes time. Pursuing a resolution or remedy in a lawful manner does not include just slapping the business owner with a fine. He stated that the wheels of justice turn slow and often cases are dragged on for years. He said that he is not making excuses, enforcement should have been acted on earlier. Enforcement is not the only absolute solution to the problem.

Mr. Johnson stated that residents feel that if one person is allowed to do it, then others can, and do try. The feeling is if they hang in long enough with their battle, the town will eventually give in. He stated that somewhere in the process it should clearly define what is allowed.

Mr. Andolina asked if the PA-28 Inventory forms could be used for acquiring how many businesses are in operation. The town could use it as a legal standing if for ten years a resident stated no business on property (for ten years in a row) and on the eleventh year claim the business.

Mr. Daly stated that it could be used as a credibility issue. He stated that his is not sure it will preclude someone from making that argument again.

Mr. Riley stated that presentation is more persuasive.

Mr. Fillio stated that he is bothered that the townspeople voted in the district of agricultural/residential and now we are allowing businesses. He questioned if the town was being properly served by this.

Mr. Daly responded that the townspeople also voted in the home occupation ordinance.

Mr. Smith stated that he still believes now what he did back then; that the home occupation ordinance wouldn't work. A home occupation is in the home, not in any accessory building. If it's not inside the home it must not be a home occupation. Commercial businesses should be allowed only in commercial districts, not residential districts. He stated that the business can't expand either. He then noted an lawyer's office up the road whose business is located in an accessory building (the barn), and has been expanding each year and that nothing was ever done about it.

He went on to say that the Selectmen send the Planning Board to fix these things when they should go to the ZBA. The Planning Board has already dealt with these issues at the applicant's first public hearing.

Mr. Daly stated that one problem he sees is that it starts with inconsistent enforcement.

Mr. Day stated that there are three autonomous boards with different responsibilities. The Planning Board is where it starts – they put the law together. The Board of Selectmen is the policing force who enforce. He then noted that the Building Inspector is now also the Code Enforcer. He stated that the Selectmen and the Code Enforcer get the interpretation as well as recommendations from the Planning Board.

He went on to say that the ZBA is the last resort to adjudicate differences of opinion prior to court proceedings. He stated that there is not a lot of responsibility overlap in each board's functions.

Mrs. Fillio stated that the Board of Selectmen can't force the ZBA to make decisions if they (Selectmen) don't enforce the ordinances. She said the Selectmen should take an assertive position and enforce ordinance violations.

Mr. Day stated that the Planning Board writes the law and the Selectmen execute it. The Planning Board and ZBA can interact but the Selectmen are completely out of the loop.

Mrs. Fillio read Article X.10:

Enforcement: This section shall be administered and enforced by the Board of Selectmen. Any person who violates the provisions of this section shall be fined \$100 for each offense. Each day that a violation is continued shall constitute a separate offense. No action may be brought about under this provision unless the alleged offender has been given at least 7 days notice from the Selectmen by certified mail, return receipt requested, that a violation exists.

She then stated that the Board of Selectmen have been given the authority to execute this provision.

Mr. Daly inquired how the Selectmen are to know if a violation exists.

Mrs. Fillio responded that most complainants wish to remain anonymous.

Mr. Andolina asked what recourse the Selectmen should take if a complaint was filed, and the Selectmen visited the site and could not see any violation. To the complainant it would appear the Selectmen are not doing their job. He stated that evidence is necessary to proceed with a violation complaint.

Mrs. Fillio stated that in the Young case, the violation was obvious and a member of the Board of Selectmen lived directly across the street. She said that somewhere someone needs to stand up and be counted.

Mr. Clark responded that some businesses are easy to spot while others are not. Not all violations are obvious.

Mr. Fillio stated that in executing enforcement, policing can not be expected. He then said that the complaint must be submitted in writing.

Mr. Johnson stated that some residents have been denied a permit but still continue to operate. He asked how should this be enforced. He stated that if you can't enforce the ordinance, then don't have it (ordinance) at all.

Mr. Day inquired how the town would fund all of these enforcement issues.

Mr. Andolina added that the \$100 a day process must be done with specific steps. It may take time to discover if there actually is a violation. He continued to say that the town spent thousands and thousands of dollars on the Young case. It may be too costly to the town to enforce the home occupation ordinance.

Mr. Daly stated that he didn't think the ordinance is unenforceable, it just needs to be consistently enforced. Once the wrong-doer realizes that the town will enforce its ordinances, he will lose interest. Right now it appears the town has lost interest – not the wrong-doer.

Mr. Riley added that the Selectmen may not be able to enforce 100% but 20-50% is better than 0%.

Mrs. Fillio asked how many home occupation violations have been paid.

Mr. Day replied that no one has paid during his past three years as Selectmen member.

Mr. Ciardelli stated that the law is there as a deterrent, not a moneymaker.

Mrs. Fillio responded that no one speeds through Newton because everyone gets stopped. The enforcement is great. She stated that the same philosophy should be used here. If the business is not on file, it is a violation and enforcement measures must be taken.

Mr. Andolina reiterated that the \$100 a day fine has a specific process, a whole series of steps come into play.

Mr. Day redirected the issue to the "cross-pollination" of the Planning and Zoning Boards. He stated that NHMA indicates that there can be a joint member on both boards, as long as it is not the ex-officio. He asked if this would be acceptable to the boards.

Mr. Smith stated that years back he thought it was mandatory for the Planning Board chairman to also sit on the ZBA. Once he found out it wasn't he stopped going.

Mr. Daly informed members of the ZBA's schedule of meeting the fourth Thursday of each month as is needed when an application comes in. He stated that meetings can and have been held on other nights.

Mr. Andolina inquired as to how many enforcement cases Sanders and McDermott has handled for the town this year.

Mr. Daly recalled two.

Mr. Day stated that he does not distinguish between regular and alternate members as alternates must also be up to speed on each issue.

Mr. Riley stated that he would like to be appointed to an alternate position on the Planning Board.

Mr. Day stated again that he would like to see this type of meeting institutionalized and noted that the boards should meet again later in the year when zoning amendments are being considered, as this would help the interpretation process.

Mr. Smith stated that all public hearings on the proposed zoning amendments are posted for the public to come, but unless something big is happening, no one comes. He then asked if anyone had any questions or suggestions to improve the home occupation ordinance in time for March Town Meeting.

Mr. Fillio stated that he disagrees with the Rockingham Planning Commission's planner and that he thinks the ordinance can be written more clearly. He said it is too vague as it reads now.

Mr. Smith stated that you can't have a commercial business in a residential zone. All the businesses let in back in 1989 were commercial businesses. He continued to say that the Selectmen back then didn't pay attention. An ordinance was written to let everyone get on record and continue their operation. The smart ones came forward and they are now considered legal. He stated that all the others who did not come forward are now illegal.

Mr. Fillio stated that at a Planning Board meeting, the suggestion was made that at the annual review of the home occupation renewals an inspection of the business should be taken to ensure compliance. He asked if this can still be done.

Mr. Daly responded that the idea of everyone getting a home occupation permit must be subject to an inspection is doable.

Mr. Fillio stated that there are over forty home occupations in town and with an inspection, they (Selectmen) can try to get a hold on expansion compliance.

Mr. Clark stated that as Code Enforcer, he is sure that some homeowners would allow him to inspect while others would not.

Mr. Daly stated that the inspections can be made a part of the home occupation process.

Mr. Ciardelli stated that the inventory suggestion made earlier is also a good idea.

Members entertained discussion on the PA-28 Inventory form which included how and why it is used as well as its costs to use it. It was agreed that the use of the information retrieved from the form outweighed its administrative costs. It was also noted that Mr. Daly will inquire into the legality of placing home occupation questions on the form.

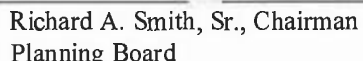
With no other discussion, the meeting adjourned at 8:41 p.m.

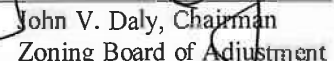
Respectfully submitted,

Catherine Belcher
Secretary
East Kingston Planning Board
East Kingston Zoning Board of Adjustment

Minutes completed and on file November 2, 1998.


James Roby Day, Jr., Chairman
Board of Selectmen


Richard A. Smith, Sr., Chairman
Planning Board


John V. Daly, Chairman
Zoning Board of Adjustment