

FILE

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

November 14, 2001

AGENDA

7:30 Appeal from Administrative Decision – Suzanne J. Ryan (2001-03)

Members attending:, Vice Chairman David A. Ciardelli, Norman J. Freeman, , Alternate members Richard A. Cook, Nathaniel B. Rowell and Peter A. Riley.

Absent: Chairman John V. Daly, Donald C. Andolina, David C. Boudreau and Alternates Edward A. Cardone and J. Roby Day, Jr.

Others attending: Suzanne J. Ryan, Atty. Sharon Cuddy Somers – representing Suzanne J. Ryan.

Appeal from Administrative Decision - Suzanne J. Ryan: Vice Chairman David Ciardelli opened the public hearing for Suzanne J. Ryan's appeal from administrative decision at 7:30 pm. Noting the absence of three regular members of the board, he designated alternate members Richard Cook, Nathaniel Rowell, and Peter Riley to participate in voting matters before the board.

Vice Chairman Ciardelli announced that this was a public hearing on the application filed by Suzanne J. Ryan and received by the Board on October 19, 2001 for an appeal from administrative decision regarding a letter from Town Counsel, on behalf of the Board of Selectmen in response to a September 9, 2001 letter to the Building Inspector, Glenn Clark in relation to Article III-A, Sections A-E, especially Section D (6), and Article IX, Section A. The application was signed by Sharon Cuddy Somers for Suzanne J. Ryan.

At the request of the Vice Chairman, the Recording Secretary noted that the application was received on October 19, 2001 and notices for the public hearing were posted on October 30, 2001 at the East Kingston Town Offices, the East Kingston Post Office, and in the November 6th edition of the Exeter Newsletter. Abutter notification was sent out to eleven abutters on October 30, 2001 and all application fees have been paid.

Vice Chairman Ciardelli then recapped the series of events as he understood them:

- 1) A letter from Donahue, Tucker & Ciandella dated September 5, 2001 was sent to the Building Inspector, Glenn Clark;
- 2) Glenn Clark through the Selectmen asked Town Counsel (Sanders & McDermott) for an opinion as requested by the applicant's attorney;
- 3) Sanders & McDermott sent an advisory opinion to Donahue, Tucker & Ciandella dated September 21, 2001; and
- 4) Donahue, Tucker & Ciandella filed an appeal on October 19, 2001 .

Atty. Somers stated that the letter from Atty. Edelman (Sanders & McDermott) was more than an advisory opinion. It was a response from the town.

Vice Chairman Ciardelli stated that he has studied the application and he is not convinced the Zoning Board of Adjustment has jurisdiction over this case for the following reason:

He quoted RSA 674:33 I (a): *The zoning board of adjustment shall have the power to hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16...*

Based on that, nothing has really happened yet. The applicant is asking for an appeal from a decision that has not taken place. He stated he had a problem with that– he doesn't believe the Board has jurisdiction. The applicant's attorney has stated her opinion and has asked the Building Inspector to see if Town Counsel concurs with her interpretation of the Zoning Ordinance. As spelled out in her own letter, Mrs. Ryan has not yet sold the property and has not received a building permit yet and has not been denied to transfer her building permit to another person or to transfer her "place in line." This hasn't taken place; this letter is a "what if" letter. The Board does not have jurisdiction here. The applicant is asking for relief from something that hasn't even happened.

He then asked Atty. Somers to explain to the Board why she thinks the Board has jurisdiction. He directed her to keep all her comments to the jurisdiction part and not to the transferability of building permits. Once her explanation is given, he would than ask the Board their opinion.

Atty. Somers stated that she is an attorney with Donahue, Tucker & Ciandelli and is representing Suzanne Ryan in this matter. On behalf of those members who are not familiar with this case she offered the following synopsis of the events that led up to this appeal:

Last spring and summer she was before the Zoning Board regarding a plot of land located on Haverhill Road. This lot used to have a house on it that burned down. When Mrs. Ryan applied for a building permit she was denied and appealed to the ZBA. It was their position that the Growth Control Ordinance was not applicable to her obtaining a building permit. They appealed to the ZBA for an appeal from the Building Inspector's interpretation of the Growth Control Ordinance and for a variance from it. Both were denied, and they have since appealed to Superior Court.

She went on to say that she then requested the Building Inspector issue a decision (as outlined in the September 5, 2001 letter) as to whether he (BI) concurred with their view. She explained that Mrs. Ryan is marketing the property and wants to have a decision rendered with regard to the Zoning Ordinance and asked the Building Inspector to review their position and to refer to Town Counsel, expecting it would go to them anyway. She said she asked Glenn Clark to respond to the matter of building permit transferability with reference to the Growth Control Ordinance. Under that request she ask the town to render an administrative decision. Two to three weeks later, she received a letter from Atty. Edelman, which was sent because the Selectmen asked him to respond to her letter. In that he gave a form of analysis. She then cited RSA 674:33 and read aloud the same excerpt as Vice Chairman Ciardelli did.

Atty. Somers continued her case and quoted an excerpt from the Zoning Board of Adjustment Handbook dated August 2001 (page 9):

The board of adjustment decides cases where a claim is made that the administrative officer has incorrectly interpreted the terms of the ordinance such as a district boundary or the exact meaning of an article or term.

She stated that this clearly states that the whole purpose of the administrative appeal is for the ZBA to act as an appellant court for various town administrators and officials. She believes this is the case here and the Board does have jurisdiction. As to the point about this being premature... that is simply not the case, her client has asked in her strategy of planning and marketing her property, for an opinion from the town in how to move forward. The decision that was rendered by the town has affected her ability to market the property. She said she does not believe the intent of a administrative appeal is so narrow and restricted that one must actually go to a building inspector, ask for a permit, get denied, and only then have grounds for appeal. The purpose of the statute is much broader than that. On two counts: this is clearly an administrative decision and two, this is clearly an administrative appeal from that decision and the Board clearly has jurisdiction.

At Mr. Riley's inquiry of who this appeal from a decision was from, Atty. Somers replied that under the statute, an administrative decision can be broader than someone going to the building inspector and asking for a permit for a shed and he says no... what is contemplated is more than that scenario, it is also the interpretation of what the zoning ordinance means and it is not always going to be in black and white. And secondly an administrative decision was made at her request of behalf of Mrs. Ryan, an interpretation of the East Kingston Zoning Ordinance. That interpretation was made through the Building Inspector and she assumes the Board of Selectmen, and Town Counsel acting on their behalf, rendered that decision.

She continued to say that the Building Inspector made a decision independent of this letter from Town Counsel and that this letter was a response on behalf of the Board of Selectmen to her request to the interpretation of the zoning ordinance. In this instance it is the Board of Selectmen who made the decision. Mr. Clark may have had some input, but that is not apparent from the documentation she has.

Mr. Riley stated that he doesn't believe the Selectmen did make a decision.

Atty. Somers replied that they did so in responding to her request for an interpretation of the zoning ordinance.

Mr. Riley replied that he disagrees as he does not see this advisory letter meeting the definition of an administrative decision. Vice Chairman Ciardelli agreed. He stated that the last paragraph of her letter that Atty. Somers is asking if the Building Inspector and Town Counsel concur with her view on the transferability of building permits. The letter from Town Counsel says they disagree with her view, but that it is not a decision.

Atty. Somers stated that if Mrs. Ryan were to obtain a purchase and sales agreement on her property, and then went to the Building Inspector or the Board of Selectmen and asked if she could assign her spot in the building permit line, the Building Inspector and/or the Selectmen would not disagree with Town Counsel's interpretation. Town Counsel also said she could not transfer her building permit to another buyer. It is doubtful the Building Inspector or the Selectmen would render a different decision than what Town Counsel advised.

Vice Chairman Ciardelli again stated that this whole issue is speculative. He said Atty. Somers asked for an opinion and one was given. Until something happens like a denial from a building permit request, no official decision has been rendered.

Atty. Somers stated that Mrs. Ryan has asked for the ability to assign her spot in line, she was told in this letter that she could not do that - that is not a what if, that is not hypothetical.

Mr. Riley said he thinks the Board of Selectmen needs to make a decision, then they can appeal it. It is called due process and in his opinion, that has not taken place.

Mr. Rowell stated that it appears the ZBA in their decisions earlier, simply stated the denial being requested is in according to the rules and regulations of the zoning ordinance. They need to be specific in details and only until the rules and regulations are changed, this is the process. The ZBA has said their decisions made earlier are in line with the ordinance as printed.

Mr. Freeman stated that the ordinance says you can't transfer a permit.

Vice Chairman Ciardelli redirected the matter back to the context of whether or not the Board had jurisdiction to hear this case.

Mr. Freeman replied that the applicant asked for an advisory opinion. That does not qualify as a decision. Advisory opinions are not binding.

Vice Chairman Ciardelli stated that the term administrative decision is the language that is appealable. The language that he is concerned with is the enforcement issue. Enforcement is when the action actually happens whether you are denied the permit or not. One seeks relief from the enforcement. One does not seek relief from an interpretation.

Mr. Cook stated that the Board cannot make a decision on the interpretation of administrative officials. The applicant needs to go back to the original process.

Atty. Somers reiterated that she believes this matter is within the Board's jurisdiction and it is the Board's job to interpret the language of the Zoning Ordinance. It is the Board's job to determine whether the interpretation of the ordinance is correct whether or not the administrative decision is correct or incorrect. There will be times that a building inspector, or a code enforcer, or a board of selectmen will make a mistake and the ZBA must function as a court and determine whether or not that official is correct. The decision that has been made in this instance is more than an advisory opinion. She said she asked for an interpretation of her client's ability to assign and transfer a building permit and was told she could not do it. That is the denial. The fact that it came from Town Counsel is irrelevant - it was a decision rendered on behalf of the Board of Selectmen. The Selectmen could just have easily written this letter and it would have been just as binding.

Sending her client back before the Selectmen and writing a new letter asking to transfer the building permit now would only render the same answer. For that reason a decision has been rendered. She said the ZBA has jurisdiction and the duty to see if this interpretation is correct.

Vice Chairman Ciardelli stated that there are a number of issues here. One is the assigning of a placeholder in line. But when Atty. Somers asked the question in her letter of Glenn Clark and further for a reading from Town Counsel... she had a fairly good idea that the transferability was questionable, or else she wouldn't have asked the question in the first place. When the letter came back from Town Counsel there was nothing stopping the applicant from moving forward with her formal request even though the opinion of Town Counsel was not the same as hers. But again, nothing has happened yet. Until it does, the Board does not have the jurisdiction of having the applicant before them seeking a ruling on it. He said before he goes any further he wanted to get a consensus of the Board on this jurisdiction matter.

At this time Atty. Somers asked to confer in private with her client. Vice Chairman Ciardelli then excused her and Mrs. Ryan from the room.

Mr. Rowell stated that the Board is restricted to literal interpretations and the intent of the law is an important consideration but it must be spelled out to be understood. All that has been asked is our opinion on the credibility of the what the administrative decision is based on.

Mr. Cook stated the applicants asked for an opinion and Town Counsel gave them one on the written ordinance. That opinion now refers back to the original ordinance.

Mr. Freeman stated that this is basically a conceptual opinion not a decision.

Mr. Cook then noted RSA 674:33 Annotations Decided Under Law (15) which states:

The duty of the board of adjustment is to "make such order, or decision, as ought to be made" did not extend to the rendition of an advisory opinion, and was satisfied by a finding that a proposed use was not permissible...

Atty. Somers and Mrs. Ryan returned to the meeting and Atty. Somers stated that she wanted to make sure the Board knew Mrs. Ryan was on the waiting list for a 2002 building permit – the fundamental issue that is here and why the board has jurisdiction. If she gets someone to buy her property, that her spot in line can be transferred to the buyer. That was a yes or no question. The answer she was told was no and in her mind that is an administrative decision based on an interpretation of the Zoning Ordinance. The reason it is a decision is because if you treat it otherwise, Mrs. Ryan can't possibly take a course of action that will do anything but hurt her. If this Board does not take jurisdiction on this matter and forces her to go out and find a buyer and then tries to assign her building permit to them at her own risk, and then she goes and tries to get concrete affirmation for this from the Building Inspector and is denied, she will not only have a concrete answer, but she would have lost a sale. Just because her client does not have a name to transfer the permit to, is not a reason to say the Board does not have a concrete set of facts before them. This is no reason for the Board to say it does not have interpretation for which to have jurisdiction and an obligation to hear.

Vice Chairman then asked the Board to decide whether or not they feel they have jurisdiction to rule on this matter. If the answer is yes, then they will move on. If the answer is no then they will leave it there.

MOTION: *Mr. Riley motioned to deny the appeal from administrative decision based on the fact a decision has not yet been rendered from which to appeal. Mr. Freeman seconded.*

DISCUSSION: None.

Vice Chairman Ciardelli called the vote. The motion to deny the appeal carried 5-0.

The Board does not feel it has jurisdiction on this matter as a decision on the enforcement of the zoning ordinance, has not been rendered. The public hearing for Suzanne Ryan ended at 8:21 pm.

OTHER BUSINESS

Minutes: The board reviewed the minutes dated July 12, 2001. Members approved them for the record.

ZBA Roster: Distributed with the agenda was an update roster reflecting the name, address, phone number, and email of the new Recording Secretary, Kathy Gonet.

Term Expirations: It was noted that the following member's terms were up in December 2001. David Ciardelli, Richard Cook, Norman Freeman, and Nathaniel Rowell. Each member expressed his interest in remaining on the board and serving for another term. The Recording Secretary would inform the Board of Selectmen for consideration of re-appointments.

At this time Mr. Freeman wanted it noted in the record the Board's appreciation for Cathy Belcher's years of service to the Board. She will be resigning her position as secretary from the Zoning Board of Adjustment and the Planning Board November 30, 2001.

With no further business, the Board motioned to adjourn at 8:35 pm.

Respectfully submitted,

Catherine Belcher,
Secretary

Minutes completed and on file November 16, 2001.