

TOWN OF EAST KINGSTON ZONING BOARD OF ADJUSTMENT

MEETING MINUTES

November 29, 2022

Pound School
41 Depot Road
East Kingston, New Hampshire

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

AGENDA

Appeal from Administrative Decision – Brad Poole – 116 North Road – Public Hearing

Rules of Procedure – Adoption

Board Members present: Tim Allen – Chair, Dave Ciardelli, Frank Collamore, Nate Maher, Alternate Paul Falman and Ed Robbins – Vice Chair.

Others Present: Attorney Jonathan Flagg, Bradley Poole, Naomi Poole, Brett Smith, and Keith Reynolds.

Chairman Allen opened the meeting at 7:00pm followed by the roll call.

APPEAL FROM ADMINISTRATIVE DECISION – BRADLEY POOLE – 116 NORTH ROAD

Chairman Allen opened the public hearing at 7:00pm for an Appeal from Administrative Decision submitted by Bradley Poole with respect to a Cease and desist Notice of Violation Use of 116 North Road, MBL# 15-03-14, as issued by the Board of Selectmen Chairperson Cacciatore on October 17, 2022 in relation to the Town of East Kingston Zoning Ordinance Article III-B – Residential/Agricultural District and Article XVI – Home Occupations. The applicant, through his attorney, requests the Zoning Board of Adjustment quash the Notice of Violation and instruct the town to take no further action with regard to this property.

He provided an overview of how the public hearing will be held: the applicant shall present his case, followed by board questions, public comment, additional board questions, and then board deliberation. All questions or comments from the public shall be directed to the chair. All members of the public wishing to speak shall provide their name and address for the record.

PRESENTATION BY THE APPLICANT

Attorney Jonathan Flagg, representing Mr. Poole, introduced himself noting he resides in Greenland but grew up in Brentwood, that he understands what small towns are like, thus board members may already know where the Poole's reside. The Poole's are lifelong residents of East Kingston, they began a septic business back in 1999 which evolved into an excavation business in 2001. The town has happily taken vehicle registrations and property taxes over the years and in 2005 they applied for a building permit to build a garage for the business equipment which was approved by the town. He noted he (Flagg) has made a request to the town for copies of documents related to this home occupation case and anticipates having more information by the promised December 5th date.

He went on to present that in November 2021, the Poole's went to register, through the business, a new pickup truck. On December 15, 2021 they attempted to register the rest of their vehicles but the town said no, they had to go to the Planning Board for home occupation approval. The Poole's applied to the Planning Board as instructed and in February 2022, the Planning Board recommended the Board of Selectmen not approve the home occupation. On March 21, 2022 the Board of Selectmen took up the issue. The minutes of that meeting do not reflect a vote to approve or not approve the home occupation. What the Board of Selectmen did say to the Poole's, though not mentioned in the minutes, was that the board would take no further action for a period of one year to allow for them to figure this out. He noted that the Selectmen make a recording of their meetings, however, once the minutes are approved, the recording is deleted. This means there was at one time, a record of this conversation with the Poole's. Since this meeting, the Poole's acquired a new vehicle that they attempted to register with the town clerk who refused to issue a permit as referenced in the RSAs, (separate from the registration) that indicates the business is town-approved. The

town clerk stated the Poole's were in violation of the home occupation ordinance, refused to register the new vehicle and essentially became the decision maker of a zoning issue. Even though the Selectmen did not take issue, the town clerk drove this issue forward which is why the applicants are before the ZBA now. In an effort to support the town clerk, Mr. Cacciatore issued the cease and desist order which gave the Poole's 20 days to comply or appeal to the ZBA. In his opinion, Attorney Flagg believes that since there was no vote by the Selectmen on the home occupation permit, the ZBA can vacate the cease and desist order. Additionally, the applicants are prepared to re-present the home occupation proposal which would speak to the Planning Board's decision to not recommend the home occupation to the Selectmen. To that extent, he submitted a set of photos taken earlier in the day depicting A) a street view showing the shared driveway in which the home cannot be seen, B) street view to the left of the driveway where the home and garage are not visible, and C) a photo showing the house and garage, which needed to be identified by a drawn circle as they were not easily visible. He contrasted these photos with the photos submitted for the original home occupation application when all the vehicles were parked on display outside of the garage to catalogue all the business vehicles. He noted there were other photos taken from the back deck of the home to show what could be seen from the neighbor's home – only field and woods; however, he was not able to locate them presently.

He continued to present that the notice of violation states, *"Mr. Poole has been operating a home business in town for a number of years without registering with the town."* No one has asked them from 1999 to 2021 to register the business with the town. He continued reading from the notice of violation that *"his (Poole's) recent home occupation application was denied;"* however, he stated, this was not true as the Selectmen's minutes do not reflect that a decision was made. *"[B]ased on the current zoning ordinances, however, he continues to store commercial vehicles greater than 14,000 GVW at the listed address, within the residential/agricultural district."*

Attorney Flagg then pointed to the notice of violation attachments: copies of both Article III-B Residential/Agricultural District and Article XVI Home Occupations. He noted the home occupation definition and standards as listed in the ordinance and stated Mr. Poole complies with all of the items listed in the standards. The Poole's operate an excavation business, where like most small businesses, they sit down at their kitchen table to balance the books. Everything else the Poole's do is conducted off site. The vehicles are not visible from anywhere but their house as they all fit into the garage, which is why they applied for a building permit from the town in 2005 and, upon approval, built it. He then read through the home occupation standards and provided the following comment:

C. *Standards:*

1. *The Home Occupation must be located within a dwelling unit, or in a building or structure accessory to a dwelling unit. – It is.*
2. *The exterior of the building must not create or display any evidence of the home occupation, except a permitted sign and parking for customers and delivery vehicles. Variation from the residential character is prohibited. – There is no signage as no business is conducted there. No customers come to the premises, thus no need for parking even though there is plenty of parking.*
3. *Adequate off-street parking must be provided for customers and deliveries. All businesses must provide adequate turnaround, drop-off, and pick-up areas in order to prevent cars from waiting in the street right-of-way and to prevent cars from backing up into the public right-of-way. The Home Occupation shall not require regular need for delivery of materials to and from the premises by commercial vehicles over twelve-thousand (12,000) pounds GVWR (e.g. tractor trailers and heavy commercial vehicles). – Again, no customer parking is needed.*
4. *The Home Occupation must be conducted by a resident or owner of the property. – The business is operated by the Poole's.*

5. *The home occupation must not offend by emitting smoke, dust, odor, noise, gas, fumes, lights, or refuse matter.* – There is none of this and there have been no complaints of this.
6. *Home occupation must not cause excessive vibrations, store or handle combustible or explosive materials, or negatively impact the physical condition, safety, access or traffic volume of existing roads.* – The premises are located on a state road and none of these criteria are violated.
7. *The Home Occupation must not utilize more than 25% of the gross floor area including dwelling, basement and accessory structures.* – It does not.
8. *Not more than two non-residents (of the premises) may be employed by the Home Occupation. For the purposes of this section, the Planning Board shall determine whether sales or other personnel, who conduct the majority of their business away from the property, shall be included in the count of those employed at the premises.* – Their two boys work for them and all are residents of the premises.
9. *Disposal of all solid waste generated by the business must be at the business owner's expense, and shall not be provided by the Town of East Kingston.* – This is true.

He then noted the exceptions as provided in the ordinance:

D. Exceptions:

- 1) *If a property is located on a State Road (NH Routes 107, 107A, 108), no more than four non-residents (of the premises) may be employed, and the home occupation use of the dwelling shall not utilize more than 50% of the gross floor area (including dwelling, basement and accessory structures).* – This is the case.
- 2) *Administrative support for businesses or services that are conducted on or off-site of the residential premises are exempt from the formal application and approval process but must complete an Invisible Home Occupation application for the purposes of municipal record keeping, pay the annual Invisible Home Occupation Permit Fee, and meet with the Planning Board to present the application and receive a favorable recommendation from the Planning Board.* – This is also the case.

He then concluded his presentation.

STATEMENT ON BOARD GUIDANCE

Chairman Allen thanked Attorney Flagg for his presentation and then provided a statement of guidance with respect to the charge of the ZBA on this matter. He noted the cease and desist order references two specific ordinances – the home occupation ordinance and the residential/agricultural district to which the order claims the Poole's are in violation. It is the board's responsibility during an appeal from administrative decision to act as the Selectboard to determine if the ordinances were interpreted correctly in the cease and desist order, determine if the violations exist, and to correct any errors thereof. It is not under the purview of the board to remove or retract the order. The board can affect the cease and desist by way of determining if the ordinances were incorrectly interpreted, but the board cannot null and void it outright.

He then inquired if board members were comfortable moving forward with the case this evening or if they need further input from the Board of Selectmen with respect to the decision to issue a cease and desist order. He stated by virtue of there being a cease and desist order, it is apparent that some level of decision was made by the Selectboard, but this can be part of the board's discussion moving forward. Additionally, the board will examine the two ordinances cited to see if there is a conflict.

He stated all board members have received packets on the case and have read through the documents, including the Planning Board and Selectboard minutes. The board will need to determine whether they have confidence the Selectboard interpreted the ordinances correctly as indicated on the cease and desist, or does the board need more

information. With no request at the moment for additional information, the board entered into the finding of fact stage of the hearing.

FINDING OF FACT

Mr. Falman stated he had created a timeline for use in his understanding of the things that led up to the cease and desist. In his reading of the March 21, 2022 Selectboard minutes, he could not see where a decision was actually made to deny the home occupation application. This caused him to question what came after this meeting as he did not see any subsequent meeting minutes whereby action was taken by the Selectmen on the matter.

Chairman Allen agreed that the Selectboard meeting minutes were lacking in content with respect to the matter; however, the issuance of a cease and desist would suggest that some decision was made.

Mr. Falman stated Selectmen meeting minutes reflect a March date and the cease and desist is dated October 17th, which leaves him to believe that more discussion on the matter was had or he questioned if the board just dropped the matter until the cease and desist was issued.

Mr. Ciardelli stated it appears the registering of the vehicles alerted town officials that put a flag in the air; it seems it was all invisible until that point. He then asked for clarification on what decision is being appealed.

Chairman Allen responded whether there were vehicles registered or taxes collected, or whether it was the town clerk who brought the matter to bear, does not matter. The facts are that the business is in existence without receiving the approval of the town (operating without a home occupation permit) and there may or may not be violations of the town ordinance with respect to those business operations. In looking at the cease and desist, the board must determine if the Selectboard's interpretation of the ordinance is accurate. The board must determine if there has been a home business in operation for a number of years without a permit. The board must determine if commercial vehicles greater than 14,000 GVW are being stored at the premises. If there are, that is a violation of the ordinance. These are the things the board has to work through, not how it got to this point. The cease and desist has items of explanation that the board needs to determine if they are factual and correct. If they are, the board would deny the appeal. If the items are not factual or are in error, then the appeal would be granted. How the case got to the ZBA is not relevant to the charge of the board.

Mr. Maher spoke to inconsistencies noted on the home occupation application and the claims made during tonight's presentation with respect to the business being invisible but then making claims a large building was constructed specifically to house the business equipment. The definition of an invisible business is that the business is conducted inside the residence. The garage is separate from the residence thus making the business visible. The charge of the board is to determine whether the Selectboard was accurate in its determination that the business is in violation of the ordinance – the property must be utilized in compliance with town ordinances. Though the Selectboard has done a poor job of explaining themselves, the cease and desist order references a decision was made. The evidence of the commercial vehicles entering and exiting the premises on a daily basis indicates the business is not invisible. Invisible is when business is being done inside the premises with no external evidence.

Mr. Robbins stated none of the information provided by Selectmen include evidence a decision to deny a home occupation permit was ever given. This calls him to question the basis for the cease and desist order.

Mr. Collamore stated in reviewing the February 17, 2022 Planning Board minutes, the rationale for not recommending the home occupation to the Board of Selectmen was due to the vehicles' gross weight. Though this was not stated specifically in the Planning Board's motion, it was concluded based on the discussion and concerns recorded in the minutes.

Chairman Allen provided an overview of the home occupation approval process in that the Planning Board is tasked with vetting home occupation applications. This is done utilizing the definition and standards listed in the home

occupation ordinance as well as other portions of the ordinance. Once all requirements are met, the Planning Board will make a recommendation to the Selectboard to which the Selectboard is then tasked with utilizing the Planning Board's recommendation to render a decision on whether or not to grant a home occupation permit. In this case, the Planning Board made their decision to not recommend which was clearly recorded in their meeting minutes. The Selectboard, on the other hand, did not clearly record their decision; however, their decision is reflected in the issuance of a cease and desist order.

Mr. Maher added the acknowledgement that a home occupation existed had already been made at the Planning Board level; it was up to the Selectboard to decide whether or not to allow the continued operation of that home occupation. This was further stated in this evening's presentation with respect to statements made the business had been in operation since 1999 or 2001 depending on which scope of the business is noted. This declaration by the Poole's corroborates the first statement of violation as listed on the cease and desist which states "*Mr. Poole has been operating a home business in town for a number of years without registering with the town.*" The Planning Board found through their review of the facts that, by information provided by the applicant, more than one commercial vehicle weighing over 14,000 lbs. was stored at the premises. There has been nothing presented to this board indicating the Planning Board's determination was not factual or was in error. This corroborates the second statement of violation on the cease and desist order, "*His recent home occupation application was denied based on the current zoning ordinances; however, he continues to store commercial vehicles greater than 14,000 GVW at the listed address, within the residential/agricultural district.*"

Review of Article III-B Residential/Agriculture District

Chairman Allen then redirected discussion to review of the two ordinances at hand, the first being the residential/agricultural portion (Article III-B). The violation as stated on the cease and desist: *His recent home occupation application was denied based on the current zoning ordinances; however, he continues to store commercial vehicles greater than 14,000 GVW at the listed address, within the residential/agricultural district.*

Chairman Allen asked Mr. Poole directly if he is storing vehicles over 14,000 lbs. on his property. Mr. Poole responded affirmatively and upon further inquiry stated there were a total of four. Chairman Allen reiterated that this board is tasked with interpreting the ordinance and sometimes that is uncomfortable; however, the ordinance is what the town adopted and it is what the board must go by.

Mr. Robbins inquired if any of those four vehicles are agricultural to which Mr. Poole responded they were not.

Chairman Allen then read aloud Article III-B Residential/Agricultural paragraph one which states:

1. *The parking of not more than one commercial vehicle of 14,000 GVWR or less is permitted and shall not have the appearance of business operations from the property. Agricultural vehicles and equipment are excluded from this requirement.*
2. *Business operations (wholesale or retail), operations of commercial equipment owned by the property owner and/or resident, operations of commercial equipment not owned by the resident (i.e., equipment operated for others), commercial or industrial operations, such as, but not limited to, trucking, hauling, excavation, mining, manufacturing, or any such similar operations are strictly prohibited within this district. Agricultural vehicles and equipment are excluded from this requirement.*

He then asked Mr. Poole if there were business operations of commercial equipment, commercial or industrial operations, such as trucking, hauling, or excavation equipment coming and going from the property. Mr. Poole responded affirmatively.

Chairman Allen then read paragraph 4 which states:

4. *Home occupations for small scale home-based businesses shall be allowed by permit-only pursuant to Article XVI Home Occupations.*

He noted it has already been determined that Mr. Poole does not have a home occupation permit as of yet.

Mr. Poole stated the ordinance says no more than one commercial vehicle unless shielded by sight. Chairman Allen replied this was from the home occupation ordinance to which the board has not gotten to yet; they are still on the residential/agricultural district. He then inquired if board members had any questions on this ordinance as cited on the cease and desist.

Mr. Robbins asked for clarification on paragraph two with respect to trucking, hauling, and excavation equipment being stored on the premises as opposed to actually operating on the premises. He is not sure just storing the equipment at the premises is in conflict with this provision.

Mr. Ciardelli responded that the activity of parking of not more than one commercial vehicle in paragraph one sets the standard for the commercial equipment in paragraph two. He then quoted from the Zoning Board of Adjustment Handbook for Officials, *"When an appeal is made to the board of adjustment under this provision, the board must apply the strict letter of the law in exactly the same way that a building inspector must. It cannot alter the ordinance and map or waive any restrictions under the guise of interpreting the law."* He went on to say you can't park anything more than one commercial vehicle over 14,000 GVWR. The ordinance is clear.

Both Mr. Falman and Mr. Robbins concurred with Mr. Ciardelli. Mr. Robbins further stated the coming and going of trucks would give the appearance a business was being conducted there. Chairman Allen agreed.

Review of Article XVI Home Occupation

Chairman Allen then directed discussion to the home occupation ordinance as cited on the cease and desist: *"Mr. Poole has been operating a home business in town for a number of years without registering with the town. His recent home occupation application was denied based on the current zoning ordinance; however, he continues to store commercial vehicles greater than 14,000 GVW at the listed address, within the residential/agricultural district."*

He stated the Planning Board vetted these items out; however, the board can talk through them to address any questions they might have. He then asked if there has been a business operating on the property without a home occupation permit since 2001 as claimed in the cease and desist order.

Mr. Poole responded that it all depends on how you define a business. Chairman Allen clarified by asking if business equipment has been coming and going to and from the property, have the books (administrative support) been conducted at the premises, and has he been using the property as the base of operations.

Mr. Poole responded they do not do the books at the premises; they only park their vehicles there. They operate the business elsewhere. He goes to work and when he drives home, he parks the vehicles there. There is no work being done at the home.

Chairman Allen stated the Planning Board has made clear over the past ten years, if your equipment comes and goes from your property, your property is your homebase of operations. The business is operating from the home. He further clarified that whether it be a septic company, a blasting company or a fireworks delivery company – just because the actual work is conducted off site, the business would still be based at the home.

Mr. Poole asked why was it different for a state trooper who parks his vehicle at his residence. Chairman Allen responded the state police agency is not owned by the trooper – it is not his business. Mr. Maher also responded that this would be a single vehicle less than 14,000 GVW.

Chairman Allen stated he can only interpret the ordinance the way it was intended and, in this case, the coming and going of business equipment from the property on a regular basis constitutes the homebase of operations for that business – it is where the business is fundamentally located.

Mr. Maher brought to light another contradiction from the applicant with respect to conducting bookkeeping activities from the residence, specifically a home office space in the main house as indicated on the original home occupation application as well as by testimony given by Attorney Flagg. The answer provided earlier by Mr. Poole was that this was not the case.

Chairman Allen offered the opportunity to clarify for the record whether or not there were bookkeeping or administrative support conducted at the residence.

Mr. Poole answered the books are kept on a laptop computer that is mobile, so that if they go on vacation it is done there, it can be done at home or at his wife's other job – it can be done anywhere. They do not have an office; it is wherever that laptop is.

Chairman Allen declared for the record the business does not maintain a home office at the site; the statements made by Attorney Flagg earlier were erroneous. This lends itself to the only business activity being the coming and going of vehicles.

Mr. Poole stated when he completed the original application for the home occupation, he told them he had a laptop, and he was told that if he has a room to sit in at his home with this laptop, that constituted an office.

Mr. Maher asked if the business has an alternate physical address as he tried to look the business up online and found it listed as a PO Box, as the charge of the board is incredibly black and white. If the business' physical address is at the residence, then that is the business address.

Chairman Allen summarized as follows: all of the digging occurs offsite, all of the landscaping occurs offsite, and the business equipment comes and goes to the property routinely. He inquired where the maintenance of the equipment happens to which Mr. Poole responded that all maintenance/service is done at the job site, or wherever he brings the vehicle/equipment.

Chairman Allen provided another example for interpreting business operations: UPS conducts its business off the grounds of their terminal; however, that terminal serves as the hub of the business. This is how the town interprets business operations. The coming and going of vehicles, bringing equipment back and forth to property routinely.

Mr. Poole stated this is not true of the equipment, only the vehicles. The equipment basically goes from jobsite to jobsite; it rarely comes home.

Mr. Maher spoke to the validity of the Poole's business operations by virtue of issuing a cease and desist. There is a question about whether or not a decision to not grant the home occupation was ever made as the minutes do not reflect such decision. There is a record of the Planning Board's decision in February 2022, but there is no record of the Selectboard making a decision.

Chairman Allen noted that statements made by the applicant were not reflected in the Selectmen's meeting minutes either nor was a record of a decision; this puts those minutes into question. The minutes are not very well written nor do they appear accurate. Mr. Poole stated there was no record of a decision by the Selectmen because there wasn't one made.

PUBLIC COMMENT

Chairman Allen opened the meeting to public comment.

Mr. Brett Smith of 3 Ashlie Road spoke to his support of Mr. Poole and shared his own experience with respect to him obtaining a home occupation permit, getting flagged at the town clerk's office when registering business vehicles, going

through the application process with the Planning Board, enlightening them on the fact that many people drive personal vehicles over 14,000 GVW, and months later receiving his permit from the Selectmen with specific stipulations about his commercial vehicles. He then proceeded to share that his 26,000 lbs. dump truck sometimes finds its way to his driveway.

At this point, Chairman Allen asked Mr. Smith to discontinue this line of discussion so as not to put his own home occupation permit into compliancy question. He further stated that when an individual goes to register a business vehicle at their home address, they are stating that the business is based out of the home. Mr. Smith received approval for his business because he stated that although the administrative support portion of the business was being conducted from his home, the commercial vehicles were stored at another location. This information is stated in the Planning Board minutes.

He continued to explain that the State of New Hampshire defines a commercial vehicle as greater than 10,000 lbs. that one uses for commerce and makes money with. The town thought this was too restrictive so they upped it to 14,000 lbs. This means any vehicle over 14,000 lbs. that makes money is considered a commercial vehicle and anything in excess of that is not permitted.

Mr. Smith then took up the position that someone inserted on his home occupation application that he has a 10x10 office in his home dedicated to the business. This is not true and he did not insinuate as much. Chairman Allen advised him to circle back to the Planning Board if had questions about his own home occupation application.

Attorney Flagg noted that the Board of Selectmen motioned and voted 23 times during their March 21, 2022 board meeting and that it is not statistically feasible the minutes erroneously missed recording a motion on the Poole home occupation matter. He further stated he has made a request for documents through the Selectmen's office and anticipates receiving them on or about December 5th, at which time he may have more information to provide to the board.

Chairman Allen asked board members if they had anymore questions before they moved to deliberation. Attorney Flagg reminded the Chair that he is anticipating more information from the Selectmen as one of the questions they have is regarding whether or not the Poole's business is grandfathered. Chairman Allen noted the grandfathered provision affects businesses who were in operation in 1989, and by the applicant's own testimony, their business was established in 1999 and modified in 2001. Therefore, the business is not grandfathered and this is not a matter for the ZBA.

He then asked for clarification on why a home occupation permit was never requested from 2001 until now. Mr. Poole responded that he was under the assumption he was not operating a business from home as he was only parking vehicles on the property that he pays taxes on, the business was not open to the public, all work was conducted offsite of the premises, he doesn't provide any work on his property, and no one comes to his home. They go to work each day, come home from work, get up the next day and do it again.

Chairman Allen asked Mr. Poole if all of his vehicles have been registered to this location over the years. Mr. Poole responded affirmatively; and asserted they have been for 20 years.

Chairman Allen inquired if there was another physical address to keep any sort of equipment. Mr. Poole responded there was not. Mr. Robbins asked if there were any vehicles on the property that have not been registered. Mr. Poole responded there were none.

Mr. Ciardelli asked if all the vehicles that have been registered for the last 20 years have been under the 14,000 GVW. Mr. Poole responded he has registered dump trucks and tri-axels since they built the house and the town has had no problem with taking his registrations up until now. He does not know what changed.

Mr. Keith Reynolds of 6 Sullivan Drive spoke to his support for Mr. Poole and that as a fellow small business owner in town who recently went through the home occupation process, he, too has had to figure out what to do with his business vehicles over 14,000 GVW. He said there are people all over town who have 450's parked in their driveways.

Chairman Allen stated he can't speak specifically to Mr. Reynolds' case; personal vehicles can park on properties; it's the commercial component that applies. Mr. Reynolds stated he is letting his workers take his vehicles home, but he still has to figure out whether to purchase smaller vehicles to comply with this. Chairman Allen suggested Mr. Reynold's direct any questions he has about his own home occupation permit with the Planning Board as his situation is not relevant to the case before the ZBA.

Chairman Allen continued to state the town voted and approved this ordinance as well as the commercial vehicle size restriction. The size restriction was suggested by the Planning Board, adopted by the voters as they felt this would be a big enough truck to not cause a nuisance with the coming and going in residential districts. If it's a farmer, it does not apply. If it's a personal vehicle, it does not apply. If it's a commercial vehicle that is tied to your business and you are making money with it, then it applies.

Mr. Ciardelli added these zoning ordinances are put in place to protect the residents of the town. They are voted by the town.

Mr. Reynolds stated small business owners in town cannot afford to spend \$30k-\$40k a year to rent a business property to store their equipment offsite. He inquired how to overturn this restriction.

Chairman Allen responded citizens can attend Planning Board meetings, and put forth warrant articles for change. Without restrictions you could have 40 trucks lined up on a property idling for hours. The rules are meant to protect the town and allow property owners to live in peace. Rules cannot be applied to individual properties; but townwide or by district.

Mr. Smith stated in this case the Board of Selectmen didn't do their job – they kicked it down the road.

Chairman Allen responded the ZBA has before them a cease and desist that cites violations of specific ordinances. Whether or not any ZBA member agrees with it is irrelevant. The facts as discussed thus far include:

- There are four vehicles stored on the property that are over 14,000 GVW.
- The vehicles exit and enter the property regularly and have been since 2001.
- The vehicles are registered at the business address (116 North Road) which would also constitute administrative support of the business; thus the administrative work for the business is conducted from the premises. The business is registered with the Secretary of State with the address of 116 North Road as declared by Attorney Flagg.

Chairman Allen closed the public comment portion of the hearing.

CONTINUED FINDING OF FACT

Mr. Maher inquired as to how many vehicles are registered at the premises. Mr. Poole responded one personal vehicle, three work trucks, and two trailers. Mr. Maher inquired if there were any other vehicles registered to his home address. Mr. Poole indicated there were not; only four trucks and two trailers.

Mr. Poole inquired why he is even before the ZBA as he was not done with the Selectmen – the home occupation discussion never finished. Then he got a cease and desist from one Selectman, not the Board of Selectmen. He questioned why is he here before the board and wasting his time when he was not done meeting and resolving this with the Selectmen?

He went on to say that at the March Selectmen's meeting, the Selectmen were ready to give him his home occupation permit, but Joe Cacciatore didn't want to let him add any vehicles in the future. Mr. Nigrello couldn't understand why

that was and wanted further explanation. That's why that meeting ended the way it did without any explanation. Again, he asked, if there is no explanation, why is he even here? Since there are more meetings to be had with the Selectmen, why is Cacciatore wasting his (Poole's) time and money at the ZBA for no reason. He added if he had a year to figure this out, why does he have a cease and desist? They are still figuring it out.

Chairman Allen responded the reason Mr. Poole is before the ZBA is because he (Poole) requested this hearing.

Mr. Maher stated that in understanding the power of the ZBA, the board cannot explain why any individual, Selectboard or otherwise, didn't take action in March. There is a very prescriptive process, the ZBA's charge is to evaluate the cease and desist order. It is likely town counsel has provided guidance and input on the cease and desist and found evidence valid enough to bring the matter before this board. All the board can do at this time is evaluate the contents of that cease and desist; but the board's authority is limited.

Mr. Falman asked for clarification with respect to contact from the Board of Selectmen since the March 2022 meeting.

Mr. Poole stated he has had no contact with the Selectmen in 20 years before he got that letter. He clarified at further inquiry that he has not received any communications from the Selectmen since the March 2022 meeting.

With no further questions from board members or additional input from the applicant, Chairman Allen closed the public hearing for board deliberation.

DELIBERATION

Chairman Allen asked if the board was comfortable moving forward with deliberation and decision or do they want more information from the Selectboard.

Mr. Ciardelli stated there was not enough information – he wants to know more about what was going on with the Selectboard. He'd like to know if they communicated a grace period for one year. That doesn't seem to be in the record anywhere. He is not comfortable with the way this has transpired.

Mr. Maher asked what information coming from the Selectboard could make the violations cited in the cease and desist any less valid. He would like to offer the applicants the most expedited path for resolution. It will be another month before the board could meet. Still, all the board will be doing is addressing the violations noted in the cease and desist, unless the Selectboard invalidate their own cease and desist.

Mr. Ciardelli stated the part that bothers him in the cease and desist is relative to the home occupation in which the 14,000 GVW vehicles tipped the scale. There wasn't just one vehicle exceeding the limit, there were four which the town has been registering for 20 years at this address. Does that amount tacit approval? The ordinance says this is not allowed but it has been the case for years and now the town says it can't continue.

Mr. Maher stated it is likely the Planning Board as part of their due diligence, conducted their own evaluation, and had that same discussion in which they concluded the home occupation, as being conducted, was not in compliance.

Chairman Allen concurred and stated that was indeed what was found. Planning Board member Bath brought forth the 14,000 GVW matter, and Planner LaBranche brought forth that the excavation and commercial nature of the operation was in conflict with the home occupation ordinance. Those were the facets as to why the Planning Board did not put forth a positive recommendation.

Mr. Falman spoke to the Selectboard meeting where there appeared to be some acknowledgement to help the applicants or work something out. *"Mr. Nigrello suggested the vehicles be put in Mr. Poole's name versus the business name, the vehicles are shielded. More discussion."* The minutes of the Selectboard's meeting with Mr. Poole do not reflect a denial, but more of a continuance. He would like to know what transpired from February 2022 to October 17, 2022. There were seven months of inactivity and suddenly there is a violation which is why he asked if there were any letters or communication between the Poole's and the Board of Selectmen since the March meeting. Concerning is

the poor recordkeeping of the meeting coupled with not prompt action on behalf of the Selectmen to make a final resolution.

Mr. Maher spoke to how best to move this appeal forward to resolution; is it better to taken action this evening or to go back to the Selectboard and ask for more information. The cease and desist states the business has been in operation for a number of years without a permit and that there is a continued storage of commercial vehicles on the property. Neither of these statements are up for debate; the applicant has acknowledged this. The applicant's best outcome is to get approval for his home occupation. The ZBA cannot help with this tonight. All that is before the board is whether or not the cease and desist is valid.

Mr. Collamore asked if there is a record of an actual denial for the home occupation by the Selectboard.

Chairman Allen clarified the cease and desist does not state the business is operating after it was denied; it says it is in operation without a permit and there are vehicles being stored that weigh over 14,000 GVW. He, too, would like to offer the most expedient process to assist the applicant.

Mr. Ciardelli quoted language from the NH Zoning Board Handbook (RSA 674:33), *"The zoning board of adjustment shall have the power to hear and decide appeals if it is alleged there is an error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance..."* and stated this is the charge of the ZBA tonight. The question is, was there an error?

Mr. Maher indicated he had additional questions for Mr. Poole regarding a promise of one year of clemency relative to the town taking any formal action against his business. If the answer is yes, then he (Maher) does not feel the cease and desist is valid and would conclude the Selectman who signed the order did so in direct contradiction to an agreement.

CONTINUED FINDING OF FACT

Chairman Allen reopened the public hearing to allow for additional questions and testimony.

Mr. Maher asked if Mr. Poole if he was promised, at the March 21st Selectboard meeting, that he would be given one year to figure out this process. Mr. Poole responded affirmatively. At further inquiry, Mr. Poole stated it was agreed by both Selectman Cacciatore and Selectman Nigrello; Mr. Caron was not present at the meeting. He (Poole) was not able to register trailers at that time and Mr. Nigrello had stated he (Poole) needs to get to work and they can't keep him from working. Nigrello told him to take a year and work out the process and get it straightened out.

Clarification was made that the one-year process was not just to register the vehicles, but that the one-year timeframe applied to allowing the business to continue as presently operating while they figured out the home occupation process. Mr. Poole testified this was the case. He further testified there was a room full of people when this conversation took place including both the police chief and fire chief as well as Mrs. Poole.

Chairman Allen reclosed the public hearing.

CONTINUED DELIBERATION

Chairman Allen stated in light of the new information regarding a one-year grace period, he would like the Selectmen to come in and weigh in on this matter. It would not be appropriate to take information from one side and not consult with the other side. He continued to say that at face value, per Mr. Poole's own admission, the business operations are in violation of the ordinances. He then took a straw poll for board feedback on continuing the public hearing to next month to allow for response from the Selectboard as well as to ascertain any other information the ZBA feels it needs. All were in agreement. A continuation date of December 29, 2022 was chosen. It was noted that the ZBA would make the final decision on this matter at the town level before it goes to court, should that be the case; the decision would not be remanded back to the Selectboard.

Information to be sought from the Selectboard includes:

- Providing a legal statement surrounding the one-year grace period
- Specifics of the decision regarding the home occupation application recommendation
- Summary, or copy of, any further discussion, decisions, or actions on the matter subsequent to the March 21, 2022 Selectboard meeting.

MOTION: Chairman Allen motioned to continue the public hearing to December 29, 2022 at 7pm for the appeal of administrative decision submitted by Bradley Poole with respect to a Cease and desist Notice of Violation Use of 116 North Road, MBL# 15-03-14, as issued by the Board of Selectmen in relation to the Town of East Kingston Zoning Ordinance Article III-B – Residential/Agricultural District and Article XVI – Home Occupations to allow adequate time for the Selectboard to provide statements on the one-year grace period, specifics on the home occupation application decision, and to provide additional information on discussions, decisions or actions after the March 21, 2022 Selectboard meeting. Additionally, to invite the Selectboard to the December meeting to answer any additional questions the board might have on this matter; seconded by Mr. Ciardelli. With no further discussion the motion passed 5-0-0.

Chairman Allen closed this hearing at 8:47pm.

APPROVAL OF MINUTES

Board members reviewed the minutes from October 26, 2022.

MOTION: Mr. Robbins motioned to approved the October 26, 2022 minutes as presented; seconded by Mr. Ciardelli. With no further discussion the motion passed 3-0-3 (Mr. Falman, Mr. Collamore, and Mr. Maher abstaining).

RULES OF PROCEDURE

Board members reviewed the draft Rules of Procedure noting the purpose of the document is to inform the public and applicants of the process for submitting an application to the board as well as the expectations in how those applications are adjudicated.

MOTION: Vice Chair Robbins motioned to adopt the revision to the Rules of Procedure as presented; seconded by Mr. Falman. With no further discussion the motion passed 5-0-0.

OTHER BUSINESS

With no other business before the board, the meeting adjourned at 9:01pm.

Respectfully submitted,

Catherine Belcher

Land Board Secretary

Minutes approved on December 29, 2022.