

# TOWN OF EAST KINGSTON ZONING BOARD OF ADJUSTMENT

## MEETING MINUTES

December 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 – Continued Public Hearing

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.

Chairman Allen opened the meeting at 7:01pm followed by the roll call. He noted since there were no members of the public present and that Attorney Flagg was familiar with the hearing process, he would refrain from providing an overview of the hearing process as he typically does for the general public.

### APPEAL FROM ADMINISTRATIVE DECISION – BRADLEY POOLE – 116 NORTH ROAD

Chairman Allen opened the continued public hearing at 7:03pm 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. He noted Mr. Poole is being represented by his attorney, Jonathan Flagg.

He then provided a recap of why the public hearing was continued from November stating the board requested information and clarification from the Selectboard with respect to items the board deemed to be relevant to the case:

- A legal statement surrounding a one-year grace period that would have allowed Mr. Poole 12 months to continue operating his business from his residence while he worked out terms for ascertaining a home occupation permit.
- Clarification with respect to the Selectboard's decision to deny Mr. Poole's home occupation.
- A summary, or copy of, any further discussion, decision, or actions taken on the matter post March 21<sup>st</sup>.

Chairman Allen then referenced the letter drafted to the Selectboard requesting these aforementioned items as well as inviting them to attend this hearing should they wish to. This letter was forwarded to the Selectboard on December 21<sup>st</sup> and a response from the Selectboard was received yesterday (December 28<sup>th</sup>) and immediately disseminated to the board. He then read the letter of response into the record:

*RE: Appeal from Administrative Decision – Mr. Bradley and Mrs. Naomi Poole*

*Members of the Zoning Board of Adjustment:*

*It is our understanding, from the minutes provided, that you are looking for a letter outlining the given grace period for the business vehicles owned by Mr. Bradley Poole. During the December 12, 2022 Board of Selectmen meeting this topic was addressed and the information is provided below.*

*Mr. Nigrello shared that it is his understanding that Mr. Poole was granted a one-year grace period beginning in December 2021 for his current vehicle registrations in a business name that were due for renewal. In order for the vehicles to be in his business name and registered in town, he would need a home occupation permit. Not wanting to interrupt Mr. Poole's business, the board agreed to grant a one-year period for the registration renewals in order for Mr. Poole to obtain a home occupation permit and/or meet all town regulations. Mr. Nigrello said his understanding*

*was that the one-year grace period would expire in December 2022, when the vehicles in question were scheduled for renewal again. Mr. Nigrello and Mr. Cacciatore both agreed this was their best understanding of the intent of the Board at that time.*

The letter was signed by all three selectmen (Cacciatore, Caron, and Nigrello). He then entered into the record an excerpt of the December 12, 2022 Selectboard meeting minutes as cited in the Selectboard's letter of response.

*In response to the Zoning Board of Adjustments first question to the Board of Selectmen from their public hearing on Tuesday, November 29, 2022, Mr. Nigrello share the Planning Board's February 17, 2022 decision to not recommend the Poole home occupation application. Mr. Nigrello said during that time the Planning Board voted unanimously to not recommend Mr. Poole a home occupation permit. Due to their recent request dated December 1, 2022, following the public hearing, the Selectboard will give a definitive answer.*

*Mr. Cacciatore made a motion to affirm the Planning Board's decision to not recommend Mr. Poole's home occupation. Mr. Nigrello seconded. All board member were in favor.*

*In response to the second question from the 11/29/2022 public hearing of Zoning Board of Adjustment, Mr. Nigrello shared this it is his understanding that Mr. Poole was granted a one-year grace period beginning in December 2021 for his current vehicle registrations in a business name that were due for renewal. In order for the vehicles to be in his business name, he would need a home occupation permit. Not wanting to interrupt Mr. Poole's business, the board agreed to grant a one-year grace period in order to obtain a home occupation permit and/or meet all town regulations. Mr. Nigrello said his understanding was that the one-year grace period would expire in December 2022. Mr. Nigrello and Mr. Cacciatore both agreed that this was their best understanding of the intent of the board.*

Chairman Allen then referenced the finding of fact that was drafted from the last meeting that will go into the record as discovery. All board members are in receipt of this document. He opened the floor to questions from board members regarding the new information received (Selectboard response, findings of fact) – there were none.

#### PRESENTATION/REBUTTAL BY THE APPLICANT

Attorney Jonathan Flagg thanked the board for continuing the public hearing and then reported the Poole's were not in attendance due to a family medical matter. He asked if copies of correspondence between he, the Town Administrator and the Land Board Secretary were distributed to the board, to which they were not; however, copies were available for dissemination if so ordered. It was noted that the documents provided by Attorney Flagg contained more documents than what was referenced by the Land Board Secretary, so Chairman Allen asked Attorney Flagg to provide a summary of what he was submitting to the board while the two copies he provided could be shared around the board table.

Attorney Flagg stated the Land Board Secretary had corresponded with him on December 15<sup>th</sup> requesting any additional items he'd like to submit to the board for the December meeting and to forward those items to her by December 21<sup>st</sup>. He then corresponded with the Town Administrator to inquire on the status of his right-to-know request for documents associated with this case. He stated he then received a copy of the December 12, 2022 Selectboard meeting minutes depicting the Selectboard taking a vote on the home occupation application of Mr. Poole – an action about the Poole's in which the Poole's were not notified would take place.

He went on to say they learned two things from the packet of information he received from the Town Administrator (right-to-know documents, Selectboard meeting minutes);

1. The Selectboard decided to issue cease and desist order in October but did not take action on the Planning Board's recommendation until December 2022, thus he alleges the cease and desist is premature.

2. The Selectboard also acknowledge through their own correspondence that the one-year grace period was not up until December 2022 even though the cease and desist was issued in October.

Based on these findings, Attorney Flagg feels the matter should be remanded back to the Selectboard for them to issue a new cease and desist. This would provide the Poole's with the opportunity to appeal the actual decision of the Selectboard versus a notice of violation. It is his position that the cease and desist is not valid.

#### PUBLIC COMMENT

Noting there were no members of the public present, Chairman Allen opened the meeting to the public for procedural purposes at 7:14 pm and then closed the meeting for public comment at 7:14pm.

#### FINDING OF FACT

He then opened the floor to board members to inquire of any other information they might need from Attorney Flagg before he closed the meeting for board deliberation.

Mr. Falman inquired how the Poole's were notified of the one-year grace period and if it was the Poole's understanding that the grace period began in December 2021. Attorney Flagg responded the Poole's were notified of the grace period at the March 2022 Selectboard meeting; however, he was not sure if the Poole's understood the period began in December. He (Flagg) stated that if he was told in March that he was given a one-year grace period, he would assume it was from March to March.

Mr. Robbins stated there was some ambiguity with respect to the December and March timelines. Attorney Flagg added that the matter before the Selectboard in March just drops; it is not even continued to the next meeting, and then, on December 12<sup>th</sup> the issue comes up again which was probably prompted by the ZBA's correspondence, but even so, nobody informed them (Poole's) that this matter was going to be discussed at the December 12<sup>th</sup> Selectboard meeting. Additionally, he (Flagg) stated he was in constant contact with the Town Administrator and at no time did she tell him about the December 12<sup>th</sup> meeting.

Chairman Allen then directed the board to be cognizant that this information is not relevant to the board's decision. He explained the fact that the Town Administrator did not notify the applicant is unfortunate, but not relevant; the exact dates of when things transpired is interesting, but not relevant. The Zoning Board of Adjustment is tasked with interpreting whether the cease and desist and the articles contained within are accurate. He then opened the floor to any other questions that are relevant to the charge of the board.

Mr. Robbins inquired as to what the Poole's have done over the past year to mitigate the problem. Attorney Flagg responded they have tried to get the matter back before the Selectmen which now has been done. He noted issues with the Town Clerk alleging she made zoning decisions by using the hammer of the vehicle registration process. They (Poole's) have gone through the proper process; however, they are now questioning that process because the Selectmen have issued a cease and desist prematurely. He is not sure the cease and desist is valid – the Selectmen made a decision that wasn't noticed. He stated this newly documented decision by the Selectboard means the Poole's may be back before the Zoning Board when the Selectboard finally get it right. He said the Zoning Board has a cease and desist that was issued two months before any decision was made.

Mr. Falman asked Attorney Flagg to clarify if there has been any formal communication between the Poole's and the Selectboard since the March 2022 timeframe. Attorney Flagg responded the only communications are those which were submitted tonight (right-to-know, queries regarding case before ZBA) – nothing with regard to the home occupation process before the Selectboard up until the December 12<sup>th</sup> Selectboard minutes. He (Flagg) stated they could not do anything until such time as they received a decision from the Selectboard, and now they have one made on December 12<sup>th</sup>.

#### BOARD DELIBERATION

With no other questions from the board, Chairman Allen closed the hearing for board deliberation (7:20pm). He then reviewed the finding of fact as generated from the November 29<sup>th</sup> meeting.

1. *In December 2021, through the vehicle registration process, Mr. Poole was instructed to undergo the home occupation approval process as he was informed he was operating a business without a home occupation permit.*
2. *Mr. Poole submitted a home occupation application to the Planning Board and a public hearing held on February 17, 2022.*
3. *At the February 17, 2022 Planning Board meeting, the board voted 5-0 to not recommend the Board of Selectmen approve the home occupation application based on the proposal not complying with Zoning Ordinance Article III-B.1 which states that 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; and for not complying with Zoning Ordinance Article XVI.F which states that that commercial activity is not a permitted use under a Home Occupation Permit.*

Chairman Allen noted the commercial activity is recorded as comments made by Ms. LaBranche about excavation and commercial trucking in the Planning Board minutes.

4. *The Board of Selectmen took up the matter at their March 21, 2022 meeting; however, the meeting minutes did not record any action on the Planning Board's recommendation.*
5. *The Board of Selectmen issued a Notice of Violation (cease and desist order) on October 17, 2022 citing Mr. Poole has been operating a home business in town for a number of years without registering with the town; and 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.*
6. *The October 17, 2022 Notice of Violation indicates the decision was appealable to the Zoning Board of Adjustment within 30 days of the notice.*
7. *Mr. Poole submitted his appeal from administrative decision to the ZBA on November 9, 2022. The matter was assigned a case number (2022-05), a public hearing date was scheduled for November 29, 2022, abutters and members of the public were notified pursuant to RSA 676:7.*
8. *Mr. Poole has been operating a home business from his residence of 116 North Road, East Kingston since 1999.*
9. *The scope of that business changed from a septic business to an excavation and landscaping business in 2001.*
10. *The property is located on a state road in a residential/agricultural zone consisting of approximately 12 acres.*
11. *At current, Mr. Poole owns and registers with the town four commercial trucks over 14,000 GVW and two trailers.*
12. *Business vehicles have been entering and exiting the property at 116 North Road regularly and have been since 2001.*
13. *The vehicles are registered to the business with a business address of 116 North Road.*
14. *The business does not meet the definition of an invisible home occupation.*
15. *The business is not grandfathered.*
16. *Mr. Poole's own testimony corroborates the violations listed on the Notice of Violation (cease and desist).*
17. *Excavation and landscaping operations are done off premises.*
18. *Mr. Poole claims he does not maintain a dedicated office at the residence; books are maintained on a laptop.*

19. *The maintenance of the business equipment is conducted off premises.*
20. *There is no other physical address where business vehicles and equipment are stored.*
21. *Mr. Poole asserts he was extended a one-year grace period from the Selectboard to get his business approval in order; but received a notice of violation order within six months of this agreement.*

Clarification on this one-year grace period has since been provided by the Selectboard confirming it was a one-year grace period for the Poole's to register their business vehicles; not for the operation of the business.

22. *There are questions surrounding the one-year grace offer described by Mr. Poole and the issuance of the cease and desist order in October 2022. This item to be investigated further.*

These questions have since been answered through the Board of Selectmen's meeting minutes and letter.

23. The public hearing was continued to December 29<sup>th</sup>.

All other specifics associated with this case are detailed in the November 29<sup>th</sup> Zoning Board of Adjustment minutes.

Chairman Allen went on to say the board is tasked with deciding whether there is a violation of the ordinance contained within the cease and desist order. The board does not have the authority to remove the cease and desist, but can determine whether the ordinances cited have been violated. The board has the authority to interpret the ordinances cited on the cease and desist. He stated the cease and desist was issued by the Selectboard, their meeting minutes prior to the cease and desist were lacking as to whether a decision had been made, however, subsequently, the Selectboard has clarified their intention by action taken at their December 12<sup>th</sup> meeting. Whether it was a retake of action or first initial action on the home occupation itself doesn't change the fact that the Selectboard has issued a written decision about the home occupation permit. The Zoning Board minutes of last month provide a record that there are vehicles over 14,000 GVWR going in and out of the Poole property on a daily basis – Mr. Poole stated this himself. The vehicles coming and going regularly is how the town interprets a business operating from the property – this was discussed at length at the last meeting.

He further opined that the most expeditious process that would allow the applicant's to move forward in pursuit of settling this matter, is for the board to make a decision on this case tonight. Kicking this back to the Selectmen just for them to re-issue a new cease and desist and restart the appeal process all over again is not a wise use of everyone's time or resources. Especially, when it is clear that the ordinances, as cited in the cease and desist order, have been violated. The vehicles were registered for one year as allowed by the Selectboard and the home occupation was applied for and denied – there is now official documentation reflecting this denial. The timing of some of these decisions is unfortunate, but the outcome is the same.

Mr. Ciardelli stated the board has received a lot of information which has been documented in the finding of fact, and he is glad the board went back to the Selectboard for clarification. Now the charge of the board is to determine if the cease and desist was issued erroneously or if was a mistake made. His opinion is that the cease and desist was not erroneous or made in error. The rest of the information provided is basically background noise.

Mr. Maher stated it was good to get clarity from the Selectboard about the grace period in that it was applicable to the vehicle registration only – it did not hold the town silent relative to the ongoing use of a business without the appropriate home occupation permit. Whether or not there was a Planning Board decision in February or subsequent decision made or not made by the Selectboard is somewhat irrelevant, since the Board of Selectmen has gone on record to clarify that leniency was granted for the vehicle registrations only. Looking at the cease and desist order, all, except one word, stands as the Poole's, by their own admission, have been operating a business from their home for a number of years without registering with the town. There were no exceptions or applicable waivers for utilization of that property. Whether there was a home occupation application denial or not, is irrelevant; had the Poole's not moved forward with the home occupation permit process, the cease and desist would be applicable. Had they moved

forward and it had not been granted (as is the case) the cease and desist would be applicable. In October, the fact remains that the Poole's were continuing to operate a business from their home outside the rules and laws of the town. Thus, the cease and desist order is correct and should be upheld.

At further inquiry, Mr. Maher stated the only word that he felt was erroneous in the order was the word "denied" as the home occupation was determined to be denied, or documented to be denied, on December 12<sup>th</sup>, there was no record of a denial prior to that date; however, the facts surrounding the operation of a home occupation without approval still remain intact with or without the official written denial. The cease and desist is applicable.

Mr. Robbins stated the town could withdraw the cease and desist and re-issue one after the December 12<sup>th</sup> decision.

Mr. Maher responded that the Poole's could have stored their vehicles somewhere else while they attempted to receive the appropriate permits. It appears the Poole's believed they could still operate the business without a permit; however, the Selectmen made clear this was not the case in their October cease and desist order. The next step in the process is for them to adjudicate whether or not there is going to be a home occupation permit granted, which looks like the Selectboard has already taken action on this; however, that is not the matter before the board at this time.

Mr. Robbins, Mr. Collamore and Mr. Falman agreed with Mr. Maher. Mr. Falman added that had there been any doubt on behalf of the Poole's they could have communicated with the Selectboard to seek resolution on the matter as well; communication works two ways.

Chairman Allen stated the findings of fact from the last meeting were pretty clear, the meeting minutes very accurately reflect the fact there's a home business operating without a permit; to Mr. Poole's own testimony, there are multiple vehicles over 14,000 pounds coming and going to and from the property.

#### DECISION

**MOTION: Chairman Allen motioned to DENY for the appeal of administrative decision for Mr. and Mrs. 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 based on the findings of fact and all statements made thereof on record; seconded by Mr. Robbins. With no further discussion the motion passed 5-0-0.**

Chairman Allen closed this hearing at 7:36pm.

#### APPROVAL OF MINUTES

Board members reviewed the minutes from November 29, 2022.

**MOTION: Mr. Ciardelli motioned to approved the November 29, 2022 minutes as presented; seconded by Mr. Collamore. With no further discussion the motion passed 5-0-0.**

#### ANNUAL REPORT

Board members reviewed the 2022 Zoning Board of Adjustment annual report article for insertion into the town report and approved by general consent.

#### OTHER BUSINESS

With no other business before the board, the meeting adjourned at 7:46pm.

Respectfully submitted,

Catherine Belcher

Land Board Secretary

Minutes approved on February 1, 2023.