

TOWN OF EAST KINGSTON ZONING BOARD OF ADJUSTMENT

MEETING MINUTES

February 1, 2023

Pound School
41 Depot Road
East Kingston, New Hampshire

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

AGENDA

Motion for Rehearing on the Appeal from Administrative Decision – Brad Poole – 116 North Road (Case #2023-01)

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

Others present: none

Chairman Allen opened the meeting at 7:02pm followed by the roll call.

MOTION FOR REHEARING FOR THE APPEAL FROM ADMINISTRATIVE DECISION – BRADLEY POOLE – 116 NORTH ROAD

Chairman Allen opened Board discussion on the motion for rehearing submitted by Bradley Poole through his attorney regarding the ZBA's December 29, 2022 decision to deny Mr. Poole's application for an Appeal from Administrative Decision 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 provided an overview of the motion for rehearing process stating anyone with standing can submit a motion for rehearing of a decision rendered by the Board should they feel the Board's decision was unreasonable or unlawful, or if it is alleged a mistake was made. The rehearing process is designed to afford local zoning boards of adjustment the opportunity to correct their own mistakes before appeals are file with the court.

Board members confirmed they were in receipt of, and have read through, the Motion for Rehearing dated January 27, 2023 from Attorney Flagg. Chairman Allen then presented the motion for rehearing for the Board's review, noting that some of the items listed in the document are basic statements of facts that need no response from the Board, while others may require response. He instructed the Board to go through each of the statements in the request to determine if they had erred in any of the areas that would justify a rehearing.

1. *On February 17, 2022, the Planning board voted not to recommend to the Board of Selectmen to approve the Pooles home occupation permit.*
2. *The Selectmen took up the matter at their March 21, 2022, meeting, but the Selectmen took no action at that duly advertised meeting.*
3. *On March 21, 2022, the Selectmen gave the Pooles one year to sort out their issues of vehicle registration and home occupation.*
4. *A single selectman issued a Notice of violation on October 17, 2022, citing the Pooles for operating a home business without a permit.*

He asked for comments from Board members on these four items noting the items were basic statements. Mr. Falman commented on item number 3 with respect to the one-year grace period, stating the Board of Selectmen indicated the one-year period was from December 2021 to December 2022. Board members agreed noting the specific dates were provided by the Selectmen at the request of the ZBA in order to get clarification.

5. *The Pooles timely appealed the decision of the single Selectman to the ZBA and a hearing was held on November 29, 2022. At that hearing, the ZBA continued the hearing to December 29, 2022 so that it could ask the*

Selectmen if they actually held a vote on the Planning Board's recommendation that the Pooles application for a home occupation be denied, and so that the Selectmen could tell the ZBA whether the selectmen had voted to give the Pooles, at the Selectmen's meeting of March 21, 2022, one year to sort out their vehicle registration issues and home occupation.

Chairman Allen stated, although this is just semantics, the Board did not ask the Selectmen if they had voted, the ZBA asked the Selectmen to clarify their decision because the minutes were lacking detail. Board members were in agreement that no errors were made by them with respect to this item.

- 6. By letter to the ZBA, the Selectmen admitted that they had not taken a vote on the Poole's home occupation application prior to the Notice of Violation and had agreed to give the Pooles one year to sort out their registration and home occupation permit requests prior to the October 17, 2022 Notice of Violation.*

Chairman Allen stated that letter did not contain language that the Board of Selectmen admitted they had not taken a vote; it provided clarification that the one-year grace period was from December 2021 to December 2022 for vehicle registrations only while the Pooles applied for a home occupation permit. Board members were in agreement that no errors were made by them with respect to this item.

- 7. The Pooles wrote to the Selectmen by letter dated November 4, 2022, requesting information from the town. The ZBA was copied on that correspondence and all future correspondence to the Selectmen. The Selectmen partially answered the letter but did not provide responses to the request for copies of the ordinances including: Please provide copies of all documents supporting the date of adoption of article III -B, and all amendments thereto showing the date of the amendments and Please provide copies of all documents supporting the date of adoption of article XVI, and copies of all amendments thereto showing the date of the amendments.*

Chairman Allen stated this item is about the applicant's claims of being grandfathered and since the Board is charged with considering a motion for rehearing on an appeal from administrative decision, this item is not relevant. Additionally, by the applicant's own testimony, the business has been in operation since 1999 and 2001, a full decade after the deadline to qualify for grandfathered status. The town adopted Article III-B in 1989 requiring any business located in a residential zone to obtain a home occupation permit. To date, the Pooles have never had a permit. He went on to say the ZBA did not have to dig into this matter during the appeal as the Planning Board had already determined the business was not grandfathered during their home occupation hearing in February 2022. Board members were in agreement that no errors were made by them with respect to this item.

- 8. Without notifying the Pooles, their counsel, or publishing any notice of intent to consider the home occupation application and having actual knowledge that the issue of home occupation was currently before the ZBA, the Selectmen nevertheless, and without the Pooles present, voted on December 12, 2022 to deny the home occupation permit application.*

Board members were in agreement that this item has no bearing on the Board's decision to deny the appeal.

- 9. The ZBA knew about the fact that the Selectmen had not responded to the Pooles November 4th letter and knew that the Selectmen had held an illegal vote on December 12, 2022, and knew that the Selectmen had not voted on the Pooles home occupation application at the time of the Notice of Violation, and knew that the Selectmen had given the Pooles one year from March 21, 2022 to sort out their vehicle registration and home occupation issues, but nevertheless voted on December 29, 2022, to deny the appeal of the Notice of Violation.*

Chairman Allen made note of the reference to an illegal vote stating three Selectmen took a vote at a public meeting on December 12, 2022 and that he does not see how that can be construed as illegal. Again, in that November 4th letter, the Selectmen confirmed the dates of the one-year grace period (December 2021 to December 2022) and only for vehicle registration purposes while they worked out their home occupation permit. Board members agreed this

item does not change the facts the decision was based on, and further agreed no errors were made by them with respect to this item.

10. *The selectmen's December 12, 2022, decision is incorrect or unlawful for the following reasons:*

- A. *It was decided without public notice of it being on the agenda and without notice to the Pooles so they could appear before the board;*
- B. *The Pooles use of their property is grandfathered;*
- C. *The Selectmen failed to properly consider the ordinance and its definitions and incorrectly decided that the Pooles have a home occupation and that the ordinance has been violated, to wit: ARTICLE XVI- HOME OCCUPATIONS (Adopted 3/89) (Amended 3/17) (Amended 3/18) A. Definitions: A Home Occupation is a professional occupation, service business or the production or selling of a product that is carried out from the primary dwelling which is clearly accessory and subordinate to the residential use of the property. A Home Occupation may not be conducted in an Accessory Dwelling Unit. (Amended 3/18)*

A grandfathered nonconforming use is a use not permitted in the zoning district where it operates and that existed prior to adoption of the Home Occupation ordinance on January 6, 1989. The baseline of the nature and scale of the Grandfathered Non(1)Conforming Use shall be determined by the record established by the Grandfathered Non-Conforming Use Survey over the most recent 5 years. (Amended 3/18)

The Pooles have no idea what the ordinance said in 1989, or 2017. The town has not explained that, so the Pooles have no idea if they are grandfathered, even assuming they actually have a "home occupation" to begin with. There certainly is no home occupation "carried out from the primary dwelling" and the town has not chosen to explain anything to the contrary. The town has provided no evidence of an "professional occupation", no evidence of a "service business", and no evidence of "the production or selling of a product" that is "carried out from the primary dwelling".

WHAT IS A NON-PERMITTED USE? So what uses are NOT permitted?

- F. *Uses Not Permitted: The following uses are not permitted as a Home Occupation: adult oriented business; fireworks storage, manufacture and sales; industrial and commercial manufacturing or activity; vehicle restoration and auto body shops; storage, handling or sales or regulated substances. (Adopted 3/13; Amended 3/17)*

Question: is parking vehicles a "commercial activity? How many company vehicles are parked at homes all over this town? In fact, parking vehicles is by definition, "inactivity." All of the listed non-permitted activities are activities. The Pooles have no activities on site. As such, the Pooles have a permitted use because they do not fall under the section describing non permitted activities.

EVEN IF NOT GRANDFATHERED AND EVEN IF THE USE IS A NON- PERMITTED USE, ARE THE POOLES PERMITTED BECAUSE THEY ARE INVISIBLE?

An Invisible Home Occupation is one with no visible activity conducted outside the home. A Visible Home Occupation is a home-based business with a sign and/or customers visiting the business for the purchase of services or products. (Amended 3/96; Amended 3/17)

The Pooles have no visible activity outside the home. Parking vehicles is not an activity. The Pooles do not have an occupation that is conducted inside or outside of their home. If it were, every person who brings a company vehicle home, or works from home, would have a home occupation.

By contrast, a visible home occupation has signs and customers visiting and the Pooles certainly don't have that.

Even if the Pooles have an "activity" by virtue of parking alone, they are invisible from the road, and therefore cannot be prohibited by the town. The ordinance itself explains that the purpose of the ordinance is to "protect public health and safety" and "shall have no impact to the character of residential neighborhoods and the town". The Pooles use has no public health and safety impact, and because it is not visible from the street or from neighbors, it cannot impact the character of the neighborhood or the town. Therefore, regulating it in any way is prohibited by the ordinance itself and by the New Hampshire constitution.

ADMINISTRATIVE SUPPORT

What is more bothersome is that the Selectboard improperly required the Pooles to complete an "invisible home occupation application" and pay the fee because the Pooles do some of their bookkeeping from their home (wherever the laptop is). What that has to do with public safety and the character of the neighborhood is a mystery and it is unconstitutional to require the Pooles to do anything simply because they do some of their bookkeeping at home. If the town cannot show a public interest, it cannot just make these ordinances up and try to enforce them. The Pooles are not an invisible or visible home occupation and they want their vehicles registered as always with no municipal interference. By the way, bookkeeping is a permitted use.

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). 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. (Amended 3/97) (Amended 3/18)

Chairman Allen stated item 10 and all its bullets, are items that were discussed over and over at the hearing and are just a rehashing of the hearing. Board members opined that there was no new evidence within this item, nor did they feel they erred with respect to these items.

11. The Selectmen violated the agreement of the Selectmen to give the Pooles 1 year from March 21, 2022 to resolve their registration and home occupation issues by voting on the home occupation before the 1 year expired.

Chairman Allen noted the dates within this item are incorrect as stated in the Selectmen's letter. Their letter stated the one-year extension for vehicle registrations was to allow the Pooles to apply for a home occupation permit, and a Selectmen vote on that home occupation within that timeframe would be required for that permit to be issued. Thus, voting on the home occupation application prior to the end of the one-year grace period does not constitute a reason for a rehearing.

Board members agreed there was no new information to counter this statement and that no errors were made by them with respect to this item.

12. The ZBA had one single task on December 29, 2022: to decide if the Notice of Violation of October 17, 2022, was procedurally correct. Rather than decide if the Notice of Violation was correctly issued on October 17, 2022, the ZBA addressed the issue of whether the Pooles were running a commercial enterprise in a residential zone. This issue was NOT before the ZBA. As such, its December 29, 2022, decision was wrong. The ZBA knew, at its December 29, 2022, that as of October 17, 2022, the Selectmen could NOT issue a Notice of Violation because the Selectmen had not ruled on the home occupation permit and because as of October 17, 2022, the Pooles still had one year to address the home occupation issue.

Mr. Falman stated the denial for the appeal was that the applicants did not meet the requirements of the ordinance as was correctly cited by the Selectmen.

Mr. Maher stated it was not incumbent upon the town to provide the Pooles latitude to address the fact that they were illegally operating a business from their property in violation of Article III-B and Article XVI of the Town of East Kingston Zoning Ordinance. That was precisely the issue that in front of the ZBA as a part of trying to address the applicant's request to quash an invalid notice of violation. In an effort to determine if a notice of violation was correctly issued, the Board asked the Pooles and their attorney a series of questions relative to the validity and accuracy of the information that they were operating an illegal home occupation. The Board did their due diligence and had adequate discussion as to whether or not the Board felt there a notice of violation was improperly issued. The Board came to the conclusion, in section two of the notice of violation, that there was a misstatement with respect to whether or not the home occupation had been denied; but that does not change the fact that in section one, the town correctly cited a violation and they were within their purview to issue the cease and desist order. He stated he found no fault in how the board adjudicated the case and takes exception to what was said in the attorney's reference.

Mr. Robbins spoke to the initiator of this whole matter being the attempt to register the four commercial vehicles which is in direct violation of Article III-B. He stated he does not see where the ZBA has done anything incorrectly; the Board followed all the correct procedures.

Mr. Falman agreed stating the Board did not find that the Selectmen interpreted the ordinances incorrectly. It is clear the Pooles are not in compliance with the town ordinances.

Chairman Allen stated all the discussion around the activities on the property that Attorney Flagg has cited in the motion for rehearing were about establishing whether the ordinances, cited in the cease and desist, were appropriately applied. He went on to address a statement made by Attorney Flagg regarding the Board having only one single task by citing 674:33: *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 676:5 Notes to Decision #9: Under RSA 674:33 and RSA 676:5, the zoning board of adjustment may hear and decide an administrative appeal of a notice of violation to the extent that it is alleged that the administrative officer committed an error involving the construction, interpretation or application of a zoning ordinance. But the ZBA has no authority to hear and decide issues arising from the notice of violation beyond contesting an officer's construction, interpretation or application of a zoning ordinance.*

He continued to say the Board dug into the activities to make sure the ordinance was correctly interpreted just like it states in RSA 676. The single task notation by Attorney Flagg is just one component of the Board's task.

13. *By statute, the ZBA has the following power: 674:33 Powers of Zoning Board of Adjustment. --*

I. (a) The zoning board of adjustment shall have the power to:

(1) 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.

Chairman Allen noted RSA 676, as recently quoted, is applicable to this item as well. Board members were in agreement.

14. *The Selectmen ADMITTED that the October 17, 2022, Notice of Violation (a cease and desist) was improperly issued on that date because the Selectmen had taken no vote on the home occupation and had given the Pooles one year before the Selectmen would take any action. Once the ZBA had this information, its only choice was "hear and decide" if "there is error in any order" of the Selectmen. There is no dispute that there*

was an error in the issuance of the Notice of Violation. The ZBA should have sustained the appeal by the Pooles and found that the Notice of Violation was issued illegally.

Chairman Allen responded there is absolutely no evidence of the Selectmen admitting they improperly issued the notice of violation. In fact, the letter from the Selectmen answered the questions that were asked by the ZBA. The cease and desist and the ordinances cited were determined to be accurate by the testimony and application information submitted by the Pooles.

15. The ZBA, instead, decided what they thought was the most expeditious path for the Pooles and essentially said that since the Pooles, in the opinion of the ZBA, were in violation of the zoning ordinance anyway, the fact that the Notice of Violation was not properly issued made no difference. The ZBA ignored the fact that the Notice of Violation was illegal and leapfrogged to the issue of zoning, an issue NOT before them. Had the ZBA simply addressed the legality of the Notice of Violation, it would have had to sustain the appeal, the Selectmen would then have to hold a proper meeting on the home occupation application, and, if the home application was denied, the Pooles could then appeal to the ZBA and request a Variance or a Special Exception.

Chairman Allen responded the basis of the appeal from administrative decision was that the cease and desist should not have been issued; however, the ZBA, through its fact finding and by the testimony of the applicant and his attorney, determined that it was issued appropriately based on the Selectmen's interpretation of the ordinances. At no point did the Board state the cease and desist was illegal.

Mr. Robbins concurred and stated he did not think the notice of violation was illegal, though he thought it might be ill-timed.

Mr. Falman added it was the Board's duty to see if the notice of violation was in conflict with the zoning ordinance, and it was not.

16. The ZBA can only decide issues before it. It cannot address something not yet addressed by the Selectmen.

Mr. Maher responded the implication in this item is that the Selectmen had not denied the application for the home occupation permit; but that was not what was cited in the notice of violation. The notice of violation is specific to the two ordinances (III-B and XVI) that the Pooles admitted during the fact-finding mission that those citations were correct. The statement as to why they cited the violation was irrelevant. The Board had no record at the time that a denial had been issued; however, the Board tried to allow some latitude that if the town came back and said something different that would invalidate the notice, then the Board could have voted differently. But that was not the case; the Selectmen not only clarified the one-year grace period, but produced evidence that the home occupation application was denied. If the Pooles were offended by the Board's efforts for expediency, the Board could have taken longer.

Mr. Ciardelli stated he feels the Board has given the Pooles latitude throughout the process. The Board continued the hearing to allow them to address unanswered questions. The Pooles may not like the answers, but the Board did their due diligence to the process.

Mr. Robbins reiterated this issue began in December 2021 when the Pooles tried to register their vehicles without a home occupation permit. He stated his question at the time was what have the Pooles done to mitigate this and the only answer he got from Attorney Flagg was that they came to the ZBA to get this turned over.

Chairman Allen agreed that it was important to get the additional information from the Board of Selectmen. To him it was clear, by the issuance of the cease and desist, that the Selectmen had made a decision, but perhaps it had not been recorded the way it should have been and they rectified it after the ZBA had asked for it. Either way, the Selectmen made its decision and did so before the Zoning Board made its decision on December 29th.

Mr. Falman added the Pooles never produced any evidence of correspondence that they were pursuing the matter, to get it addressed with the Selectmen.

17. *To the extent that the ZBA disagrees that its December 29, 2022, decision was procedurally and substantively incorrect, the ZBA should consider a variance under RSA 674:33, and in doing so, should consider:*
- (A) The variance will not be contrary to the public interest;*
 - (B) The spirit of the ordinance is observed;*
 - (C) Substantial justice is done;*
 - (D) The values of surrounding properties are not diminished; and*
 - (E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.*
- (b)(I) For purposes of subparagraph I(a)(2)(E), "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:*
- (A) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and*
 - (B) The proposed use is a reasonable one.*
18. *To the extent that the ZBA disagrees that its December 29, 2022, decision was procedurally and substantively incorrect, the ZBA should consider under RSA 674:33, a special exception, and in doing so, should consider:*
- IV. (a) A local zoning ordinance may provide that the zoning board of adjustment, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance. All special exceptions shall be made in harmony with the general purpose and intent of the zoning ordinance and shall be in accordance with the general or specific rules contained in the ordinance.*
19. *The Pooles' property warrants a variance or special exception for the reasons set forth herein and on the record with the ZBA.*

Chairman Allen responded to items 17-19 collectively stating that the Pooles can submit a formal application for these processes should they wish. One charge of the Board is to help exhaust all options before applicants head to court. The Pooles have the right to apply for a variance, and provided they meet all the criteria, one could be granted. They can even go back to the Planning Board and work out the acceptable conditions for a home occupation. Both of these options must be initiated by the Pooles.

Upon Chairman Allen's inquiry, all members were in agreement that no new evidence had been provided to justify a rehearing, nor did the Board feel they erred in their decision to deny the appeal.

MOTION: After careful review of the materials provided, Mr. Robbins motioned to DENY the motion for rehearing for Bradley Poole with respect to the ZBA's December 29, 2022 denial of an appeal from administrative decision regarding a cease and desist Notice of Violation Use of 116 North Road, MBL# 15-03-14, based on the Board's determination that their December 29th decision was not unreasonable, was not unlawful, no technical errors were made by the Board, nor was any new evidence provided that was not available at the time of the original hearing; seconded by Mr. Ciardelli. With no further discussion the motion passed 5-0-0.

APPROVAL OF MINUTES

Board members reviewed the minutes from December 29, 2022.

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

OTHER BUSINESS

With no other business before the board,

MOTION: Chairman Allen motioned to adjourn; seconded by Mr. Ciardelli. With no further discussion the motion passed 5-0-0 and the meeting adjourned at 7:38pm.

Respectfully submitted,

Catherine Belcher

Land Board Secretary

Minutes approved on March 23, 2023.