

# TOWN OF EAST KINGSTON ZONING BOARD OF ADJUSTMENT

## MEETING MINUTES

July 27, 2023

Pound School  
41 Depot Road  
East Kingston, New Hampshire

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

### AGENDA

Appeal from Administrative Decision – George & Jill Whiteman – 18 Rowell Road – MBL# 10-02-17 (Case #2023-02)  
Request for Variances – George & Jill Whiteman – 18 Rowell Road – MBL# 10-02-17 (Case #2023-03)

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

Others present: George and Jill Whiteman, Attorney Will Warren, Cheryl Durkee, and Dan Bodwell.

Chairman Allen opened the meeting at 7:01pm followed by the roll call. He then announced the Whiteman's have submitted two applications (one for an appeal from administrative decision and one for nine variances) and that they are two separate cases: #2023-02 and #2023-03. He then provided an overview of the differences between the applications noting the board will put themselves in the shoes of the administrative officers in the appeal matter (Board of Selectmen for the decision to deny the home occupation permit and Planning Board for its recommendation to recommend the Selectmen not grant the home occupation permit). The board is tasked with evaluating the decisions made as it relates to the two boards' interpretations of the zoning ordinance. This is the only task of the board on the matter of the appeal from administrative decision.

He went on to say that depending on the outcome of the appeal, the board will then address the request for nine variances which will be addressed one at a time with decisions made on each individual variance, and with each evaluated on the five variance criteria.

Noting that he sat on the Planning Board when the decision was made to recommend denial of the home occupation to the Selectboard, he asked Mr. & Mrs. Whiteman if they had any objections to him sitting on the Zoning Board for these matters.

Attorney Warren indicated they wished for Chairman Allen to recuse himself from presiding over the cases. Chairman Allen then designated Paul Falman as a voting member for the evening and turned the meeting over the Vice Chair Robbins.

Mr. Maher inquired if the applicants were requesting Chairman Allen to recuse himself from both cases or just the appeal from administrative decision as the appeal is related to the Planning Board; however, the variance is not – they are completely independent of one another.

Attorney Warren responded that the recusal request is specifically for the appeal from administrative decision as the ZBA's role is different for each matter - the board is sitting as an appellant body for the appeal and as a fact finder for the variances.

Chairman Allen then announced he would recuse himself from the appeal matter and then return to the table to chair the variance requests. Attorney Warren stated he had no objections to this. Chairman Allen then turned the meeting over to Vice Chair Robbins and took a seat in the audience.

### **APPEAL FROM ADMINISTRATIVE DECISION – GEORGE & JILL WHITEMAN – 18 ROWELL ROAD (CASE #2023-02)**

Vice Chair Robbins opened the public hearing at 7:05pm for an Appeal from Administrative Decision submitted by George G. and Jill A. Whiteman who allege an error has been made in the decision, determination or requirement of

the May 18, 2023 Planning Board recommendation and the June 12, 2023 Board of Selectmen decision to not approve the Whiteman's invisible home occupation proposal to operate G&J Transportation, LLC from 18 Rowell Road, MBL# 10-17-02. The appeal cites the Planning Board and Selectmen misconstrued and misapplied the terms of East Kingston Zoning Ordinance articles related to the Residential/Agricultural District: Article III-B.1, Article III-B.2, and articles related to Home Occupations: Article XVI.A, Article XVI.C.3, Article XVI.C.6, Article XVI.C.7, Article XVI.D.2, Article XVI.F, and Article XVI.G. He then provided an overview of the hearing whereby the applicants will present their case, the board will ask questions, public comment will be heard, then the board will deliberate and vote.

#### PRESENTATION BY THE APPLICANT

Attorney Warren introduced himself as an attorney with Donahue, Tucker and Ciandella out of Exeter, NH, representing George and Jill Whiteman of G&J Transportation, LLC. He stated they have submitted a number of documents for the appeal and are happy to answer any questions the board might have about those documents; but for the purpose of presentation, he will provide a summary of those materials.

He stated the Whiteman's own property at 18 Rowell Road, MBL# 10-02-17, which is a two-acre parcel located in a residential/agricultural district, consisting of a single-family home and 40x76 foot garage. The garage is used to park the tractor trailer and has been used in that manner since 2013. A building permit was issued for the construction of the garage for this specific use in 2012 and the use was approved by the town at that time. A certificate of occupancy was issued in 2013. At this point the building and its use became vested as it was lawfully built and approved by the town. At the time the occupancy permit was issued, and the use vested, the only activity for G&J Transportation was the parking of the tractor trailer – there was no business administration going on as the business was operating out of Massachusetts. G&J Transportation LLC was not registered in East Kingston until just over a year after the garage was built. It wasn't until 2020 when the use was expressly prohibited by the zoning ordinance – specifically the parking of not more than one commercial vehicle of 14,000 GVWR or less, and commercial operations of the trucking company not being an allowed use. It wasn't until 2023 that the town apprised Mr. Whiteman of the requirement for a home occupation permit in connection with the G&J Transportation activities and the parking of the tractor trailer unit. Mr. Whiteman is doing his best to comply with the town; he consulted with the town when applying for the home occupation permit and it was recommended he apply for an invisible home occupation largely because there are two distinct uses going on: 1) parking the tractor trailer, which is a vested use for over a decade, and 2) administrative services for the business. Consistent with this guidance, he applied for an invisible home occupation permit. It is his understanding that the Selectboard cannot grant a home occupation until they receive a favorable recommendation to do so from the Planning Board. The Planning Board met to consider the invisible home occupation proposal and ultimately voted not to recommend the Selectboard grant the permit. The Whiteman's are appealing both the decisions of the Planning Board to not recommend, and the Selectboard for denying the permit.

He went on to present that the area the Planning Board strayed from its analysis was in considering these two separate uses - these were combined as a single use. The Planning Board treated the application as though it was a new use to house a tractor trailer and operate a business office. That is not the case, the use in parking the trailer truck at the property is a vested use under New Hampshire law. The Supreme Court has stated that an owner who relies in good faith on the absence of any regulation that would prohibit the proposed project, and has made substantial construction on the property, acquires a vested right to not only complete the project, but to continue the use indefinitely into the future notwithstanding subsequent regulations or ordinances that might be adopted in the future. The town's ordinance recognizes a similar principle in Article XXI.C that speaks to a lawfully nonconforming use that was in existence prior to the time another ordinance was enacted that would otherwise bar it. That use can continue notwithstanding the enactment of a subsequent regulation provided the use is not enlarged, increased or extended, or moved. The ordinance specifies that marketing a property for that use is evidence of an intention to keep that use, thus the ordinance is set up to assist property owners in maintaining a lawfully nonconforming use. In this case, Mr. Whiteman has continuously used the garage to park his work vehicle since the occupancy permit for the garage was

issued. He went on to explain the term *park his work vehicle* to mean the tractor trailer truck is his work vehicle that he drives to work each morning, drives home at the end of the day, parks it, sleeps, and drives to work the next morning.

He stated G&J's primary operation is in Hudson, Massachusetts. Mr. Whiteman is not conducting regular trips to 18 Rowell Road whereby there is some sort of manufacturing on the property or where deliveries are being made to 18 Rowell Road; the only use being done, which is allowed under NH law and the zoning ordinance, is parking the truck and trailer overnight. It is no different than a delivery driver who uses his own vehicle to make deliveries, drives home and parks the vehicle overnight. The use of parking the tractor trailer is a vested use, regardless of whether a home occupation permit is granted, and it may continue as a vested, lawfully nonconforming use. When the Planning Board analyzed this, they were not looking at this as a vested use, which is separate and apart from the administrative business office. The Planning Board should have focused its analysis on the administrative tasks associated with the business. When considering the business office activities, the Whiteman's do not believe those tasks even rise to the level of requiring a home occupation permit as a home occupation is defined as a professional business, service business or the production or selling of a product that is carried out from the primary dwelling. This is none of those; it is just administrative work being done in connection with a business with primary operations well outside of East Kingston. The first question for the Zoning Board is whether or not a home occupation permit is even required given that the parking of a tractor trailer is a lawfully nonconforming use and vested right. Should he ZBA feel a home occupation permit or invisible home occupation permit is needed, the applicants submit that the Planning Board's decision was unreasonable and unlawful in its determination the use did not comply with all the requirements. He then offered to go over each of the items in the appeal.

#### BOARD QUESTIONS AND FINDINGS OF FACT

At this time Vice Chair Robbins opened the floor to board questions. Mr. Falman inquired as to how Mr. Whiteman was informed by the town that he needed to apply for a home occupation permit. Mrs. Whiteman responded she went to register the tractor trailer and was told at that time. Mr. Whiteman added that the town held his registration for a day until they were able to get a signature from a selectman to allow the registration to be processed.

Mr. Maher asked for evidence to support the applicant's claim that the town knew and approved of the use of the structure for the storing of the tractor trailer unit. He did not see any statement of such on the occupancy permit nor did he see a building permit application in the information packet.

Attorney Warren responded Mr. Whiteman had spoken directly to the building inspector at the time who indicated he would be willing to testify to this, and that Mr. Whiteman told the building inspector the purpose for the garage was to park the tractor trailer unit. He cooperated with the town at that point taking into consideration the recommendations from the building inspector. It was understood by the building inspector at the time that the building was being purposed for the tractor trailer unit. Regardless of whether or not the building inspector knew, the use was allowed at the time as indicated by the building inspector at that time. It wasn't until 2020 that the town imposed weight limits on vehicles parked at residences. This parking of the tractor trailer was vested separately of the construction of the building.

Mr. Maher stated he appreciated the explanation but is not sure he agrees with the determination of vested rights. He asked the question as there was nothing in the application packet to substantiate those claims.

Mr. Whiteman stated the fire chief also knew as the garage had to undergo a fire inspection, and that the police chief knew as well.

Attorney Warren stated that there is no evidence to the contrary; the only evidence submitted to the Planning Board and the ZBA is that the use was permitted, and the town was aware of the use at the time the building permit was issued.

Mr. Ciardelli inquired about the guidance given by town officials with respect “as long as the neighbors were okay with the proposed use, it would be okay.”

Mr. Whitman stated he was told by an individual in town that his best option was to go to the town hall to make sure there was no reason why he couldn't have his truck at his home. The town hall stated the only ordinance on file would be that if the neighbors have a problem with the truck, the truck would have to go, so he was instructed to check with his neighbors and the road agent due to the weight limit on the road. The road agent said the truck would be no problem as the weight limit was to protect the neighborhood from other people driving their equipment in and out, specifically construction equipment that can damage the road. After he purchased the property, he went and checked with all the neighbors; no one had any concerns or problems. He then submitted plans to the building inspector for the garage who inquired why he needed a building that big. He told the building inspector it was to park his truck in it as in the winter he does not want snow on it and so that he can start it up and let it idle in the building and not outside. The building inspector granted the permit. When he finished the garage the building inspector was no longer there and the selectmen had to sign off on the permit so he could get an occupancy permit. He has been in the building since then, parking there every single day.

Vice Chair Robbins inquired as to the weight of the truck as the weight limit on the road was noted.

Mr. Whiteman stated the truck weighs 39,000 pounds, which is over the ten-ton limit and the reason why he checked with the road agent. He was told because it was his personal vehicle to be stored at his home, he was allowed to take it up and down the road.

Mr. Maher spoke to the law that governs vested uses noting the presentation of the law was very good; however, he asked Attorney Warren to speak to the provisions that a vested use not expand or enlarge in order to stay vested. The presentation is that the parking of the truck is vested, but the business use of the property expanded with the addition of the business office in 2014. He asked him to reconcile the expansion of the business use as it relates to the vested parking. Additionally, he stated he does not agree with the claim that the administrative work to support the business does not require a home occupation permit. He stated the establishment of a business at an address is, by default, different than just parking a truck at that address and that this change, post garage construction, is specifically prohibited as part of the vested right.

Attorney Warren stated the NH Supreme Court has addressed the issue on multiple occasions and has held that a lawfully nonconforming use may be expanded under state law. It may be lawfully expanded if the expansion is a natural progression and is reasonable. As far as the expansion goes, registering the business at a location is simply filing a couple of documents with the NH Secretary of State. Additionally, the expansion of a business office does not expand on the footprint of the nonconforming use. Examples of unacceptable expansions would be the addition of a second tractor trailer or increasing the number of runs per day. Registering the business at this address was a matter of convenience and a natural progression for a lawfully nonconforming use.

Mr. Maher inquired if maintenance of the vehicle is performed at the home address to which Mr. Whiteman responded it is done inside the garage and supplies for maintenance are delivered to the property. He has been maintaining the truck since he moved into the property.

Attorney Warren noted the maintenance activity is a part of the vested use based on the fact the service has been provided since before the garage was built and since the business originated.

Mr. Maher indicated he is gathering as many facts as he can as they will also need to determine the scope of the use of the garage as it relates to the 25% gross floor area provision. He then asked if the zoning ordinance at the time of the construction of the garage allowed for the operation of the commercial activity from a residentially-zoned property.

Attorney Warren responded that Article III-B of the zoning ordinance wasn't adopted until 2020.

Mr. Maher reiterated the question, noting there was a preceding action taken by the town which required all businesses that would be operated out residentially-zone properties to comply with other provisions of the zoning ordinance.

Attorney Warren stated the definition of a home occupation is the best response to the question noting it was adopted in 1989 for what were defined as home occupations. Though the ordinance has changed over the years, the definition has not changed significantly over the years and the 2018 definition states a home occupation is a professional occupation, service business or the production or selling of a product. This is not the case in this instance - just a vehicle being parked at a home and maintained as has been established. No services are rendered at the property, no product is being produced or sold and, based on the time the occupancy permit was being issued, there was no requirement for the Whiteman's to apply for a home occupation permit. He admitted he has not seen a full version of the home occupation ordinance that was enacted at the time the use began; however, what he has seen is the definition has been similar over the years.

He went on to say that the vehicle does meet the definition of a commercial vehicle as it relates to the ordinance; however, the use that has been occurring over the span of a decade is not considered a commercial purpose under the zoning ordinance. The ordinance defines commercial purpose as, "any use of land or buildings for the purpose of light manufacturing, repairing or selling at retail or wholesale a product, good or service." None of those activities are occurring at the property.

Mr. Maher asked about the location of the primary base of the operations.

Mr. Whiteman responded the base is in Hudson, Massachusetts at property he leases along with other people. He stores materials, logs and products there. He also hauls out of other locations and everything he hauls is produced off site from his property.

In response to Mr. Ciardelli's inquiry about ownership of the truck, Attorney Warren stated the vehicle belongs to the business not the individual. In response to Mr. Ciardelli's second question, Mr. Whiteman stated the truck used to be stored on Route 125 in Brentwood where the office was located.

Attorney Warren then presented the specific provisions outlined in the complaint that the Planning Board and Selectboard decisions were unreasonable and unlawful.

- Article III-B (parking of commercial vehicles over 14,000 lbs./commercial operations): These provisions were not adopted until 2020, the use was vested prior to that, and the use was in existence after that. Because they are vested in accordance with NH Law and the town's ordinance, these provisions do not apply to this specific use.
- Article XVI.A (visible activity outside the home): there are two trips made per day (leaving/returning) and if those two trips constitute visible activity outside the home, then any home occupation that requires any degree of travel will require a full public hearing and cannot meet the standard of an invisible home occupation. The use is a vested right and does not violate the zoning ordinance. Mr. Whiteman added the tractor trailer is parked inside the building and cannot be seen by the neighbors or people driving by.

Mr. Falman asked if all the abutters had been notified of this public hearing and if there were any other abutter comments or feedback.

Mrs. Belcher (Land Board Secretary) responded that abutters had been notified and no other comments or feedback had been received. Cheryl Durkee of 15 Rowell Road stated she lives across the street from the Whiteman's and that if she didn't know he had the truck, she wouldn't know it was there. He is very courteous to the neighborhood and does not turn his headlights on when pulling out of the driveway, he drives very slowly, and toots the horn at her grandson.

Attorney Warren continued with his presentation:

- Article XVI.C.3 (regular need for delivery materials from vehicles over 12,000 lbs.): The fact that there is a tractor trailer making two trips per day does not violate this provision as there are no deliveries made to and from the premises. The tractor trailer is being parked overnight only.
- Article XVI.C.6 (excessive vibrations, negatively impact neighborhood, traffic volume/safety): The activity has been going on for over a decade thus granting the home occupation permit would make no difference to the existing conditions.
- Article XVI.C.7. (25% gross floor area): The house is 1,663 square feet in footprint, the garage 3,040 feet for a total of 4,703 feet with 25% being 1,175 feet. The portion of the garage dedicated to the storage of the tractor trailer is 76x15 feet. Whether the storage of the truck and the administrative tasks are combined or calculated individually, the use does not exceed 25% of the gross floor area.

Mr. Maher spoke to his concern of contradictions in the presentation with respect to the claim the building was constructed for the sole purpose of storing the tractor trailer and the counter argument that only a portion of the building is being used in order to satisfy another provision. Carving out portions of the garage so that it does not contribute to the overall square footage seems like they are playing it both ways.

Attorney Warren responded that the Planning Board focused its analysis on the comings and goings of the tractor trailer in determining the use does not comply with the zoning ordinance. If Mr. Whiteman were to completely stop parking the tractor trailer truck at the property, there would be a single-family home and garage that are permitted by the town. There is a distinction between the garage and the using the garage for a particular purpose, and the amount of the space taken up for that particular purpose is essentially the space for the tractor trailer and any other materials (maintenance items) that may be associated with it.

Mr. Maher stated the ordinance clearly states the home occupation must not utilize more than 25% of the gross floor area including dwelling, basement and accessory structures. The applicant has submitted, as part of this appeal application, that the sole purpose for constructing the garage was for the tractor trailer unit and now, in a separate portion of the documentation, they provide, a rational, but otherwise conflicting argument, that in order to satisfy one portion of the home occupation requirement (gross floor area) the claim is that only a portion of the building is for the truck. The basis of the entire vested case relies on the claim the town approved the garage for the sole purpose to house the truck. He stated he is having trouble reconciling these two claims without feeling a less than truthful analysis has been given.

Mr. Whiteman replied the truck can only fit into one of the doors in the garage, the rest of the garage is for his personal use – the truck only has its bay. The remaining first floor, second floor and third floor of the garage are for personal use. The truck only uses an 8x70 foot portion.

Attorney Warren spoke to Article XXI (nonconforming lots, structures and uses) and noted there is a clear distinction between the nonconforming buildings and nonconforming uses. Both the building and the use could be lawfully nonconforming; however, it is only the use that is lawfully nonconforming. It is only the use that they are talking about, and it is only the use the Planning Board focused on. Should the tractor trailer unit go away, there is no issue here.

- Article XVI.D.2 (administrative support services are exempt from public hearing process): The Planning Board determined the parking of the tractor trailer did not constitute administrative support; however, the Whiteman's restate their claim the parking of the truck is a vested, lawfully nonconforming use. Even if it wasn't vested, this can still qualify as administrative support because the truck isn't being stored on the premises in conjunction with the business activities, it is only parked there overnight.

- Article XVI.F (industrial/commercial manufacturing or activity not permitted): The Planning Board determined this was some sort of commercial activity; however, even though the truck is technically defined as a commercial vehicle, there is no manufacturing or commercial activity going on at the premises.
- Article XVI.G (business who can demonstrate the business is invisible): The use does not create any additional traffic (two trips per day) which is what everybody else creates, there are no additional visible impacts because they park the truck inside the garage and out of sight. The garage is well situated to conceal the activity and reduce any impact to the surrounding neighborhood. The garage is set back behind the house, there is a wood buffer, and the garage is centrally located on the lot so as to minimize any impacts that could fall upon the abutting properties.

Mr. Ciardelli spoke to Article XVI.A.3 with respect to deliveries by commercial vehicles over 12,000 lbs. and the essence behind the reason this paragraph was in the home occupation ordinance in the first place which was to address the impact of large commercial trucks in residential neighborhoods and the potential danger, concern, and inconvenience to neighbors. Part of the language even speaks to preventing cars from waiting in the streets and from backing up traffic. He stated he is familiar with the location of the home and the garage and is impressed with the parking abilities of Mr. Whiteman to back the truck into the carport with such precision. But it also tells him that Mr. Whiteman stops his truck in the street and backing in which is where that part of the home occupation ordinance comes into play.

Mr. Whiteman stated he backs into the property once a day and when he leaves in the morning as he is driving straight out. His driveway is wide enough at the end of it so that if cars were behind him or coming toward him on the roadway, he can easily swing into the driveway to allow them to pass. He does not need to stop traffic in order to back into his driveway. He does this as a courtesy and turns on all his hazards and strobes so that everyone knows when he is maneuvering. He has been doing this for eleven years.

Mr. Maher spoke to the definition of commercial activity, in that the administrative functions of the business, the invoicing, payments made, etc. are being conducted from the property. This is where the money flows for the business, thus this is part of the commercial business.

Attorney Warren stated the ordinance defines commercial purposes as any light manufacturing, repairing or selling, the retail or wholesale of a product, goods or services of which none of these activities are occurring at the property. It doesn't extend to accepting payments for an activity that is conducted offsite.

Mr. Maher responded the issue is that the applicants are claiming there is no commercial activity at 18 Rowell Road; however, there is a commercial vehicle operating out of the residence, there is a commercial business registered at 18 Rowell Road with the Secretary of State's Office, and there is commercial activity within the administrative portion of the commercial business. There may be more discussion to be had on this topic; but this is the position he (Maher) has on the matter of commercial activity.

Vice Chair Robbins spoke to the vesting or grandfathered issue in that it can only be grandfathered if the commercial business was in operation at the date of the public posting of the home occupation ordinance dated January 6, 1989.

Mr. Maher stated the Attorney Warren has in no way suggested the commercial activity is a grandfathered use; he has stated it was a vested use. The provisions where the business would have to have been registered with the town in 1989 do not apply here.

Attorney Warren agreed that there is no argument for grandfathered status. He stated there is a distinction between a legally nonconforming use and a grandfathered use.

#### PUBLIC COMMENT

With no other questions from the board, Vice Chair Robbins opened the hearing to abutter and public comment.

Dan Bodwell of 79 North Road stated he has no affiliation with the applicants but listened to the testimony provided and has concerns about board member Maher's comments about money coming in and out of a home as meeting the definition of commercial activity as this occurs with most homes. He said the building that houses the tractor trailer could easily be used for storing a mobile home with no concern from the town. He has been a resident for 58 years and people need to make a living and it seems that people in town do not want to allow residents in town to conduct essential work; they want the services, but they don't want to live near the service provider.

Cheryl Durkee of 15 Rowell Road stated that when the Whiteman's bought the house they let the neighbors know what their plans were (construct a garage and store the tractor trailer truck). In the 13 years they have been doing this, they have never had an issue with them. Mr. Whiteman is very quiet, and he leaves his lights off when leaving in the morning and in the evening, he backs in and parks the truck inside the garage.

#### BOARD QUESTIONS AND FINDINGS OF FACT

With no further comments from the public, Vice Chair Robbins closed the hearing to public comments and re-opened the hearing to board questions and comments.

Mr. Maher spoke to the comments made by Mr. Bodwell regarding how money flows out of his (Maher) house every day and that his (Maher's) comments about the money flow were specific to the flow of money for the trucking operations – if the economics of the business are operated out of 18 Rowell Road, then that constitutes commercial activity associated with the business.

Mr. Whiteman then compared the activity of a typical homeowner paying their bills from their home to the invoicing and bill paying for the business, claiming they were similar in nature.

Mr. Maher stated the difference was the typical homeowner does not have a business registered at their home with the Secretary of State.

Mr. Whiteman stated the billing from the company is processed out of whatever company he is trucking for; it is not done out of the home.

Mr. Bodwell spoke to his regret of being passive over the years to the changes made to the zoning ordinance and further stated he was ashamed of how it has changed. He then insinuated Mr. Maher was way off track in his line of questioning and comments.

#### BOARD DELIBERATION

Vice Chair Robbins closed the public hearing at 8:14pm for board deliberation.

Mr. Falman stated Mr. Bodwell's comments that changes made to the zoning ordinance over the years may have caused some confusion to which he (Falman) believes the confusion began in 2020 when the town defined a commercial vehicle as anything over 14,000 lbs. In this case, Mr. Whiteman in 2013, talked to members of the town including the road agent, sought advice on how to proceed, followed the advice, complied with all the requirements, got the proper permits, was issued an occupancy permit, and has been operating along fine until this year. He was instructed to apply for a home occupation permit, he did, and was then denied. Everything he thought he did for the property 10 years ago is now wrong. This is not correct and is unfair to the resident whose livelihood is now threatened. This is an unfortunate set of circumstances as he (Whiteman) has been doing the same thing since he moved into town.

Mr. Collamore indicated that he agreed with Mr. Falman, precedence has been set. The way he went about setting up his business, the admirable way in which he has gone through the process, and now he, and others like him are finding themselves in this situation. It is very unfortunate that the board is starting to see a lot more of this. What constitutes a home business is just not clear enough for people to know what they can and cannot do. People are not able to register their vehicles and essentially are not able to make a living.



Mr. Ciardelli reminded the board that this portion of the meeting is to determine if the Planning Board made a mistake; did the Selectboard make a mistake. Much of the discussion has been about how the applicants got here, the changes made to the zoning ordinance over the years, being misinformed and led in the wrong direction, and had the applicants gotten different advice years ago, would they be in this position. He stated this is all history at this point and went on to quote part of the May 18, 2023 minutes of the Planning Board,

*The board [Planning Board] will evaluate the current application on the current ordinances and what is being asked for now and not what has been done in the past. He [Planning Board Chairman Bath] stated that the town currently has a number of ordinance requirements that this application does not meet...*

The Planning Board made a decision based on this snapshot in time. The charter of the ZBA is to determine if the Planning Board made a mistake; not did the road agent make a mistake 10 years ago or should this ordinance have been written the way that it was. This is not the charter of this board.

Vice Chair Robbins stated on one hand we have a business that has been in operation as an approved nonconforming business for the past 11 years, and on the other hand there is the snapshot that was taken on June 12<sup>th</sup> that said as of today, they cannot have what is happening happen. He stated he thinks the board needs to determine which one of these positions is correct. Does the board take the snapshot and go with it and say what ran before doesn't matter, or does the board consider what ran up to this snapshot?

Mr. Bodwell inquired as to the purpose of the Zoning Board of Adjustment, asking if they were the arbitrators of other boards.

Vice Chair Robbins responded that the ZBA arbitrates decisions made by other boards that are appealed, including the Planning Board – the board also makes decisions on granting zoning variances.

Mr. Maher stated the applicant's own application lays out what the Zoning Board is here to do tonight. The first charge is to determine whether or not the Planning Board, in recommending to the Selectmen that the home occupation not be issued, was appropriate or inappropriate.

He then went on to state for the record that every board member here is a volunteer member, that they are charged with the duty of enforcing the black and white text that is in front of them, which at times causes them to make recommendations or determinations that may not be consistent with individual feelings. But the town makes the decision about what is in the zoning ordinance, not the zoning board. Sitting as a volunteer and being told that he is being crazy is difficult to take. No one on the board gets paid to do this. He stated he does not like sitting on the board at times when he has to ask difficult questions; however, he has signed an oath of office to do so. He stated board members will often disagree with each other on different things and that okay which is why it is good to have multiple members on a board. The board is not often presented with easy decisions or determinations that have to be made. The board can only work with what is in the zoning ordinance and what is presented. He said he tries to be as dispassionate as he can as he processes each case.

Mr. Falman stated that at previous meetings the board made it clear it does not write the zoning requirements, the town approves them. Anyone can suggest a change to the ordinance by going through the appropriate process. The board is stuck with a dilemma of how things have changed over the years; what was allowed 12-13 years ago, and what the current requirements are. People in town talk and they know a number of people are operating businesses out of their homes; but once again, no one has made any effort to propose new language or changes to the zoning ordinance. To this case, the board is stuck with the requirements that are on the books, whether they like them or not.

Discussion on the process to change ordinance language transpired (citizen's petition or Planning Board process).

Mr. Falman stated every voter in town is responsible for the zoning ordinance language.

PUBLIC COMMENT

Vice Chair Robbins re-opened public comment at the public's request.

Mrs. Durkee stated she has lived in town for 40 years and the rules have changed over the years. She has run across a few situations when doing work on her own home where she had to make modifications to her plans or in some cases she was grandfathered in. She asked what happens when the rules change over the years; are people required to make changes each time a rule changes?

Mr. Maher stated the provisions and definitions for pre-existing nonconforming use apply to these situations. Retroactive compliance would be unfair. The substantive debate that the board may get to in the second portion of the agenda goes to how to adjudicate something that was potentially a nonconforming accessory use that may or may not have been expanded and was never registered with the town. This would need to be reconciled.

Vice Chair Robbins added the variance process is how one gets approval for their noncompliant requirement. He then reclosed the public comment section.

#### BOARD DECISION

With no other questions from board members, Vice Chair Robbins requested a motion to approve or deny the appeal from administration for George and Jill Whiteman who allege an error has been made in the decision, determination or requirement of the May 18, 2023 Planning Board recommendation and the June 12, 2023 Board of Selectmen decision to not approve the Whiteman's home occupation proposal to operate G&J Transportation LLC, from 18 Rowell Road, MBL #10-17-02 based on the findings of facts as presented and discussed.

**MOTION: Based on the information and testimony presented, Mr. Ciardelli motioned to DENY the Appeal from Administrative Decision submitted by George and Jill Whiteman (Case # 2023-02), as the Board determined the Planning Board, in its interpretation of the Zoning Ordinance, did not err in its judgement or recommendation to the Board of Selectmen to not grant an invisible home occupation permit, nor did the Board of Selectmen, in its interpretation of the Zoning Ordinance, err in its judgement or decision to deny an invisible home occupation permit; seconded by Mr. Maher. With no further discussion the motion passed 4-0-1 (Mr. Falman abstained).**

The public hearing closed at 8:35pm and a 5-minute recess was called.

This July 27, 2023 Zoning Board of Adjustment meeting reconvened at 8:41pm.

At this point Chairman Allen returned to the board table and designated Paul Falman back to alternate member. With the decision on the Appeal From Administration complete, the board will now move on to the public hearing for variances.

#### **VARIANCE REQUEST – GEORGE & JILL WHITEMAN – 18 ROWELL ROAD (CASE #2023-03)**

Chairman Allen noted Case # 2023-03 for George and Jill Whiteman is a request for nine variances. He informed the board and the applicants that the board will evaluate each individual variance and will not be voting on them as a cluster. Since the information presented in the appeal is not directly relevant to the variance application, and they are separate applications, the applicant will be required to give a full presentation. He also directed board members to not make decisions based on information they heard from a previous case. Board members will need to re-ask questions as they need to ensure everything is laid out appropriately. He then opened the public hearing at 8:43pm on CASE# 2023-03: VARIANCE request submitted by GEORGE G. WHITEMAN and JILL A. WHITEMAN seeking variances from East Kingston Zoning Ordinance Article III-B.1, Article III-B.2, Article XVI.A, Article XVI.C.3, Article XVI.C.6, Article XVI.C.7, Article XVI.D.2, Article XVI.F, and Article XVI.G. The applicants propose to operate G&J Transportation, LLC, a business office with the parking and storage of a commercial vehicle exceeding 14,000 GVWR at 18 ROWELL ROAD, MBL# 10-17-02.

Attorney Warren inquired on the presentation process as there are nine variances being sought. Chairman Allen responded that given the timeframe, and if there are no objections from the applicants and the board, he recommends

the applicant present all of the information and how it applies to each variance, and then the board can vote individually on each variance request. Both the board members and the applicants agreed to this format.

Chairman Allen further stated that unlike the administrative appeal where there was a decision on whether there was an error made in the Planning Board and Board of Selectmen's decisions, the ZBA will now make decisions based on the five variance criteria, thus, the presentation should address each of the five criteria for each of the variances that are being requested.

#### PRESENTATION BY THE APPLICANTS

Attorney Warren of Donahue, of Tucker and Ciandella presented for the applicants George and Jill Whiteman and G&J Transportation, LLC who own property at 18 Rowell Road, MBL# 10-02-17, a 2-acre lot in a residential/agricultural zone with a single family dwelling unit and a 40x70 foot garage which is used to store Mr. Whiteman's work vehicle, a tractor trailer, which is parked overnight and driven out in the morning and returned at the end of the work day. The garage was constructed back between 2012-2013 with a building permit issued shortly after they purchased the property on April 3, 2012. The garage was constructed over the next eleven months and the certificate of occupancy was issued March 14, 2013. The building permit was issued by the building inspector at the time and the certificate of occupancy was issued by the Board of Selectmen because at the time there was no building inspector. The use became vested in or around 2013 after the building (garage) was constructed and Mr. Whiteman began storing the tractor trailer in the garage. The use that he is talking about is not the garage itself, but the parking of a tractor trailer inside the garage. The use qualifies as an accessory use to the primary use of the single-family dwelling use. It was considered as parking a work vehicle at the property and was also considered a permitted use at the time which establishes the time it was vested. In 2020, the town adopted Article III-B in which this type of use was expressly prohibited within the residential/agricultural district, specifically in that it prohibits the parking of not more than one commercial vehicle of 14,000 lbs. or more and prohibits trucking in the residential/agricultural district. In 2023 Mr. Whiteman was informed that he needed a home occupation permit to operate his business, G&J Transportation, LLC out of the home at 18 Rowell Road and to continue to park his tractor trailer on the property.

He went on to present that Mr. Whiteman went on to apply to the town for a home occupation permit for an invisible home occupation to which the application was denied. Mr. Whiteman is happy to apply for and obtain an invisible home occupation permit and pay fees associated with that, which is why they have chosen to apply for multiple variances in this case rather than seeking a variance from Article XVI in its entirety. The town has an interest in regulating home occupations and they are not looking to circumvent that process; they are just looking to continue a use that was established back in 2013 and to continue operating what the town has classified as a home occupation.

He noted that as a result of the use being established in 2013, before there was a business registered at the property, the use became a vested use under NH law. Mr. Whiteman applied to the town and spoke with the building inspector, the road agent, and neighbors about building this garage to park and store his tractor trailer before he even applied for the building permit, and then went forward to apply for and was granted a building permit. The certificate of occupancy was issued about a year later and Mr. Whiteman began parking his tractor trailer there. The use of parking the tractor trailer in the garage at 18 Rowell Road, and the necessary and associated activities such as maintenance, became vested in 2013. This also constitutes a lawfully nonconforming use per the town zoning ordinance under Article XXI.C which states that:

*Where on the effective date of the adoption of this Article or applicable amendment, a lawful use of land exists which would not be permitted by regulations imposed by the Zoning Ordinance, the use may be continued so long as it remains otherwise lawful, provided that:*

1. *The use may not be enlarged or increased, nor extended to occupy a greater area of the building or land that was occupied at the effective date of adoption of the Ordinance or amendment which would have prohibited the use;*

2. *No such non-conforming use shall be moved, in whole or in part, to any portion of the lot or building other than that occupied by such use at the effective date of the adoption of the Ordinance or amendment which would have prohibited same.*

He continued by stating the NH Supreme Court has on many occasions looked at ordinances similar to this as well as NH vesting doctrine and has determined that lawfully nonconforming uses may be expanded to a point whereby it is a natural progression of the use. As long as that expansion is not unreasonable or beyond the bounds of the established use, such that it becomes a different use, then the Supreme Court has upheld the expansion of lawful nonconforming uses.

Attorney Warren then listed the articles which variances are being sought:

- Article III-B.1 to permit the parking of a commercial vehicle exceeding 14,000 GVWR where the ordinance does not permit the parking of commercial vehicles exceeding 14,000 GVWR.
- Article III-B.2 to permit the parking of a commercial vehicle where the ordinance prohibits trucking and hauling.
- Article XVI.A to permit an Invisible Home Occupation, to include the indoor parking of a tractor trailer, where the ordinance would prohibit visible activity conducted outside the home.
- Article XVI.C.3 to permit an Invisible Home Occupation, to include the indoor parking of a tractor trailer, where the ordinance prohibits Home Occupations requiring regular delivery of materials to and from the premises by commercial vehicles over 12,000 pounds GVWR.
- Article XVI.C.6 to permit an Invisible Home Occupation, to include the indoor parking of a tractor trailer, where the ordinance prohibits Home Occupations that cause excessive vibrations or negatively impact the physical condition, safety, access, or traffic volume of existing roads.
- Article XVI.C.7 to permit an Invisible Home Occupation, to include the indoor parking of a tractor trailer, where the ordinance prohibits Home Occupations that utilize more than 25% of the gross floor area including dwelling, basement, and accessory structures.
- Article XVI.D.2 to permit an Invisible Home Occupation, to include the indoor parking of a tractor trailer, where the ordinance would prohibit visible activity conducted outside the home.
- Article XVI.F to permit an Invisible Home Occupation permit, to include the indoor parking of a tractor trailer, where the ordinance prohibits Home Occupations that involve industrial and commercial manufacturing or activity.
- Article XVI.G to permit an Invisible Home Occupation, to include the indoor parking of a tractor trailer, where the ordinance would prohibit visible activity conducted outside the home.

The applicants submit that all of the criteria can be met for each of these variance requests under RSA 674:33 and proceeded to address each one requesting the same consideration enter into each requested variance and that each variance be granted on the same basis that he will outline.

He stated the first two criteria are that the variances will not be contrary to the public's interest and the spirit of the ordinance is preserved. The NH Supreme Court has consistently held that they are intertwined. In order to meet these variance criteria, the proposed use cannot unduly conflict with the zoning ordinance such that it violates ordinance basic zoning objectives. The Supreme Court has recognized that a variance by its very nature does not comply with the strict letter of ordinance so there must be something more than just not complying with the strict letter of the ordinance; thus, the Court has instructed ZBAs to consider whether the requested variance would alter the essential character of the neighborhood or threaten the public health, safety or welfare.

Because he has stated the use is vested and has a long-standing use in the community, given the character of the use, and its history for an extended period of time without any public outcry or upset, the proposed use will not change the character of the neighborhood because it has become part of the essential character of the neighborhood. Even if it hadn't become an essential part of the neighborhood, the garage is uniquely situated so as to minimize any potential impacts on the surrounding neighborhood. It is set back 200 feet from the road, located in the middle of the lot, and has a wooded buffer with the house located out front. There is little evidence of this tractor trailer and of the garage in the surrounding neighborhood. The variances also do not threaten the health, safety or welfare as Mr. Whiteman has been operating the tractor trailer out of the garage for more than 10 years and has an excellent track record of safety, he is considerate to other drivers waiting for them to pass while backing into the property, and with no record of past injury, threat or harm to the general public, the continued use will not threaten in the future.

The third prong of variance criteria is substantial justice and although the courts have not looked at this in great depth the guidance states that in order to deny the request, there must be some gain to the general public from denying the request that is not outweighed by the applicant for the loss of that denial. This speaks to the interest of the general public; not just to the neighbors against the interest of the individual. In this case, there will be no gain to the general public in denying the variances; the use has been in existence for over a decade. It is barely noticeable to the neighbors, it is a very infrequent use with only two trips a day, one leaving and one returning home – this is minimally invasive on the surrounding neighborhood. Denying the variances will not serve the public's interest, it will not promote health, safety and welfare, and is not in anyone's interest to deny them. It will harm the property owner if they are denied. The garage, which was purpose-built for the purpose of parking the tractor trailer and approved by the town by way of building permit in 2012, certificate of occupancy in 2013, and it has been used every day since that time for the parking of the truck. The Whiteman's have been paying property taxes on the building and have invested a considerable amount of money in constructing it for the purpose of parking the tractor trailer overnight. As previously stated, Mr. Whiteman sought and received the approval of the construction of the garage and use by town officials and his neighbors, taking into account all their suggestions. Denying the variances at this point would also have the effect on the use of the garage – a considerable loss to the applicant should relief not be granted. Many of the criteria that are applicable to an invisible home occupation are also applicable to a visible home occupation, and when the Planning Board considered the application for an invisible home occupation it determined that several of the visible home occupation criteria were not met. Thus, the variance would also apply to visible home occupation which may be needed by the applicants in the future should the variances associated with the invisible home occupation not be granted. Given there would be no gain to the public to grant the nine variances, but detrimental to the applicants, granting the variances would do substantial justice.

Attorney Warren stated the fourth criteria is that values of surrounding properties would not be diminished. The use is long established, it is a vested, lawful nonconforming use. It is a longstanding use in the neighborhood and property values would have already adjusted based on existence on this garage and the use for which it was intended to park a tractor trailer unit inside once a day. The invisible home occupation permit that they hope to obtain, and the operation of a home occupation for the administrative work and the parking of the tractor trailer are the objectives of these variances. Leaving the house in the morning and returning after a day's work is de minimis to the surrounding properties. The administrative activities being conducted inside the home cannot have any plausible effect on property values and two added tractor trips per day do not have a significant effect on property values.

The last criterion is literal enforcement of the ordinance would result in an unnecessary hardship, and to meet this criterion it is understood that a specialized condition must distinguish it from other properties in the neighborhood, that there is no fair or substantial relationship between the purpose of the ordinance provision and the specific application of that provision to the property, and that the proposed use is a reasonable one. The specialized condition on the property is namely the 40x76-foot garage that has been purpose-built to house the tractor trailer. There are no other garages like this in the surrounding neighborhood that he or the applicant is aware of. The property has unique

characteristics in the form of the garage that supports the proposed use to house an invisible home occupation. Based on these specialized conditions, there is no fair or substantial relationship between the public purposes of the ordinance and the application of the provision at issue of this property. The purpose of the zoning ordinance is to promote health, wealth and safety of the town and denying any of the variances will not promote the health, wealth and safety of the town. This is a vested use that is lawfully nonconforming that can be continued under NH law regardless of whether it being operated in conjunction with a business. Thus, operating a home occupation in conjunction with the business does not interfere with the public purposes of the zoning ordinance.

The proposed use is reasonable to each of the variance requests as invisible home occupations are allowed in residential/agricultural zones with a permit and the applicant proposes to obtain a permit so that they are operating under the town's permitting process which is part of the reason they have requested multiple variances instead of simply asking for a variance from the entire permitting provisions of the ordinance.

The NH Supreme Court has offered guidance in these last two unnecessary hardship prongs, indicating that to meet the hardship test, the applicants only have to demonstrate the proposed use is reasonable given the special conditions of the property. The special conditions of this property are a 40x76 foot garage specifically built to house a tractor trailer truck and a driveway designed to back a tractor trailer in. It is uniquely set up to store a tractor trailer and operate an invisible home occupation in connection with the tractor trailer. It is the applicant's position that they have met all of the requirements as laid out by the legislature and the Supreme Court for each of the variances requested and, as such, they request the board grant the variances.

#### BOARD QUESTIONS AND FINDINGS OF FACT

Chairman Allen inquired as to when the business address was originally registered at 18 Rowell Road. Attorney Warren responded that the building permit was issued in 2012, the certification of occupancy in 2013 and the business was registered at 18 Rowell Road in March 2014, just over a year after the building permit was issued.

Chairman Allen notes G&J established 18 Rowell Road as their headquarters in 2014. Attorney Warren stated in 2014 they changed the registered business address with the Secretary of State's office.

Mr. Ciardelli stated the board has reviewed the materials submitted but he has questions regarding the square footage and the percentage of allowable space for the business. His original calculations before the presentation when adding the total size of the garage and house came to 60%; however, he understands that much of the garage is used for personal use. He questioned how much of the garage is dedicated to the maintenance portion for the truck to which Mr. Whiteman indicated not much more space at all.

Attorney Warren noted with respect to calculating the floor area, the garage itself is separate and distinct from the use that is being proposed. They are essentially proposing to use the property as if it hadn't been used before so that the garage is an existing structure and the use that they are applying for is to park the truck in the garage in connection with an invisible home occupation. It's not the ratio to the house and garage or vice versa; but the tractor trailer truck activities associated with the total floor space of the home and the accessory structure (garage).

Chairman Allen stated that because the variances are so different from routine variance requests, he is struggling to understand exactly what the board is being asked to approve. For the sake of argument because he does not have the 2013 zoning ordinance on hand, and if, for discussion purposes only, the board says it agrees that parking the truck in the garage is a vested activity; the issue is that in 2013 or 2014 there had been a requirement to obtain a business permit to operate a business, which had been on the books for almost two decades. Even if they were to carve out the parking of the truck, there was still a requirement for the applicants to obtain a home occupation permit for the business once they registered the business at 18 Rowell Road with the Secretary of State. Additionally, why are the applicants asking for an invisible home occupation when all of what is being presented looks like a visible home occupation. If the board was to say the applicants have a variance to park the truck at the residence, they have a

variance to come and go, they have a variance for the 14,000 lb. weight limit, and relief from every one of the criteria, it's not even close to an invisible home occupation, it's a visible home occupation. He questioned why the applicants are seeking to obtain an invisible home occupation.

Attorney Warren responded because an invisible home occupation has more criteria to meet, the invisible criteria in addition to all the other criteria for a visible home occupation, thus their reasoning was that if the Zoning Board doesn't believe it appropriate to grant variances for all of the criteria for an invisible home occupation permit, they hoped they would grant the variance necessary for a visible home occupation permit. The applicants aren't trying to get out of anything, they are trying to correct something. They are happy to take whatever lead the board sets and if it involves getting a full home occupation permit then that is an acceptable path forward.

Chairman Allen stated, to Mr. Bodwell's point, the board is here to grant relief when it is necessary. It is not meant to be some crushing burden that everyone needs to meet the letter of the law all of the time. The board, in theory, is being asked to provide variances to specific criteria within the home occupation permit, but the board is not providing a variance to go off and operate a business or providing a home occupation permit. The board can provide relief from these sections and then the applicants would have to go back to the Planning Board with specific variances from the home occupation requirements to apply for a home occupation permit.

Mr. Maher stated that as he works his way through all of this, the board needs to focus on whether or not the parking of the vehicle in the garage is a vested use that is no longer subject to the town's opinion. If the board comes through that (for discussion purposes only), then the requested relief of many, if not all of the Planning Board's objections to the home occupation permit, go away. It all relates to the traffic generated by the storage of that vehicle on the premises. If the board comes through all of this, it may not be in the applicant's best interest to continue an exhaustive review of the rest of the ordinances. Their path becomes far clearer to receiving an invisible home occupation permit because what makes it visible is predominantly related to the truck. If the truck is allowed to exist there, prior to there being lots of other criteria that they need relief from, it all becomes somewhat of a moot point. Additionally, he does not believe the board can provide relief from all of the variances requested.

Chairman Allen stated he agreed 100% with Mr. Maher's position in that the truck being vested on the property is a big discussion point. He (Allen) was not clear on what exactly the applicants were asking for relief from. Parking of a commercial vehicle where the ordinance prohibits trucking and hauling is one thing, but in the actual application, the applicants are asking for an invisible home occupation. The ZBA is not going to provide a home occupation permit; that is not their purview. They can provide relief to specific ordinances; but relieving the requirement for a home occupation permit would be inappropriate for the board. If the applicants are asking for specific relief from these ordinances so that then they can go and apply for a home occupation, and be granted or denied for some other reason, then he understands what is being asked of the board.

Attorney Warren responded that is exactly what the applicants are asking for and that the variance application was styled on the invisible home occupation because that was what was previously applied for. What they are seeking relief from is specific visible home occupation requirements so they can obtain a permit.

Another reason Mr. Allen raises this is because the invisible home occupation application that went before the Planning Board did not require a public hearing or notification of abutters per the invisible home occupation process; however, should the applicant submit an application to the Planning Board for a visible home occupation, appropriate public hearing notice and abutter notification would be done. A visible home occupation application that notifies the public and abutters is more appropriate for a business like this. He noted this is all downstream from now as the board will need to discuss the merits of vesting first.

Vice Chair Robbins suggested the board look at the vesting and variances as two different items, discussing Article III-B in relation to the existence of the garage and the truck and then separate them completely from Article XVI which

deals with the home occupation. It may make the deliberations easier and if the board agrees the truck can exist and the garage can exist, it would it give the applicants automatic relief for the rest of it.

Chairman Allen called for other board questions in relation to the application as a whole prior to discussion the vesting matter.

Attorney Warren stated the court has indicated it is appropriate for zoning boards to make an inquiry as to whether variance relief is necessary, and that the vesting discussion is a good way to process that. He stated he appreciates this analysis.

At Mr. Maher's inquiry, clarification was provided by Mr. Whiteman that the truck and trailer are both parked inside the garage, and that the garage also houses a personal car lift and racecars, as well as the basic layout and space dedicated to those uses.

Chairman Allen stated that if there are no more board questions, the board will, as a whole, discuss whether the board feels the truck is vested and then deliberate through the rest of the variance requests.

Mr. Ciardelli stated that in the past requesting this many variances would never have passed the giggle test; however, this case is very unique. The hardship criteria are always the most difficult to get passed; yet he has never seen a physical structure as being identified as something that is unique to the character of the property. It is usually something physical like the hardship of the land that prevented the property owner from doing anything else with the land. If the garage is a fixed structure, then it does become a unique part of the property.

Chairman Allen concurred that hardship is always the hardest criteria to meet, and he would like to hear more about the building of the garage process as he noted former Building Inspector John Moreau, who sat in on every Planning Board meeting during the time he served (likely during the 2013-2014 timeframe), Having had been the Building Inspector at the time, he (Moreau) would have known the zoning ordinance as good as any member of the Planning Board. Testimony has included the efforts of the applicants to do all that was required of them; however, he is having a difficult time understanding how this hardship is different. He gave the example of asking the building inspector for a permit to build a 50x100-foot structure on his property and, provided he meets setbacks, there is nothing the building inspector can do to preclude him from doing so. The building inspector can only approve structures, they do not approve the use of structures and most building inspectors know this. He then asked how this property is any different than his own or another's property from building a great big structure and then saying they have been using it for a specific purpose for the past ten years and now want it to be grandfathered or vested and it is a hardship that it can't be used that way anymore. How is this property unique from another who builds a garage and parks something in it until the town catches them? It's an honest question. The board has to figure out how this hardship fits as it's something about the property that justifies relief from the rules. To Mr. Ciardelli's point they could say it was a giant boulder in the middle of the property where one cannot meet certain setbacks with their house because of this unique thing. How does building a great big building unique from what your neighbors can do? He said that clarifying this would be very helpful.

Attorney Warren responded they are not just dealing with someone who built a great big garage and then used it until the town caught up. They are talking about someone who went to the town for the required building permit, the town granted the permit, granted a certificate of occupancy. At this point the town is estopped from claiming that was improper. This isn't a case of someone going out and building a building in secret that no one knows about and uses it willy-nilly for years.

Chairman Allen stated he was not insinuating this about the applicants, it was a question from a uniqueness perspective. The building inspector approved the building of a structure; how is that structure now a unique characteristic that would justify relief from the rules.



Attorney Warren responded that in terms of the special characteristics of the property, they are talking about special characteristics that define it, that set it apart from other properties in the neighborhood. The analysis the board should undertake is not whether another property owner could go out and get a permit to build a structure of this size on their own property; the inquiry is what conditions of the property currently, including its structures, define it and distinguish it from currently existing properties in the neighborhood. At this point, these characteristics of this property (the garage that has been permitted by the town) are unique and distinguishable from any other property in the neighborhood. This is how the applicants believe the board should look at the special conditions of the property.

Mr. Ciardelli stated Attorney Warren has used the term purpose-built throughout his presentation and he (Ciardelli) understands its part of their argument as it being part of the uniqueness of the property (not a boulder, not a cliff, not a stream); it is a purpose-built garage. Any garage of that size in a farming community could be used to store hay or tractors, etc., and it appears it is the opinion of Attorney Warren that the structure was purpose-built to house a tractor trailer and has used this argument throughout the presentation. Although he (Ciardelli) has wrestled with it, he is more satisfied with this position.

Mr. Maher inquired of the signature on the certificate of occupancy. Mr. Whiteman indicated it was a selectman. Chairman Allen presented the certificate which stated it was John Moreau, the building permit was signed by Ray Donald who served as building inspector before John Moreau. Ray Donald also served as selectman at some point.

Mr. Maher stated his line of questioning was to try to establish credibility of the applicants' position that they took all steps reasonable to get approval to build this purpose-built structure from the highest authority. The applicants were building a garage and no matter how they intended to use the garage, it had to be in compliance with the law of the land at that time. They were in a residentially zoned area and would any sort of commercial entity have been allowed in that zone/area at that time. Based on the information presented, the answer to that question is no.

Mr. Whiteman stated that at the time there were no weight limits on commercial vehicles and if you had a commercial vehicle, it just had to be shielded from sight.

It was noted that the shielded by sight provision was from the home occupation ordinance which required a permit for that provision to apply.

Mr. Robbins stated the 14,000 GVWR was added to the ordinance in 2020 and the garage was built in 2013. He surmised that the garage was built at that time to house a commercial vehicle.

Chairman Allen stated that the town did have provisions about one commercial vehicle which had to be shielded by sight, but it was part of the home occupation provisions that required a home occupation permit. No home occupation permit means that provision does not apply. This case is about a vehicle on a property as a business without a permit. He redirected the discussion back to the variance requests and then opened the hearing to public comment.

#### PUBLIC COMMENT

Mr. Bodwell spoke to his disappointment in how the town has changed since he was a selectman and how the town is turning into what, during his time serving, they tried to protect the town from. There has been a large Massachusetts influence as people move into town. Back in the 80's he, himself, was passive as it related to the ordinances, even as he was doing some of the same work Mr. Whiteman does. East Kingston has become a snob neighborhood where residents expect services but don't want anyone who provides them anywhere near them. He cannot turn back the hands of time, so they must move forward. In this situation, Mr. Whiteman did his due diligence at the time, and if all these requests are denied he will have lost his way of living. His understanding, back when he served as selectman, was that the ZBA served as an arbitrator between the boards. He recommends the board move forward and allow Mr. Whiteman to continue his business. The town knew about it, through no fault of his own, he was denied registration of his truck. Mr. Whiteman corrected Mr. Bodwell noting the town did not deny his registration, they gave him one year to address the home occupation but allowed him to register the truck for another year.

Without any further public comment, Chairman Allen closed the hearing to public comment and opened it to board questions.

#### BOARD QUESTIONS AND FINDINGS OF FACT

Mr. Ciardelli stated he has been in town for many years, and he agrees that things have changed over the years. In many cases for the better, and the volunteerism as represented by the Zoning Board is one. The board is here to help people out as they are all residents and neighbors. Situations occur where mistakes are made and some of the things the board tries to pick through are evidence of malice and ignorance, ignorance in terms of not aware of all of the things that need to be done. There are people who are aware of all the things that need to be done and they play games with it. The ZBA has been pretty good at picking its way through all of that. The board tries to help things out.

Chairman Allen then closed the public hearing of Case 2023-03 and opened the meeting to board deliberations.

#### BOARD DELIBERATIONS

Chairman Allen talked through the truck on the property situation explaining the reason he asked when the business address moved to 18 Rowell Road, was because he wanted to know when the town office should have been made aware of a business operating from the property. There was a requirement to have a permit to have a business that had been in effect 20 years prior to the 2014 date when they started registering the vehicles and running a business from the property. Shame on the town hall for not dealing with this then. This is one of the points that makes this case unique and it establishes that the truck had been there a long time before the town finally came around to noticing and stopping it.

Mr. Maher stated for the record that it was not like someone was registering a pickup truck which could have been reasonably construed as a residential vehicle, this was a vehicle that was clear and present to the town that it was a commercial vehicle.

Chairman Allen added this is not a business on a piece of property that was pushed way back into the woods and was perhaps unnoticed for 20 years and the town finally noticed it. It is not justification for the homeowner to continue operating the business. Just because someone didn't know there was a rule to have a business permit, doesn't mean 20 years later when they got caught and claimed they didn't know about it, it would be okay. This truck is very visible and everybody knows the truck has been there, with one of the Selectmen living at the end of the road. So the fact that the town knew that the truck was there aligns with what the Whiteman's have expressed. John Moreau, who is very knowledgeable did not, in this case, investigate whether there was a business permit or not – there was a miscommunication that happened, and the Whiteman's were under the impression they had their permits. The truck has been there a very long time.

To further that point, Mr. Maher stated what substantiates the most for him is that the applicant was given guidance to discuss the proposed nonconforming use with their neighbors prior to moving forward. That's a pretty nonstandard practice for application of a building permit. It says to him that someone who was a town official was telling him (Whiteman) he was about to do something that is not normal; check with your neighbors to be sure that is okay with them before they do it and if nobody complains then they are good.

Chairman Allen stated that that process is still not correct and is 100% against the regulations, but that person was acting as a town official.

Mr. Maher continued that the town official led the applicant to believe they were going through the steps necessary to do what they thought they would be allowed to do.

Mr. Ciardelli added that this attributed to months and years afterwards where the neighbors have been happy.

Mr. Maher agreed, stating significant care has been made to co-exist happily.

Mr. Falman stated in addition to this and having spoken to selectmen over the years, the selectmen used to annually drive around the town on a designated weekend looking for unauthorized changes. With the garage structure being the size that it is, and where it is, and if the selectmen continued their annual tour practices, it would have been visible.

Mr. Ciardelli stated the thing that brought this matter to light was the flag that went up on the GVWR weight.

Chairman Allen stated those are questions he has asked of the town hall himself and it isn't that ordinance has caused a number of these issues to pop up, it's that the town has started to enforce things. In the past they may have been too busy and didn't look at them.

Mr. Ciardelli stated that anytime over the years, someone could have complained and brought it to the town. This is a positive thing with respect to how the Whiteman's have made accommodations to their neighbors over the years.

Vice Chair Robbins noted the business permit with the state but not with the town and inquired as to why.

Mr. Whiteman responded he was only required to register the truck with the town. He added there were a few years where he registered six or seven trucks, trailers, equipment and other things that were housed at a different location. All those different trucks and items were registered in town and at some point, someone should have questioned why he had so many trucks registered at his home location and asked what was going on; but they did not.

Vice Chair Robbins responded this was the point he was trying to make; that the town knew this was going on and they had the opportunity to stop it.

Chairman Allen stated his opinion as a board member is to ask should the ZBA be granting variances for business activity and the parking of the truck that never got a permit along the way – absolutely not. That is why the town has an ordinance. However, in this particular case, it appears the town had an opportunity along the way to enforce this and it fell through the cracks. As part of the board's deliberations, he asked board members about their feelings for the acceptability of truck being on the property from a vesting perspective.

Mr. Ciardelli stated the board should allow it.

Mr. Collamore stated the board should allow it.

Vice Chairman Robbins stated the board should allow it.

Mr. Falman stated the board should allow it and added the town itself has not offered any evidence of complaints which tells him the use has been acceptable to the town.

Mr. Maher stated he has nothing that contradicts the applicant's claim that they were instructed to behave in this manner and only have substantiated evidence that leads him to believe the town either stated or implied that they were following the process necessary to build a garage they believed would be suitable for use for the storage of the tractor trailer.

Chairman Allen added that the implied approval of what was happening is the part that leans him towards a variance as being appropriate.

Mr. Maher responded that the statements regarding invisible home occupation undoes some of that as the business is clearly visible and has been consistently visible even though it has not been an issue.

From a deliberation standpoint, Chairman Allen stated the parking of a vehicle at 18 Rowell Road, is the part that he is comfortable moving forward with. The recommendation of the board, should they approve all the variances, should include a variance to park the one vehicle and that it comes and goes once a day. The statements about parking a truck to then operating a business is a natural progression is not a natural progression – they are parking a vehicle and then all of a sudden, they are operating a business. If variances are granted, the business should be locked in stone to what it is now, very clearly laid out in the variance – one truck, once a day, the size of the truck, etc. because the variance

will, in theory, stay with the property forever. It needs to be pinpointed so that the property can't have five trucks added. The town has known that the Whiteman's have one truck that comes and goes every day and whether they knew there was technically a business or not, they do now. It is one truck, not a trucking company.

Mr. Maher stated that in order to provide some latitude, the board might want to tie this to relief from the 14,000 GVW and that it would be permissible within that existing structure so that another ancillary structure could not be built on the property for the sole purpose of housing another commercial vehicle thus allowing for expansion. That it gets tagged to a nonconforming use. He then asked if the board needs to grant all the variances or if the board just needs to communicate to the town that it is the Zoning Board's opinion that the request for variance is not necessary because the use is vested on precedence of law. Maybe defer to the town's attorney for this language.

Chairman Allen stated he might counter that with the *use* of the property is vested and the truck comes and goes every day, but the business operation there may or may not be vested.

Mr. Maher agreed, opining it is only the first request for variance that applies. Additionally, he is trying to chart the most expeditious path for the applicants so they understand where they need to go next. He does not believe hearing and voting on the nine requested variances is in their best interest.

Discussion ensued on whether or not the ZBA should pick and choose which variances to address or determine that all the facets of the business are vested.

Mr. Maher stated the only part of the operations that he sees as vested is the provision to park one commercial vehicle in the structure, which was the expressed purpose for constructing the garage. That predates a specific ordinance that put weight characteristics on the provisions.

Board members reviewed the variance requests related to 14,000-pound gross vehicle weight and the trucking and hauling (Article III-B. 1 and 2) noting these would apply to the fact that the truck has been parked on the premises for over a decade – vested-wise.

Vice Chair Robbins spoke to the trucking and hauling provision in that trucking and hauling is not occurring on the property to which Chairman Allen countered that an explosives company doesn't blow things up on their own property but is still an explosives company.

The board then reviewed the variance requests seeking relief from Article XVI noting those particular requests should be separated from the Article III-B requests and that specific conditions would be part of the board's decision on each variance that is granted (i.e. the vehicle be parked in the enclosed structure to satisfy the business not being visible from outside the home).

Chairman Allen inquired where board members stood on the vesting portion of the activities (the truck's coming and going on the property) as it violates the residential/agricultural provisions (Articles III-B.1 and 2), and if the truck were to be parked inside with nothing visible from the outside, would they agree that everything else falls under a standard home occupation permit. This would allow for the board to approve those two variances and then refer the applicants back to the Planning Board for them to get a home occupation permit.

Mr. Maher agreed that the likely action of the board would be to give consideration of the first two variance requests as he does not see how the board could approve the remaining requests. Should they move forward and address the remaining home occupation variance requests, the board would be setting precedence that there is no point for a resident to obtain a home occupation permit in the first place.

Chairman Allen agreed. Mr. Falman added a stipulation that the truck has to be parked inside conforms with what the board believes was the requirement at the time the ordinance allowed for one commercial vehicle to be allowed shielded by sight. Mr. Ciardelli agreed. Vice Chair Robbins also agreed and reiterated the statement the truck be

required to be parked inside anytime it is on the property and noted it is not parked inside at the moment; it is parked under the carport.

Mr. Whiteman responded the tractor trailer gets stored in the garage, his RV is under the carport which looks like a tractor trailer, but is a recreational vehicle separate from the tractor trailer that is registered as a personal vehicle.

At Attorney Warren's request, Chairman Allen re-opened the public hearing.

Attorney Warren suggested the board grant the variance with the condition the applicants obtain a home occupation permit whether it be a visible or invisible home occupation permit, that would address the Planning Board's findings with respect to the noise and vibration provisions, etc. This would alleviate any concern about the Planning Board's interpretation of the provisions and would also require the applicants to obtain the appropriate permit.

Mr. Maher stated he would like to see some separation of those remaining variances to address the parking be allowed irrespective of whether a business operates there now or in the future. It allows the applicants the latitude, should they need to relocate the business in the event they can't get a home occupation permit, they are still allowed to park the vehicle at the premises. And if, for legitimate reasons, the Planning Board or Selectboard decides to deny a visible or invisible home occupation permit, the applicants won't be back to a ZBA meeting to revisit something the board feels they are okay with – the vesting of the parking of the truck.

He went on to say the board will address each variance individually and will need to couple some conditions to each one of them and tailor each one as the board votes.

Chairman Allen stated there are pros to both processes; he is leaning more towards the parking of the truck being vested, leaving it alone as that is the use of the property that has been allowed. The variance requiring a home occupation to be required as a part of the approval gives the town and the Planning Board some oversight for when the Whiteman's one day sell the property.

Noting the late time and the decision-making ahead of the board, discussion ensued on continuing the public hearing, and on the possibility of the applicant withdrawing their variance requests concerning Article XVI (home occupations).

Attorney Warren stated his concern about withdrawing the home occupation requests was that the Planning Board, in their Notice of Decision and related documents, made comments about the noise and vibrations of the truck.

Board members countered those comments with the fact that if the ZBA decides the truck is permitted, then the noise and vibration is a moot point. By withdrawing the home occupation variances, the Planning Board continues to exercise its rightful authority over the home occupation approval process.

Mr. Maher further stated that the board would like to put the applicants in a position to defend and legally respond to any concerns about the parking and coming and going of the tractor trailer by granting relief from those provisions.

Chairman Allen added if the applicants didn't have the truck on the property and went to the Planning Board for an invisible permit for administrative purposes only, the permit would be approved that very day. This would be to do the paperwork of the business, register the vehicles, taxes, etc. It's the introduction of the truck going in and out of the property that throws a wrench into it. The board's point is that if the coming and going of the truck in a specific manner is not part of the equation, at that point the only portion of the business that needs approval is the administrative portion. The coming and going of the vehicle is off the table for the Planning Board's consideration as part of the home occupation. As a single board member, he opined the application before the Planning Board should be a visible home occupation versus an invisible one.

In thinking about protecting the town's future interest, Mr. Maher stated trying to build in the latitude in each variance's decision that the applicant may need for the future would be impossible – especially on whether or not the business should be visible versus invisible.

Noting the time being after 10pm, Chairman Allen suggested the board continue the public hearing to next month. Mr. Maher inquired of a continuation with the Whiteman's who stated though they would prefer to have decision rendered this evening, as they are prohibited from storing the truck at their home; however, they would be willing to continue the hearing to ensure the board is given the time necessary to form their final decisions and conditions.

Upon further inquiry, Mr. Whiteman stated he was informed he could not store the truck on the property until the matter was resolved, even though he was previously told the truck could stay on the property. Fortunately, he was able to find a location to park the truck even though there is some hardship to do so.

Board members indicated Mr. Whiteman's willingness to continue the hearing was further evidence of his credibility concerning his compliance with all that has been required of him.

Chairman Allen stated the board wants to be sure their decisions do not hinder the applicants or the town, and that they don't miss something as they have been at the meeting for over three hours and board members need to be refreshed and ready to make sound and complete decisions. He recalled the times when the board made decisions, feeling pressed for time in the late evening hours and his regret for having missed important items in those decisions.

He stated no decisions have been made, no variances have been granted, nothing has changed – the board is still working through its decisions and will continue to do so for 30 days.

**MOTION: Chairman Allen motioned to continue Case #2023-03 Variance Requests for George and Jill Whiteman to August 24, 2023 at 7pm for additional board deliberation, review and decision; seconded by Vice Chair Robbins. With no further discussion the motion passed 5-0-0.**

The applicants were informed the Notice of Decision for the appeal case (2023-02) will be sent to them.

Chairman Allen tabled the approval of the meeting minutes and any other board business to the August 24<sup>th</sup> meeting and the adjourned the meeting at 10:20pm.

Respectfully submitted,

Catherine Belcher  
Land Board Secretary

Minutes approved on October 16, 2023.