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TOWN OF EAST KINGSTON ZONING BOARD OF ADJUSTMENT

MEETING MINUTES

October 16, 2023

Pound School
41 Depot Road
East Kingston, New Hampshire

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

AGENDA

Motion for Rehearing (Appeal) – George & Jill Whiteman – 18 Rowell Road – MBL# 10-02-17 (Case #2023-05)

Motion for Rehearing (Variances) – George & Jill Whiteman – 18 Rowell Road – MBL# 10-02-17 (Case #2023-06)

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

Others present: George and Jill Whiteman, and their Attorney Will Warren.

Chairman Allen opened the meeting at 7:00pm followed by the roll call. He then designated Alternate Paul Falman as a full voting member for the evening.

He announced there were two items on the agenda, both were Motions for Rehearing as filed by George and Jill Whiteman:

- Motion for Rehearing (Case# 2023-05) with respect to an Appeal from Administrative Decision (Case# 2023-02) whereby the ZBA denied the appeal on July 27, 2023.
- Motion for Rehearing (Case# 2023-06) with respect to Variance requests (Case# 2023-03) whereby the ZBA denied the variances on August 24, 2023.

He noted he would not be chairing the Motion for Rehearing on the Appeal case; he would recuse himself as he did with the original hearing; and would turn that portion of the meeting over to Vice Chair Robbins. He will, however, chair the Variance Motion for Rehearing case. He will present the variance case first which will then be followed by the Motion for Rehearing on the Administrative Appeal.

He announced for the record that the applicant asked that the Motion for Rehearing, case# 2023-05, be handled outside the 30-day required timeline. In honoring that request, the board will be hearing both cases this evening.

Motion for Rehearing (Variances) – George & Jill Whiteman – 18 Rowell Road – MBL# 10-02-17 (Case #2023-06)

Chairman Allen opened discussion on the request for a Motion for Rehearing with respect to their August 24, 2023 decision to deny nine variance requests (case# 2023-03) submitted by George and Jill Whiteman as it relates to the Whiteman's proposal to operate an invisible home occupation from their residence located at 18 Rowell Road, MBL# 10-17-02. He announced that no testimony would be taken at this time as the board will make a determination as to whether a rehearing is in order based solely on the information described in the Motion for Rehearing as submitted by the applicant. He stated the board would not be rehearing the case this evening, but would have discussion on whether the board thinks there was a mistake made with the original decision, or if something was overlooked, or if new information that substantially changes a board member's mind on the matter and feels the board should rehear the case.

He asked if board members had any questions about the process for consideration of a Motion for Rehearing. There were none.

Chairman Allen then read aloud the overview provided in the Motion for Rehearing:

DRAFT – NOT YET APPROVED

37 As explained in more detail below, the ZBA should grant this request for rehearing for five reasons. First, the ZBA's
38 decision was unlawful and unreasonable because the Applicants' use of their property to park a tractor trailer, including
39 coming and going from the Property with the tractor trailer once per day, is a vested, constitutionally protected use
40 under New Hampshire law. Second, the ZBA's decision was unlawful and unreasonable because the Applicants' use of
41 their property to park a tractor trailer, including coming and going from the Property with the tractor trailer once per
42 day, is a lawfully nonconforming use under the plain terms of the Zoning Ordinance. Third, the ZBA's decision was
43 unlawful and unreasonable to the extent it was influenced by factors or considerations not presented or discussed at
44 the ZBA's public hearing. Fourth, the decision of the ZBA was unreasonable and unlawful because the requested
45 variances satisfy the statutory variance criteria set forth in RSA 634:33. Finally, the decision of the ZBA was
46 unreasonable and unlawful because the ZBA's interpretation of the Zoning Ordinance would result in an
47 unconstitutional taking.

48 He asked if all board members received the applicant's packet on the request for rehearing and if they have read
49 through it completely. Board members responded affirmatively. He stated that because everyone has already read
50 through it, they will not be reading through each item at this time. He asked if board members had any questions or
51 comments with regards to the five stated reasons for rehearing.

52 Mr. Falman stated that one of the principles raised in the Motion for Rehearing is the issue of a pre-existing,
53 nonconforming use of the property. He then cited the notes under RSA 674:19 (paragraph 3) which states that *the*
54 *right to maintain nonconforming uses is meant to protect property owners from a retrospective application of zoning*
55 *ordinances, so that the property owners may continue using and enjoying their property when their uses were lawful*
56 *prior to the enactment of a zoning ordinance.*

57 He went on to say there was some reference to these terms in the Planning Board minutes when they originally heard
58 the application for home occupation in which the question was asked, who is responsible for determining what is a
59 prior, lawful, nonconforming use. He stated this is his question as well and asked if this was something the ZBA did not
60 property consider. He asked who has the jurisdiction to make that determination.

61 Chairman Allen responded that a pre-existing, nonconforming use would be a use that was in existence prior to the
62 passage of an ordinance.

63 Mr. Falman stated that one of the arguments made in the Motion for Rehearing is that the use is a vested,
64 constitutionally protected use. He asked who makes that determination.

65 Chairman Allen responded that determination would be made by the town.

66 Mr. Maher stated the town did make that determination by way of the Planning Board rendering their decision to
67 recommend denying the home occupation.

68 Mr. Falman stated the Planning Board made some reference that they do not consider the historical use of the
69 property.

70 Mr. Maher stated a vested, nonconforming use would have to be something that was in use prior to the violated zoning
71 ordinance being established. In this case, the violation the Planning Board found was to the original requirement to
72 register a business in the town, a requirement which far preceded the applicant's application for a home occupation
73 permit. Additionally, no data was presented stating there weren't any restrictions to parking a commercial vehicle on
74 the property when the property owner requested to build the garage. And third, there was nothing provided to the
75 town in writing that reflects the use of the garage was for the purpose of parking a tractor trailer truck. There is lots
76 of anecdotal history about conversations that were had, but nothing on the building permit application that would
77 identify the new structure as a garage for a tractor trailer, nor does the application establish the property as a
78 commercial property as opposed to a residential one.

DRAFT – NOT YET APPROVED

79 He stated the ZBA had walked through all those facts when they evaluated the Planning Board's recommendation to
80 the Selectboard who ultimately denied the application.

81 Vice Chair Robbins stated the board might be getting off focus and redirected the discussion to the variances.

82 Chairman Allen responded the board is tasked now with whether or not the board made a mistake. Mr. Falman's
83 question is a valid question even though he (Allen) does not think the board made a mistake with respect to what Mr.
84 Maher had stated. All of that was considered, and it was established that the use was not a vested, non-conforming
85 use.

86 Vice Chair Robbins stated he wanted to be sure the board was staying on point with the variances and not moving onto
87 the appeal matter. He went on to say he agreed with Mr. Maher that the board did cover and consider those points.

88 Mr. Falman stated he was not sure the board discussed those points (vested, nonconforming use) in detail and then
89 conceded the board had discussed it when they went through each of the variances.

90 Chairman Allen opined the board did cover this in their review and further established the use was not a grandfathered,
91 nonconforming use. Had there been evidence to the contrary, then the board could have determined that it was.

92 He then went on to address statements made within the motion for request as it relates to the third reason for the
93 request: *Third, the ZBA's decision was unlawful and unreasonable to the extent it was influenced by factors or*
94 *considerations not presented or discussed at the ZBA's public hearing.*

95 He stated this statement has powerful accusatory undertones which is further expounded on page 15 under Section C,
96 specifically stating:

97 *At the conclusion of the ZBA's July 27, 2023 hearing date, a majority of the ZBA's members were in favor of granting*
98 *the Applicants the relief they needed to obtain either a Visible Home Occupation Permit or an Invisible Home Occupation*
99 *Permit. At least one of the members acknowledged that the Applicants' use of the Property is vested, and it appeared*
100 *that a majority of members were in agreement. Between the time of its July 27, 2023 meeting and its August 24, 2023*
101 *meeting, however, the ZBA completely reversed its position.*

102 *At the beginning of the ZBA's August 24, 2023 meeting, before reopening the public hearing on the Variance*
103 *Application, ZBA Chairman Allen spoke at length about how "powerful" the ZBA is, repeatedly using the word "power"*
104 *and expressing his belief that the ZBA may be the most powerful board in the Town. With respect to the accuracy of*
105 *these characterizations, the Applicants simply note that the New Hampshire Supreme Court has consistently held that*
106 *boards of adjustment are boards of limited authority. See, e.g., Peabody v. Town of Windham, 142 N.H. 488,495 (1997)*
107 *(observing that the ZBA's "jurisdiction is limited to regulating the use of land"); see also 15 P. Loughlin N.H. Practice:*
108 *Land Use Planning and Zoning § 22.01 (LEXIS 2023) (observing that the ZBA's jurisdiction is limited to hearing and*
109 *deciding administrative appeals, granting variance, making special exceptions, and granting equitable waivers).*

110 *More to the point, the Applicants are concerned that the ZBA's change of position, together with Chairman Allen's*
111 *commentary about the extent of the ZBA's power, suggests the ZBA may have been unduly influenced by persons who*
112 *were not present, and/or considerations that were not presented, in the course of the ZBA's proceedings on the Variance*
113 *Application. To the extent the ZBA was so influenced, the ZBA's failure to engage in a Bartlett analysis and the ZBA's*
114 *decision to deny the Variance Application in its entirety violated the Applicants' rights to procedural due process and*
115 *were thus unreasonable and unlawful.*

116 Chairman Allen stated that some of his statements in this section are taken out of context. He agreed that he spoke at
117 length at the beginning of the meeting in question using the word powerful a number of times for the purpose of
118 explaining to the ZBA member recruits in the audience that the ZBA is powerful in that it has the ability to grant relief
119 to ordinances. That is a powerful thing and should not be taken lightly. That is a responsibility this board carries

DRAFT – NOT YET APPROVED

professionally. He went on to say he spoke about the board having very strict guidelines in which to operate, and later in the evening during one of his preambles, spoke to the board about guidelines and guardrails, statutes and past case law that the board needed to consider and work within when making decisions on the variances. This context of the statement made within the Motion for Rehearing makes it sound like he was on a rant on how powerful the board is. Those statements are inappropriate. Additionally, the accusation that the board came back and reversed itself is also out of context. There was significant discussion about vesting, and significant discussion about how to make this work for the applicants, and, like he stated in his opening statement at the August meeting, that upon his own reflection and review of the meeting minutes, he felt it was his duty to remind the board that it does not make decisions based on how they feel about the applicants or how they feel about the applicant's predicament; they must base their decisions on the five variance criteria. The statements in the Motion for Rehearing make it sound like the board was in complete agreement and then came back with complete opposite agreement or had completely reversed their decision. The reading of the minutes show that board members started out with one position, but moved to another throughout the discussion when they went through the five variance criteria.

He stated the accusations within the Motion for Rehearing are unfounded, unsubstantiated, and unprofessional. The board dedicated four hours to deliberating on these cases and did so with a very mindful and thoughtful process. Though he does not believe the board erred in any of its variance decisions, on this item in particular, he is sure the board did not make a mistake. The board has every right to recess and consider the information that they have and absorb it and process it internally. None of the board members spoke outside of the meeting. The board has the right to think about the case and come back for further deliberation. Nothing was done inappropriately. The Motion for Rehearing makes it look like the board acted inappropriately, but that is not the case.

Mr. Falman stated that after the first meeting the board was sympathetic to the applicant's plight and the predicament they were in; however, sympathy does not mean the board was going to grant them a variance.

Chairman Allen also noted the meeting ran to 10:30 at night; everyone was tired, and they got off track. As the Chair, he stated he needed to redirect the board when they reconvened to stay within the guidelines necessary for variance consideration.

Mr. Falman stated the board made every effort to come up with a way to provide relief to the applicants. Vice Chair Robbins agreed.

Chairman Allen redirected back to the Motion for Rehearing at hand. With regards to the five items laid out in the Motion for Rehearing, he asked board members by show of hands, if they thought the board erred, made a mistake, did not consider all of the information, or feels as if something else noted in the Motion for Rehearing changes their mind or makes them feel they made an error and need to go back and rehear the case. No hands were raised. He asked if there were any other comments or questions. There were none.

MOTION: Chairman Allen motioned to DENY the Motion for Rehearing (Case# 2023-06) with respect to the ZBA's August 24, 2023 decision to deny nine variance requests submitted by George and Jill Whiteman as it relates to the Whiteman's proposal to operate an invisible home occupation from their residence located at 18 Rowell Road, MBL# 10-17-02 for all the reasons stated in the discussion; seconded by Mr. Falman. With no further discussion the motion passed 5-0-0.

Chairman Allen closed the discussion on the Motion for Rehearing Case# 2023-06 and officially recused himself from board and the Motion for Rehearing on the Appeal from Administrative Decision matter by leaving the board table and taking a seat in the public seating section.

Motion for Rehearing (Appeal) – George & Jill Whiteman – 18 Rowell Road – MBL# 10-02-17 (Case #2023-05)

DRAFT – NOT YET APPROVED

Vice Chair Robbins opened the discussion for the Motion for Rehearing with respect to their July 27, 2023 decision to deny an appeal from administration decision (case# 2023-02) submitted by George and Jill Whiteman as it relates to the Whiteman's proposal to operate an invisible home occupation from their residence located at 18 Rowell Road, MBL# 10-17-02. No testimony will be taken at this time. The board will make a determination as to whether a rehearing is in order based solely on the information described in the Motion for Rehearing as submitted by the applicant.

He then read aloud the Motion for Rehearing summary statement as follows:

The ZBA should grant the request for rehearing for four reasons. First, the ZBA's decision was unlawful and unreasonable because the Applicants' use of their property to park a tractor trailer, including coming and going from the Property with the tractor trailer once per day, is a vested, constitutionally protected use under New Hampshire law. Second, the ZBA's decision was unlawful and unreasonable because the Applicants' use of their property to park a tractor trailer, including coming and going from the property with the tractor trailer once per day, is a lawfully nonconforming use under the plain terms of the Zoning Ordinance. Third, the decision of the ZBA was unreasonable and unlawful because the Planning Board and the Select Board misinterpreted the Zoning Ordinance in denying the Applicants' Permit Application. Finally, the decision of the ZBA was unreasonable and unlawful because the ZBA's interpretation of the Zoning Ordinance would result in an unconstitutional taking.

Vice Chair Robbins asked board members if they had received the Motion for Rehearing application and had adequate time to read through all the material. Board members responded affirmatively. He then asked if any of the items listed in the Motion for Rehearing caused board members to question their decision to deny the original appeal back in August. No one voiced any concerns regarding their August decision. Vice Chair Robbins stated that unless there were any other comments or questions about the Motion for Rehearing, he would entertain a motion on the request.

MOTION: Finding no basis for a rehearing, Mr. Collamore motioned to DENY the Motion for Rehearing (Case# 2023-06) with respect to the ZBA's July 27, 2023 decision to deny an Appeal from Administrative Decision submitted by George and Jill Whiteman as it relates to the Whiteman's proposal to operate an invisible home occupation from their residence located at 18 Rowell Road, MBL# 10-17-02; seconded by Mr. Maher. With no further discussion the motion passed 5-0-0.

Vice Chair Robbins then closed the discussion on Motion for Rehearing case# 2023-05. The Whiteman's and their attorney left the meeting. Chairman Allen returned to the board table and resumed chairing the meeting.

MINUTES

The board reviewed the July 27, 2023 meeting minutes and noted corrections.

MOTION: Chairman Allen motioned to approve the July 27, 2023 meeting minutes as corrected; seconded by Mr. Maher. With no further discussion the motion passed 5-0-0.

The board reviewed the August 24, 2023 meeting minutes.

MOTION: Chairman Allen motioned to approve the August 24, 2023 meeting minutes as printed; seconded by Vice Chair Robbins. With no further discussion the motion passed 5-0-0.

BOARD MEMBER RECRUITMENT

Board members reviewed a letter of interest from Jeffrey Miller expressing his interest in serving as a member of the ZBA. Board members opined on Mr. Miller's employment background, noting its value for the work of the board.

MOTION: Mr. Maher motioned to recommend the Selectmen appoint Jeffrey Miller as an alternate member on the ZBA; seconded by Chairman Allen.

DRAFT – NOT YET APPROVED

200 Discussion: Board members discussed the appointment process whereby the ZBA makes recommendation to the Board
201 of Selectmen as a means of keeping checks and balances.

202 **With no further discussion the motion passed 5-0-0.**

203 Clarification was made to the numbering of the motions for rehearing and their associated cases whereby all
204 applications/petitions/etc. receive a case number and are recorded on the ZBA Case Master posted to the board's
205 webpage.

206 **2024 APPLICATION SUBMISSION DEADLINE**

207 Board members reviewed the proposed meeting and application submission deadline schedule for 2024. The Rules of
208 Procedure states the applications are to be submitted 21 days in advance of a scheduled board meeting (4th Thursday
209 of the month; however, the board has 90 days to begin consideration and approve or disapprove of an application,
210 unless the applicant agrees to an extension. This 90 day requirement is a change from previous versions of board rules
211 and became effective in June 2022 as part of HB1661.

212 It was decided that the date of the December 2024 meeting will be determined in November or December of 2024.

213 **MOTION: Mr. Maher motioned to approve 2024 Application Submission Deadline Schedule with the December**
214 **meeting date to be determined; seconded by Chairman Allen. With no further discussion the motion passed 5-0-0.**

215 With no other business before the board,

216 **MOTION: Mr. Maher motioned to adjourn the meeting; seconded by Vice Chair Robbins. With no further discussion**
217 **the motion passed 5-0-0 at this meeting ended at 7:45pm.**

218 Respectfully submitted,

219 Catherine Belcher

220 Land Board Secretary

221 Minutes approved on _____.