

**Kingston Zoning Board of Adjustment  
December 11, 2014  
Public Hearing**

**Minutes**

The Chairman called the meeting to order at 7:03 PM; there were no challenges to the validity of the meeting.

**Members Present:**

Ellie Alessio, Chair  
John Whittier  
Peter Coffin, Alternate

Ray Donald, V. Chair  
Darryl Branch

Also present: Ben Romano, Board Alternate; Ellen Faulconer, acting secretary.

Ms. Alessio introduced the Board; it was decided that Mr. Coffin would be the voting member for tonight's hearing.

MM&S to approve the November 13, 2014 minutes as written. (Motion by Mr. Donald, second by Mr. Branch) Motion passed 4-0-1 with Mr. Whittier abstaining.

Copies of a law lecture series regarding running a land use board were distributed to the Board members.

Ms. Alessio reviewed positions for the upcoming election as the filing period is in January; Mr. Alberts will decide if his schedule will permit him to stay on the Board and get back to Ms. Alessio.

**Bob Ducharme  
36 Main Street**

**Re: Decision for  
6 Sands Lane  
Tax Map U6 Lot 5**

Derek Durbin, attorney for Mr. Ducharme, introduced himself to the Board; he summarized the arguments that had been submitted in the memorandum to the Board. He noted an error on page 1 of the memorandum; the reference to 205.3.C should be 205.4.C. He explained that Mr. Ducharme was challenging three decisions made by the Board: the special exception granted for 205.4; a variance from 301.1.D and a variance regarding new construction on a private road. Mr. Durbin noted that the proposal has a 20 ft. setback but 150 ft. are required in the Shoreland; the special exception needed to meet 4 criteria but the applicant thinks only two were able to be met; Section C requires that they demonstrate that no other use of the property without getting the special exception and D requires that it

meet the intent of the ordinance; they contend there was no evidence submitted to address these two sections specifically. He stated that moving the footprint from one encroachment to another non-compliant encroachment on the other side provides no greater conformity; the property owner has reasonable and viable use of the property as it exists now; he noted that water quality was an issue with the placement and there is nothing that says that the owner couldn't comply with the regulations by building back further on the property. He noted that the State requires a 50 foot setback, the Town requires 150 feet. Mr. Durbin added that the applicant can come into greater conformance but the current position makes it less conforming; he continued that the ordinance speaks to undeveloped lots of record and the ordinance is designed to allow landowners with undeveloped lots the ability to make reasonable use of the property and develop it; he stated that this is clearly not one of those circumstances; this is the reconstruction of a home that is becoming less conforming. Mr. Durbin suggested that the applicant really needed a variance to Article 305.9 as the property owner is actually expanding a non-conforming use; he explained that this property had been a seasonal use property that is expanding so the property owner needed to get a variance not a special exception. Mr. Durbin stated that he believed the Board erred by granting a special exception and also erred in not deliberating individually on each criteria as to how it was met; he noted that the minutes did not reflect any discussion on the individual criteria.

Mr. Durbin re-iterated that the side setback is not coming into greater conformity by eliminating one encroachment as it is encroaching closer to a neighbor on the other side and is being done to that neighbor's detriment.

Mr. Durbin explained his contention of the error in granting a variance to 301.1.A regarding new construction on a private road citing RSA 674:41; he noted that while there are exceptions, there was no evidence that any of them applied in this instance.

Mr. Durbin also noted that the property owner did not apply for any relief from the Aquifer Protection Ordinance adding that the owner would need to proceed at his own peril by not applying for that relief. Mr. Ducharme asked why a smaller project couldn't be built to limit the encroachment for both neighbors since the owner was building a new building; he added that property values would be diminished if the view was obstructed.

Mr. Coffin reviewed the RSA and asked if a site plan or road had ever been reviewed or accepted by the Town; Mr. Durbin said he could not find anything suggesting that it had. Ms. Alessio reviewed that 20 foot deed from the discussion at the September hearing. Mr. Coffin confirmed that it was a private road; he said that the RSA says that the ZBA can't give a permit on a private road. There was Board discussion regarding the interpretation of RSA 674:41; Ms. Alessio read the letter of denial from the Building Inspector; she said that the public versus private issue did not come into any bearing. Mr. Ducharme stated his belief that the ROW issue had been communicated incorrectly to the Board. Mr. Durbin suggested that the Board get advice from the Town Attorney as to whether the ZBA can give relief for a building permit on a private road based on language in RSA 674:41. Mr. Donald said that he was not interested in wasting taxpayer money by asking the Town's attorney to interpret the RSA; he added that the ZBA did not take any action

that violated the Ordinances or the RSA's. Mr. Durbin stated that the amount of taxpayer dollars to get an opinion from the Town Attorney is less than that spent on a court case. The right-of-ways were reviewed again; Ms. Alessio noted that there were two on the property; Mr. Ducharme asked to see documentation showing that there were two ROW's instead of one; he explained that the court decree was not a ruling on the size of the ROW; it was regarding the ROW being blocked. Mr. Coffin noted that the ZBA granted relief to the Town's ordinances and did not address or waive the State RSA so they ZBA did nothing wrong. Attorney Durbin said that the Board can't grant relief in opposition to State law. Mr. Coffin stated that the court has to determine a State RSA interpretation. Mr. Coffin said that issue about the building permit on a private road was because it is a tear-down of the existing and new construction for a new building. Ms. Alessio said that the proposal got the corner of the house off the neighbor's property and makes the non-conforming problem less non-conforming; she stated that many lots are non-conforming and too close to their neighbor's property especially down around the lake; the Board tried to strike a balance between the intent of the ordinances and individual property rights.

Ms. Alessio commented that she did not agree with the applicant's position. Mr. Donald said that he did not agree with delaying the property owner any further by asking to have an attorney do research on the motion for the re-hearing; based on his knowledge of the Town's ordinances and State laws, he would deny the request for the re-hearing. Mr. Coffin noted that he was not at the original hearing but thinks there are enough problems with meeting the State statute and whether the ZBA had the authority and he believed that the Board needed to get an interpretation from Town counsel; he said that the Board did not have this information so it was through no fault of their own but thought they needed a legal opinion.

The Board reviewed RSA 674:41 again; Mr. Coffin read sections indicating that the Planning Board and governing body had authority; Ms. Alessio read a section in 674:41 II regarding the ZBA making a reasonable exception and noted an additional passage about the ZBA granting a variance.

Mr. Whittier stated that he was not an attorney but he can see that both parties feel they could be harmed by the Board's decision and the ZBA is in an untenable position and will probably be settled in court and attorneys determine the RSA interpretation then; he said that the Board chose what they thought was a best solution to a tough situation; he felt they did the best they could and stands by the decision the Board made. Mr. Whittier added that the property owner could have worked out a negotiated settlement with a neighbor about the encroachment or the house could have been rebuilt on the existing footprint. He reiterated that there were enough complicating factors to allow the Board to stand by their earlier decision.

Ms. Alessio explained that this hearing was to determine if the Board would schedule a re-hearing on the matter and if it was, Mr. Sands could send in a letter of opposition at that time. She said that the Board had received a letter from Mr. Sands but this hearing was not the venue for it. She said that the Board needed to make a decision about having a rehearing and they were not taking any comments from the floor.

Mr. Coffin noted that the deliberations on the criteria were not in the minutes and asked what the Board did at the meeting. Ms. Alessio said that the Board did have the discussion and voted on granting the special exception; the specifics were implied by the vote itself. Mr. Branch agreed with Ms. Alessio; he explained that by voting in the affirmative for the overall motion, it is obvious that the Board determined the specifics of the Special Exception during the discussion. He stated that he did not believe the Board erred and had not seen any new evidence that an error was made.

Mr. Ducharme said there were comments about the ROW on the property that were discussed like they were accurate with no documentation supporting the assertion. Mr. Durbin said that the location of the house was within the ZBA's purview; the whole scope of the project would be. Mr. Alessio explained that the ZBA relied on the Building Inspector as to what relief was needed for the owner to move forward.

Ms. Alessio asked if the Attorney had anything to add; he said that all had been said. Ms. Alessio gave Mr. Durbin the letter that had been received from Mr. Sands.

**MM&S to deny the request for the re-hearing.** (Motion by Mr. Donald, second by Mr. Whittier) **Motion passed 4-1** with Mr. Coffin opposed.

Ms. Alessio announced that there would be a ZBA hearing in January.

**Meeting adjourned by the Chair at 7:53.**

Respectfully submitted,  
Ellen L. Faulconer