

TOWN OF KINGSTON  
ZONING BOARD OF ADJUSTMENT  
PUBLIC HEARING  
JUNE 8, 2023

**PRESENT:** Peter Coffin, Chair; Peter Broderick; Kyle Bache (alternate); Michael Rohulich (alternate), members

**ABSENT:** Meghan Kelley, Vice Chair; Shaw Tilton, member

**ALSO PRESENT:** Robin Carter, Land Use Administrator

Mr. Coffin called the meeting to order at 7:04 PM.

Mr. Russman recused himself for tonight's hearing and was present in the audience as an abutter. Mr. Bache and Mr. Rohulich were voting members.

A quorum was present at the meeting. Mr. Coffin informed the applicant that there were only four (4) members that would be voting tonight as opposed to five (5) members. He asked the applicant, Chris Moultroup who was present on behalf of Until Service Corp. if he was okay with only four (4) voting members. Mr. Moultroup asked if the Board would still be able to vote and make a decision with only four (4) members. Mr. Coffin replied, yes and explained that the Board can vote with only three (3) members, however, the vote would have to be unanimous. Mr. Broderick further explained that what the applicant is agreeing to, is if there is a 2-2 (tie) vote then an affirmative motion would not pass. Mr. Moultroup said that he would like to proceed tonight knowing that there are only four (4) Board members.

**PUBLIC HEARING**

**Until Service Corp. Utility Right of Way (ROW)**

*<Board note: hearing opened at 7:09 PM>*

Mr. Coffin read the notice for the application.

The applicant appeals the Administrative Decision regarding Article 201.4:E-18 of the Town of Kingston Zoning Ordinance, whereby the Board of Selectmen denied permission for Until to use herbicides as proposed, which states the following as a prohibited use in the Aquifer Protection Zone.

Mr. Coffin said that they did get a study done by a hydrogeologist.

**Danna Truslow, Truslow Resource Consulting LLC** introduced herself. Ms. Truslow mentioned that she is a professional geologist in New Hampshire, a hydrogeologist in the state of Maine and a professional hydrogeologist with her company. She explained that she was asked by the Zoning Board of Adjustment (ZBA) to review the Unitil request for appeal to look at the situation in regard to groundwater quality and the resources in the aquifer protection zone. *Ms. Truslow brought a large mapping diagram for reference. Copies of Ms. Truslow's evaluation were available for handout.*

**Ms. Truslow provided an overview the information provided in her letter to the ZBA, dated June 5, 2023, regarding Hydrogeologic Evaluation of Unitil Appeal for Herbicide Use on Transmission Lines in Kingston Aquifer Protection Zone.**

- She was able to get a file of the Unitil ROW and was able to map and analyze where the resources were.
- Unitil has filed for an appeal to use herbicides in the ROW. There were seven (7)

herbicides that would possibly going to be used in the ROW from NE to SW Kingston and runs through the aquifer protection district.

- Based on looking into background research and speaking with Mr. Moultroup of Unitil –
  - The work will be done by a licensed contractor.
  - They will be certified commercial pesticide applicators in the state of NH.
  - Her understanding is only licensed applicators are required to do the work and that they are trained for all safeguards that are required.
- The last time spraying was conducted by Unitil along the ROW was in 2018. Spraying is anticipated every five years; this was another consideration she took into account when looking at all the information.
- The application method is low volume application of herbicides from handheld applicators, targeting only the vegetation that is taller than 15 feet, vines, and some exotic invasive plant species.
- By law, no spraying is allowed within 25 feet of surface water including ponds, lakes, streams, rivers, and wetlands. She noted that there are many areas of surface water within the power line ROW.
- Also, by law, weather conditions are closely monitored.
  - Days where herbicides are used, they need to have low winds to prevent drift of the herbicides from the areas being sprayed.
  - Conditions need to be dry to prevent the wash off of chemicals and migration into soil and water.
- There is no spraying within 250 feet of bedrock public water supply wells or 400 feet from gravel packed public water supply wells. Ms. Truslow noted that there are four such wells along the power line.
- Ms. Truslow took an overlay of maps using the granite program that is available online. Took the powerline itself mapped, the wetlands there included in the natural wetlands inventory database, the presence of the aquifer protection zones, all streams and water bodies as well as conservation land. Conservation lands included easement properties and Town owned properties.
  - Using this analysis, there is approximately 31,000 feet of power line running through Kingston. Approximately 24,000 is within the Kingston Aquifer Protection Zone. 11,260 feet is within Zone A which is considered a higher valued aquifer area.
  - Looking at the presence of wetlands, brooks, stream, rivers and ponds, water supply wells, and conservation lands, there are approximately 12,100 feet of the 31,000 feet of ROW where herbicide application will not be completed due to these features.
- Ms. Truslow mentioned that is it the shallow groundwater that is most likely to get contaminated because when it is being sprayed if it lands on soil, it will get washed off into the soil.
- The chemicals being used based on chemical activity cling to the soil and do not migrate all that well to rainwater. In the most vulnerable areas, they could contaminate groundwater or surface water around surface water bodies.

Ms. Truslow said that with this consideration and the amount of land that would be eliminated from spraying, the herbicide application as applied on a 5-year time frame would have little impact to groundwater quality.

Ms. Truslow commented that she could go into more detail on her study. She brought up an article that was done on glyphosate, which is the key chemical ingredient of Roundup and there are some concerns. Most of the specs that are published so far, the agencies, including international agencies feel that there is not a lot of evidence that there is carcinogenic or mutagenic impact from this.

Ms. Truslow summarized her evaluation. Because of the co-occurrence of the features which eliminates so much of the ROW from being sprayed and the characteristics of the chemicals being used, there should be little impact on water quality. Ms. Truslow had the following recommendations if the Board decides to move forward and approve the appeal:

1. Unutil will confirm that the areas outlines in Maps 1, 2, and 3 are areas that will not be treated.
2. Unutil will provide an estimate of the volume of herbicide used during the 2018 herbicide application work.
3. Storm drains will be identified and given 25-foot buffer from herbicide application. They should be given the same setback as the surface water body.
4. Unutil contract will avoid the use of low soil adsorption products.
5. Unutil will conduct a NH Natural Heritage Bureau Survey to identify areas of rare and endangered species and remove these areas from the herbicide application areas.
6. As phragmites typically occur in a wetland setting, these areas should be omitted from spraying unless there is a more detailed plan provided for application in these areas.

**Board comment(s):**

Mr. Coffin brought up to Ms. Truslow that on your report in a conversation with Mr. Moultroup that Unutil does not map wetlands. How does the applicator identify where the wetlands are. Ms. Truslow commented that this is a good question for Mr. Moultroup.

Applicant, Christopher Moultroup, Manager – Forestry Operations for Unutil was present on behalf of Unutil Service Corp.

Mr. Moultroup responded to Mr. Coffin's question and said that it is up to the contractor to keep within the 25 feet from the surface water. He referred to the map exhibits Ms. Truslow brought, and the wetlands shown are in a no spray zone.

Mr. Coffin said that a condition would be that the applicators would have to have access to good maps or GPS.

Mr. Moultroup suggested that he can work with Ms. Truslow and overlay the wetlands on maps she provided, and this could be given to the applicators.

Mr. Coffin mentioned to Mr. Moultroup that the conditions Ms. Truslow recommended would have to be conditions precedent which means that the Board would have to have a means for Unutil to provide the information to them.

Mr. Coffin said the storm drains should be show on the maps. Ms. Truslow said they should be available at the Town Hall.

Mr. Coffin brought up that high adsorption products should be used so they cling to particles and don't drip down into groundwater. Ms. Truslow mentioned that the products that are suggested are the ones with the highest level of adsorption are glyphosate, Rodeo, Aquaneat, Aquamaster, and Garlon 4 Ultra. Ms. Truslow said that the Krenite S and Escort XP have the lowest adsorption . Ms. Truslow said she could add the adsorption details to her evaluation. Mr. Coffin suggesting adding, *adsorption coefficient less than 100 liters per kilogram*.

Mr. Coffin brought up that Mr. Moultroup, Unutil does not have phragmites on their list but suggests leaving it in the list of conditions.

Mr. Broderick asked what the training was for the applicators. Mr. Moultroup didn't know their exact training. He said they are licensed certified applicators.

Mr. Bache referred to Ms. Truslow's statement on page 5 of her evaluation. "Most of the products proposed for use will adsorb to soil particles and are less likely to travel through the soil to groundwater." He asked, is there a potential of product to reach the groundwater through the soil. Is this for the products that would be proposed to use, or the ones selected to use by Unitil. Ms. Truslow said that the ones that have the higher adsorption are much less likely to migrate through, they cling to the soil. She commented that you can't say that there will never be any transport but with the strong affinity that there is a much lower chance of particles to migrate.

Mr. Coffin said that the seven (7) chemicals Unitil proposes to use have been approved by the NH herbicide application people. Mr. Moultroup said that last year they used Rodeo and Escort mixture with surfactant. Mr. Coffin asked if the Board recommend Unitil didn't use Escort because it is a low adsorption product that they would have alternatives.

Mr. Broderick asked if any of the chemicals were persistent of going up the food chain. Ms. Truslow said that bioconcentration is a factor of how much gets passed into the body. Most of these are not going to be persistent in that way.

Mr. Coffin asked what it means that bioconcentration for Garlon 4 Ultra is 97.7. Ms. Truslow explained that if this came in contact with fish or an aquatic species this is how much they could take up into their body. Ms. Truslow said that she did look up limits on the bioconcentration and it showed anything below 1,000 liters per kilogram should be acceptable.

Mr. Coffin asked how long does it take for the herbicide to dry in case it rains. Mr. Moultroup says they do not spray on rainy days.

Mr. Bache asked that the products listed could be used and have different water solubility. Do we know which products are going to be used. Mr. Coffin said that under Ms. Truslow's recommendation that we will want to avoid low soil adsorption products like Krenite S and Escort XP. Their soil adsorption factors are 38 and 34.7 as compared to other ones that are 2,000, 1,600 and 100 liters per kilogram.

Mr. Bache said he would like to know how many gallons that will be used. Mr. Moultroup explained that the applicators send this information to the state after they are done so should be able to get this data. He noted, it might include some data from Plaistow too but can try and get this for the Board.

Mr. Rohulich asked Mr. Moultroup if the reason they wanted to manage the growth in the ROW's due to it being an economic decision. Mr. Moultroup disagreed and said that over time it may help economically over time. The reason to use herbicides is because it is best practices for the industry. If you mow, you mow down stuff that you wouldn't target when spraying and the stems will multiply and could cause problems. It is best to mitigate regrowth of a specific species over an area. He said it's a better for birds, plants and animals.

**Public comment(s):**

Public comment opened at 7:59 PM.

Dana Akers, 16 Reinfuss Lane –

- Mr. Akers said he carefully read the Aquifer Protection ordinance, 201.4.E.18.
- Ordinance section 201.2.1.P clearly defines herbicides as hazardous for the purposes of this ordinance with only one possible exception, “unless and except to the extent that anyone engaging in such an activity can demonstrate the contrary to the satisfaction of the Planning Board.” He noted that this has not been presented to the Planning Board. He commented that herbicides are hazardous for the purposes of this ordinance.
- Section 201.4.E.18 prohibits hazardous materials greater than 25 gallons. Thus, the Select Board (BOS) was correct in their decision. The ZBA is being asked to determine if the decision by the BOS that was made on April 10, 2023 to deny permission for Unitil to use herbicides was correct.
- Mr. Akers mentioned that there is a provision for Special Exception, 201.4.H. which does fall under the ZBA. The Special Exception criteria was written for development that didn’t meet some specific criteria, not to determine hazardous criteria or which a procedure is provided in the ordinance.
- The first criteria that must be met is that the spraying a hazardous material “will not detrimentally affect the quality of the groundwater contained in the aquifer by directly contributing to pollution”. He stated that he doesn’t see how this criteria can possibly be met.

Mr. Coffin explained that the state rules of the Appeal of Administrative Decision is that this is a decision that the Select Board made that can’t go to the Planning Board, it has to go to the ZBA. Mr. Coffin explained that the BOS were correct in their decision. The Board discussed if this should be an application for Appeal of Administrative Decision or should it have been for a Special Exception.

Mr. Coffin read the ordinance regarding hazardous material in the aquifer protection district. Section 201:4.E.18. “Use or generation of hazardous materials greater than small quantity generators or greater than 25 gallons of regulated substances; except where permitted in association with 14 and 17 above.”

It is unknown at this time how many gallons will be used. Unitil will refer to information from 2018 and try and supply it. Mr. Broderick said the ordinance does talk about the area of the 25 gallons. He commented that 25 gallons over an acre is a lot different than 25 gallons over 5 miles. Mr. Coffin commented that they don’t know if it is 25 gallons of chemical or 25 gallons of liquid. Do not know the ratio of chemical vs the water.

Mr. Moultroup said that the information he had from the previous year was, sprayed 2.5 gallons per acre, 100-gallon mix with water and within the 100 gallons was 4% Rodeo, 4 ounces of Escort, and 10.5% to 25% of surfactant.

The Board referred to the definition of hazardous material found in Article 201:2.1.P.

Lorraine Mascioli, 26 Old Coach Road -

- Ms. Mascioli read the definition of Toxic or Hazardous Materials (Article 201:2. P.).

Mr. Coffin said that the application should have come in as a request for Special Exception versus an Appeal to Administrative Decision. The Board needs to make a decision if the Administrative Decision was correct, but the applicant can make a request for Special Exception which would be a new application that would have to be noticed.

256 Mr. Moultroup spoke and said the reason the Town hired Ms. Truslow is to decide if herbicide application in the  
257 ROW will pose a significant threat as in the definition of a hazardous material. The first sentence says  
258 ... "characteristics as to pose a significant, actual or potential hazard to water supplies" .... Mr. Coffin said that  
259 "the following commercial activities are presumed to be toxic or hazardous" ..... and pesticide and herbicide  
260 application is listed.

261  
262 Mr. Coffin explained that it also says that it is assumed that any application of pesticides and herbicides unless  
263 otherwise demonstrated.

264  
265 Lorraine Mascioli, 26 Old Coach Road that abuts the ROW and 15 North Rd.

- 266 • Ms. Mascioli said that she believes the BOS decision to deny based on the ordinance was accurate.
- 267 • Ms. Mascioli referred to and read a portion of the Aquifer Protection ordinance RSA 674:16-21.
- 268 • Concern about groundwater runoff and mentioned 31,000 feet of powerline in Kingston, which is 5.8
- 269 miles and 24,000 of that in the aquifer protection zone (over 4.5 miles).
- 270 • Commented on the formula from Unitil – spraying with a 3.5 half-life for degrading of the chemical which
- 271 will then give approximately 4 weeks until it may be fully dissipated.
- 272 • Mentioned that herbicide and pesticides are a concern for the public health and well-being.
- 273 • They are eventually trying to kill the root system.
- 274 • Spraying herbicides is not beneficial to mankind in general.
- 275 • Water is our greatest resource, and we need to value it more than anything.
- 276 • There has been evidence and there have been court hearings where companies such as Roundup
- 277 have lost due to the proof that the glyphosate did in fact cause cancer.
- 278 • Concerns about the comments "it's not too bad", but it is still chemicals that will harm and ruin our
- 279 aquifer zone.
- 280 • We need to protect our assets and water is our biggest asset. Ms. Mascioli described water as life and it
- 281 needs to be protected more than any other resource.
- 282 • Vehemently asked the Board to deny this request.
- 283

284 Mr. Coffin commented that water quality is a sensitive issue. Chlorine is a chemical that is added to water to  
285 improve safety. Not all chemicals are bad. What we are looking at now is taking the expert advice of the what  
286 the hazards of specific chemicals that are being used are.

287  
288 Mr. Coffin said we need to go back to the issue at hand that was brought up which is the procedural one. Mr.  
289 Coffin read from RSA 674.33 – the Powers of the Zoning Board of Adjustment, this is on the Appeals for  
290 Administrative Decision.

291 "(1) Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or  
292 determination made by an administrative official in the enforcement of any zoning ordinance  
293 adopted pursuant to RSA 674:16." Mr. Coffin mentioned that this RSA enables zoning ordinances.  
294 "II. In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm,  
295 wholly or in part, or may modify the order, requirement, decision, or determination appealed from  
296 and may make such order or decision as ought to be made and, to that end, shall have all the  
297 powers of the administrative official from whom the appeal is taken."

298  
299 Mr. Coffin explained that in order to do this and modify the decision from the BOS, it was his  
300 understanding that it gave the ZBA the authority to take a decision, and the decision may have been  
301 correct, but if the ZBA can modify it and if the applicant can apply it with certain safety criteria, the  
302 Board could modify the order. However, in this particular case there is a vehicle for Special  
303 Exception and yes, the applicant should have been aware of that when they checked with the  
304 Planning Office or the Select Board's office that that was the procedure to do. However, if the Board  
305 decides to uphold the BOS decision because it was correct and rescind this to a Special Exception  
306 request, the background work that has been required of the Special Exception criteria has been  
307 done.

Mr. Broderick referred to RSA 674:33.II. above and interpreted it as the ZBA has all the powers of the BOS and can make modifications with conditions. That the ZBA has the authority to modify the decision from the BOS. Mr. Coffin explained that it shows "as ought to be made". Mr. Broderick explained that he believes the RSA give's the Board the ability to resolve the issue tonight.

Mr. Coffin said that there is no doubt that the BOS made the proper decision to deny it because it is in the aquifer. They then should have communicated that there is an appeal process if you can prove that the applicant is not going to damage the aquifer there is a Special Exception process. Mr. Broderick commented that Unitil needs to do a Special Exception application then the Board should expedite it because of all the time they spent on this Appeal for Administrative Decision.

Mr. Moultroup spoke and asked if they do the Special Exception is there a way to approach it without having all the same discussion that was done for this hearing? Mr. Coffin said if they do something improper and it is challenged then not only has it wasted time nullifying the decision they took, but we'd also have to go through the whole process again from scratch. Mr. Coffin said that this hearing could not be continued because this is an Appeal for Administrative Decision, and this would be a request for Special Exception. If this application was accepted incorrectly this would be noticed at the Town's expense and wouldn't have to pay another application fee.

There was conversation in the audience on how the Board should handle this application.

Richard Russman, 18 Beach Drive –

- Mr. Russman came to the table and mentioned that it is not the publics decision on whether the Board should decide if this should be handled through a Special Exception application.

David Mascioli, 15 North Road –

- Mentioned that he has lived the Town since 1977. We are not going to know the impact of the aquifer right away; it is going to be a long-term effect.
- The herbicide application is going to be done by hand, backpack sprayers and a lot of area to be covered. What kind of a workforce will be doing this and what kind of old spray will be used.
- He heard that the adsorption is in the carbon layer of the ground. We have very sandy soil around here and how much of that is going to pass through the ground level and get into our aquifer.
- What kind of safeguards do we have as landowners, citizens of the Town, have that the people doing the applicating are doing the right thing and targeting certain species and not just spraying all over the place affecting our ground water.

Ms. Truslow spoke and said she has heard everyone's concern. She has been working on aquifer protection in Kingston for 25 years. She commented that the people have to trust the professionals doing the work. Regarding the soil, there is a lot of sandy soil, but there are a lot of places where there are gravel areas.

Mr. Mascioli said there are professionals that do work that may not do the right thing unless someone is watching them.

Mr. Coffin closed public comment. Public comment ended at 8:54 PM.

Mr. Coffin explained that the Board needs to deliberate on this and determine the certain findings of fact.

- Mr. Coffin said that one finding of fact is the Select Board correctly denied Unitil's application to use herbicides in the aquifer protection zone in accordance with the Aquifer Protection ordinance as has been stated tonight, it is prohibited. This is the answer to the Appeal of Administrative Decision.
- Can the Board modify the decision using the professional testimony that was received. The Board has been discussing this and needs to discuss further.

**MOTION:** made by Mr. Broderick to grant the applicant relief for the decision and move that Unitil be allowed limited application of herbicide within the aquifer protection zones with the following conditions found in the Truslow Resource Consulting LLC letter of June 5, 2023 titled Hydrogeologic Evaluation of Unitil Appeal for Herbicide Use on Transmission Lines in Kingston Aquifer Protection Zone.

1. Unitil will confirm that the areas outlines in Maps 1, 2, and 3 are areas that will not be treated.
2. Unitil will provide an estimate of the volume of herbicide used during the 2018 herbicide application work.
3. Storm drains will be identified and mapped and given 25-foot buffer from herbicide application. They should be given the same setback as the surface water body.
4. Unitil contract will avoid the use of low soil adsorption products, including Krenite S and Escort XP.
5. Unitil will conduct a NH Natural Heritage Bureau Survey to identify areas of rare and endangered species and remove these areas from the herbicide application areas.
6. As phragmites typically occur in a wetland setting, these areas should be omitted from spraying unless there is a more detailed plan provided for application in these areas.

**Amendments to the motion:** The conditions 1, 2,3, and 5 are conditions precedent and must be met before the approval is final and presented to the Zoning Board of Adjustment. The process to approve the application for the Appeal of Administrative Decision is approved by the Town attorney and a Special Exception is not required.

*Discussion: If a Special Exception is required, it would be a new application for a public hearing and would have to be renoticed. Mr. Coffin said, the question is if the Board is going to do a conditional relief from the Administrative Decision.*

**SECOND:** by Mr. Rohulich

**A vote was taken, 1 approved, Mr. Coffin, Mr. Rohulich and Mr. Bache opposed (1-3-0).**

**Motion fails to pass**

**MOTION:** Mr. Coffin to deny the application for Appeal for Administrative Decision because the Board of Selectman did not make an error in their ruling to deny the application for herbicides in the aquifer protection zone. The applicant can apply for a Special Exception.

*Mr. Coffin noted that this motion is to vote to deny the Appeal for Administrative Decision and advise the applicant they can apply for a Special Exception.*

**SECOND:** Mr. Bache

**A vote was taken, 3 approved, Mr. Broderick opposed (3-1-0).**

**Motion passed**

Mr. Coffin said that the Board will expedite an application for Special Exception.

*<Board note: hearing closed at 9:19 PM>*



409 Mr. Coffin asked if there was any other business to come before the Board. There was none.

410

411 **ADJOURNMENT**

412

413 The meeting adjourned at 9:20 PM.