

**Town of Kingston
Zoning Board of Adjustment
December 9, 2021**

PRESENT: Electra Alessio, Chair; Larry Greenbaum, Vice Chair; Peter Coffin, Richard Johnson, Jackie Leone, Members

Chairwoman Alessio called the meeting to order at 7:00 PM.

BOARD BUSINESS

Approval of Meeting Minutes:

MOTION: by Mr. Coffin to approve the minutes of November 10, 2021, as written.

SECOND: by Mr. Greenbaum

In favor: Alessio, Greenbaum, Coffin, Leone, Johnson; Motion passes.

PUBLIC HEARINGS

7:05 p.m. Ida and James Ahern
 2 Third Street
 Kingston, NH 03848

IN RE: Tax Map U-4, Lot 141

This is a public hearing whereby the applicant seeks an Appeal from an Administrative Decision, a Special Exception, and five (5) variances so that the applicants can demolish and rebuild their single family home in approximately the same location. The applicants appeal the Administrative Decision regarding Article 301., Section 301.D, of the Town of Kingston Zoning Ordinance, whereby the Building Inspector denied the building permit.

Furthermore, the applicants seek a Special Exception to the terms of Article 205, Section 205.7, of the Town of Kingston Shoreland Protection District Zoning Ordinance, to permit the construction of a 1,540 square foot single family residence in the same approximate footprint as the existing residence and installing a new septic tank and leach field.

In addition, the applicants seek the following variances: Article 202, Section 202.5.B and Article 205, Section 205.4.C to permit construction of a 1,540 square foot single family residence in the same approximate footprint as the existing residence and installing a new septic tank and leach field; Article 301, Section 301.1.D to permit the improvement and/or placement of a single family dwelling structure located within 20 feet from the front property line; and to permit the improvement and/or placement of a staircase located within 20 feet from the front property line; and to permit the improvement and/or placement of a deck located within 20 feet from the front property line.

Applicants Ida and James Ahern were present, along with Attorney Justin Pasay of Donahue, Tucker and Ciandella, who were authorized by the owners to represent them.

Atty. Pasay began by saying the Aherns had approached Building Inspector Robert

Steward for a building permit to raze and replace their home, which they thought they were entitled to do, but Mr. Steward explained that they would need a variance. Atty. Pasay said that he would like to address the Appeal from an Administrative Decision first, because if the Board agrees that the Building Inspector's decision was mistaken, no further relief would be needed. Chairman Alessio said she believed the Board will want to hear all of the applications. Mr. Coffin said that he only counts three variances needed. Atty. Pasay said that initially they had approached the Building Inspector expecting that state law would support the replacement of the existing house, but once he was told three variances from 301.1 D were needed, he added the other two requests for relief (Wetlands and Shoreland Protection) in case the Board did not agree to reverse the Building Inspector's decision.

Mr. Greenbaum asked Atty. Pasay to explain how he came to the conclusion that no variances were needed. Mr. Pasay first gave the background on the property, which is a small (under 13,000 sf) parcel. It is in the Single Family Residential zone, and also in both the Shoreland Protection District and the Wetlands Conservation district. The house was constructed around 1950, has two bedrooms and one bath, and its construction predates Town zoning, which was put in place in 1979. He said the Aherns plan is to take down the existing house and replace it with a new one which will be less non-conforming than the old one. He said that where the new building would conflict with zoning is entirely dimensional in nature due to the lot line setback requirements, which are 20' for front and 20' for rear and side. He directed the Board to the pre- and post-building plans showing the setbacks:

Closest structure (steps) to the front lot line: 9.8' currently, will be 13.7'

Closest point of dwelling to lot line: 11.35' currently, proposed 16.6'

Distance from the end of the steps to the water: 25' currently, proposed, 34'

Distance from house to water: 32' currently, proposed, 37'

He said the new building is basically within the foot print, but pulled further from the front lot line and also further from the lake. He said it will be much better with its relation to the front lot line and the lake.

Atty. Pasay said that the entire property is within the Shoreland Protection District of 300' and will need relief from the state and also septic approval. He said the septic system will be state of the art and farther from the water. He said the total of impervious surfaces will increase by about 3%, which is still in compliance.

Atty. Pasay said their argument is based on state case law, which is deferential to real property rights, and constitutional rights. He said in the state law in NH, the foundational conclusion is that as long as you are not making a non-conforming element more non-conforming, in this case proximity to the lot line or the water, then the Supreme court has said that you don't need variances. He then cited a case out of Seabrook which involved a house with three units where only two are allowed, and also a lot that was too small. The owner wanted to put walls on a car port to make storage, and the Town said they can't; the Supreme court said were not expanding the portion that was non-conforming, were not adding units or coming closer to the lot line, and therefore could

proceed. He said that the case of the Aherns is similar in that the changes proposed are not bringing the property closer to the lines or to the water. He said they do need to go to the state for Shoreland and septic relief, but their position is that no variances are needed.

Questions/Comments of Abutters

Chairman Alessio opened the hearing to anyone present who wished to speak in support or opposition to the appeal from an administrative decision. None wished to be heard.

Questions/Comments of the Board

Mr. Greenbaum said that in his conversations with the Building Inspector, Mr. Steward's statement was that when a building is removed, you are starting over and lose any privileges that the old building had. He said that this case is not like the Seabrook case. He asked the applicants how big of a building is being put in, as he did not see the dimensions in the materials provided. He said this is part of what he needs to consider.

Atty. Pasay said that first, the idea that removing a non-conforming building means you must start anew and comply with current zoning is not supported by law. He said the state Supreme court focuses on the use; the use of this property will continue as a single family residence. Mr. Greenbaum said that his own experience around the state is that taking the building down makes you start over, and questioned if Mr. Pasay was saying the state law changes that. Atty. Pasay said that the interpretation that you must start anew with a replacement building has existed in the state, but the bigger picture is that people have the right to use their property, and that they should be able to continue the use that has existed for 70 years. He said that the idea that removing the building and replacing it with a less non-conforming building with the same use is not allowable is not rooted in practicality or common sense. Ms. Leone asked if the house is being taken down to the foundation; Atty. Pasay said yes. He then stated that the current roofline is 1,031 sf, and the new roofline would be 1500 sf. He said that the impervious surface measurement will only increase by 300 sf overall, as other items are being removed, and the total complies with zoning.

Chair Alessio said that this board deals with non-conforming lots all the time, it is not unusual, but the argument regarding the use is unusual; she said the town is not disputing the use. She said that the Building Inspector is saying that the grandfathered footprint will be lost. She said they are always looking for properties to be bettered and made less non-conforming. But she said in addition, the Building Inspector had written to the board to say that modifying the size of the house by only 3 feet would have allowed a building permit to be issued without a variance.

Mr. Pasay said that even if they fit the house into the size Mr. Steward was looking for, it would be in non-compliance with the Shoreland Protection ordinances, for one example. He said that each application needs to be considered individually. In this case, he cited health and family space needs, and also that the proposed home is a modular building that is not custom built. He then reiterated that the state is focused on use of the property. Ms. Alessio said that neither the Board nor Mr. Steward intend to deny the

Aherns rightful use of their property; she said the considerations of this case are dimensional in nature. She said the job of the board is to uphold the regulations of the town while still affording the owners the best use of their property.

Mr. Coffin said the point they are dealing with is whether or not Mr. Steward made a mistake. He read from the ordinance which reads, "non-conforming uses may generally be continued, maintained, repaired and improved, however, non-conforming uses may not be expanded or changed to other non-conforming uses". He said that it had been pointed out by Mr. Steward that the house could be built on the existing footprint so a variance would be difficult to approve based on hardship. Mr. Coffin said that he would be reluctant to say that the Building Inspector made a mistake when he was following direction from the Zoning ordinances. So he said he would not support that but that the applicant could continue with the other variances.

Mr. Johnson asked Mr. Coffin if the regulation he was reading from was from Town ordinance or state law; Mr. Coffin said it was cited in the application packet and is Town ordinance, 205.9. He said it is being expanded. Mr. Pasay said this is exactly what was addressed in Seabrook; he said that the non-conforming part, the set-backs, are not being expanded. He said that Mr. Coffin has put his finger on the issue. Mr. Coffin said that the other issue is that if a house is torn down and not rebuilt for a year, the non-conforming use is not renewable. He said the impervious coverage is increasing but is not out of compliance to being begin with. He said again that Mr. Steward's decision was valid because it was based on the regulations.

Mr. Coffin asked about the height of the building; Atty. Pasay said that the new building will be two stories, where the current building is a story and a half, and will be within the zoning limit of 30 feet. He added that the property is within the Wetlands Conservation District, and that section 202.B 3 of the Town's regulations state that a property in that district that is destroyed or in need of extensive repair may be rebuilt within 2 years provided that it does not extend further into the wetland buffer. He said that it does not require the new building to be completely compliant with the regulations and said this highlights his point. He said that if the Aherns had allowed their property to become dilapidated, they could have two years to rebuild it without a variance, as long as it doesn't come closer to the water. He said this is nonsensical, and the regulations should favor real property rights.

Mr. Greenbaum said that he feels this matter should be sent to an attorney for an advisory ruling, on the point that State Law says they should be able to rebuild, and that the Building Inspector was incorrect in turning it down. There was some further discussion on the points raised by the applicant's attorney, and the interpretation of the regulations. Atty. Pasay said that the building is to be less non-conforming; Chair Alessio said that the building is however getting larger.

MOTION: by Mr. Greenbaum, to continue this case until January 13, 2022, to allow the Town to have legal counsel review the proposal and the Town's position thereto.

SECOND: by Mr. Johnson

In favor: Alessio, Greenbaum, Johnson, Leone; **Opposed:** Coffin; Passes.

CW Station LLC
c/o Divine Millimet
111 Amherst Street
Manchester, NH 03101

IN RE: Summit Distributing LLC
 Tax Map R-40, Lot 15

The applicant, CW Station LLC, of Kingston, NH, seeks a Re-Hearing on the decision by the Kingston Zoning Board of Adjustment granting to Summit Distributing LLC, a Special Exception to the terms of Article 201, Section 4.E.14, to permit a retail fuel outlet within the Aquifer Protection District Zone B. Should a Re-Hearing be granted, it will be held on January 13, 2022.

Phillip Coombs, 6 Little River Road, said he is representing CW Station as part owner of the property, better known as the Coombs farm. He said they are requesting a rehearing on two points; improper notification, and lack of authority of the ZBA to delegate authority to another board. He said he has received the response sent by Summit Distributing's attorney and would like to address that.

On the first point, he said his concern was that the Southeast Land Trust of NH (SELT) was not notified of the hearing. He said they hold a conservation easement on the property, and read excerpts from the Warranty Conservation deed recorded at the Rockingham Registry of Deeds as Book 5465, Page 0723. He said that SELT, the Town of Kingston and the United States Department of Agriculture are signatories, with the Town in an executory interest function. He said it was signed in 2013, and that the signers are charged with the primary purposes of the easement: protection of agricultural use and agricultural soils, protection of open spaces, and in particular the protection of the Little River, including the property's 3000 feet of shoreline. He said the Town is charged with protecting the water quality of the Little River in total. He said the proposed truck stop would be within 500 feet of the Little River, and he doesn't see how the Town can require someone to maintain the integrity of the water quality and then not notify them when there is a potential threat proposed.

Mr. Coombs said that the case law cited by Summit's attorney is from 1992, and the Town now has much more land in conservation easement; he said that the Town has a vested interest in conserved property as it has spent a lot of money on it. He said it is also within the Town's purview to have stricter standards than the state.

Mr. Greenbaum asked where in Town information about Conservation easements is available to someone looking up property abutters for a Zoning application. Mr. Coombs said that at least on his own property, it is listed on the property card. He said it is a notation that would take an extra 5 minutes to find. He said the Town should be making

this more accessible, but he thinks it's an oversight to not include easement holders as abutters.

Ms. Alessio asked if he is saying that the information is not on every tax card; Mr. Coombs said he can't answer that. However, he said that the Town has an executory interest in ensuring that SELT is following the agreement, but if SELT should fail, the Town is responsible for carrying out these duties as well. He said without notification the Town is not allowing SELT to carry out the duties they are tasked with. He said that SELT has much more institutional knowledge about what potential downsides there are to the aquifer; he said it is not fair to put this responsibility on the individual property owner.

Mr. Coombs then pointed out that the ordinance imposes additional protections for groundwater when a special exception is to be granted. He said he sees two problems, first that as an independently elected Board, the ZBA can't dictate its responsibilities to another board, in this case the Planning Board. Secondly, he said that as the minutes currently read, the motion uses the word "may" and not "shall", which he said puts no restrictions whatsoever on the applicant. He also said that the Planning Board is very competent, but they have a million other details to consider. He said that this Board (ZBA) is charged with the aquifer protection aspects, and no protections were put in place.

The Chair then asked if any in the audience have further comments in support of a rehearing. Mr. Russman said that for the record, it is not hard to find out who easement holders are on a property. He said that the Town paid 50% of the cost of buying the land (federal government other half), and there is a clear interest in water quality. He said that as the Coombs farm is one of only two active farms in town, he hopes the Board will grant a rehearing. He said it won't be a great hardship on Summit to wait another month, and will allow Mr. Coombs and SELT to be heard on the matter.

Comments of the Board

Mr. Coffin said that the first reason given for a rehearing is the failure to notify SELT, which is spelled out in the ordinance, that all easement holders "shall" be notified. He said that this notification did not occur, and suggested that the easiest remedy for this is rehearing.

Mr. Coffin then began a discussion of the second point, which was the question of whether the ZBA can require that restrictions be placed, without going through the entire process of escrow accounts and hydrogeological and engineering studies. Chair Alessio said that this was discussed at the hearing, that the amount of water on the front part of the property is less than half what would require a hydrogeological study. Mr. Coffin said that had to do with the septic system, and that the special exception was needed because a gas station is prohibited in that zone. He said that comes with restrictions, and the board agreed that to avoid going through that whole process, and putting in place binding restrictions, and without being able to meet jointly with the Planning Board, they would try to streamline the process by having the restrictions go through with the site plan process.

Mr. Coffin said that he would advise that the application be reheard on this point as well as the last. He said a legal opinion should be obtained on whether the ZBA can delegate, or if the minutes should be amended to read "shall". He said that if not, plans will need to go to the Town engineer, and multiple meetings will be needed.

Mr. Coffin said that in his opinion, the failure to notify is sufficient reason to grant a rehearing, and that the rest can be talked about at the next hearing.

Mr. Coombs said that in the case of accessory dwelling units, shifting responsibility to the Planning Board had to be decided by the voters. He said the ordinance may need to be rewritten; responsibility should not be passed off in the middle of a hearing. Chair Alessio said that it may still be shifted to the Planning Board. Mr. Coffin said that it needs to be found out if it is legal to do so, and if not, all the steps will need to be taken. He said he would like to have a position given by an attorney who could defend it in court if necessary.

MOTION: by Ms. Leone, to grant a rehearing of this case on the basis that SELT and the Town were not notified.

SECOND: by Mr. Coffin

Chair Alessio said that if easement holders can't be easily identified, deeds will have to be researched, but if the information is on the tax cards, that is not such a big deal.

Mr. Coombs said that anyone who has such an easement would want it on their property card; the conservation code gives a tax rate lower than Current Use, and they would want to take advantage of that. Mr. Russman said he can only speak for his own property card, but it is listed on his.

Ms. Alessio said that abutter notices will be reissued and include SELT and the Town of Kingston. She asked if the Federal government also needed to be notified. There was a brief discussion in which it was decided, with Mr. Coombs in agreement, that SELT has the primary enforcement authority and they are the only ones that need to be added to the abutter notifications.

Mr. Coffin pointed out that in their rebuttal, the attorneys for Summit said that CW Station cites no statutory authority to support its contention that the holders of conservation restrictions on their land were entitled to receive personal notice. He said that this is false, that in the RSA this is required.

All in favor.

Meeting adjourned at 8:26 PM

Respectfully submitted,
Susan Ayer, Administrative Assistant