

ATKINSON ZONING BOARD OF ADJUSTMENT

21 Academy Avenue

Atkinson, New Hampshire 03811

Public Hearing Meeting Town Hall

Wednesday, January 13, 2021

Members Present

Glenn Saba, Chair
Kevin Wade

Arthur Leondires

Bob Connors, Vice Chair
Scott Sullivan

Others Present

Leann Moccia
Will Reddington, Wadleigh, Starr & Peters,
P.L.L.C.

Charles Cleary, Wadleigh, Starr & Peters,
P.L.L.C.

Charles Zilch, SEC & Associates
Brian Boyle, Building Inspector

Workshop 7:00 PM

Call to Order: Chair Glenn Saba called the meeting to order at 7:00 PM.

Chair Saba read a statement into the minutes regarding electronic meetings. This meeting will be conducted via Zoom which is authorized pursuant to the Governor's emergency order. The public has access to listen and/or to participate by telephone or by Zoom. If the public is unable to access the meeting, it will be adjourned and rescheduled. All votes will be taken by roll call vote.

Roll Call Attendance: Chair Saba, alone; Vice Chair Connors, alone; Member Wade, alone; Member Sullivan, alone; and Member Leondires, alone. All of the Atkinson Zoning Board of Adjustment members stated they were present.

Other Business:

The Board received a letter from Christine Cornelius. It did not constitute a ZBA response and was tabled for discussion.

Regarding the application for Gilles Gagnon, Gilley's Realty LLC, Chair Saba expressed concern that the lot at 19 Industrial Way would become a junkyard and wondered if a time limit should be placed on time in storage of equipment. Vice Chair Connors agreed and stated that it should be an issue for Code Enforcement.

Approval of Minutes: December 9, 2020

Chair Saba, Vice Chair Connors, Member Leondires, Member Wade and Member Sullivan of The Atkinson Zoning Board of Adjustment were present at the December 9, 2020 meeting. Chair Saba, Member Connors, Member Wade, Member Sullivan and Member Leondires are

present at the January 13, 2021 meeting, reviewed the December 9, 2020 minutes, and made corrections and amendments.

Member Connors made a motion to approve the minutes of the December 9, 2020 meeting as amended and corrected. The motion was seconded by Member Leondires. Roll Call: Member Leondires, yes; Vice Chair Connors, yes; Member Wade, yes; and Chair Saba, yes; the members of the Atkinson Zoning Board of Adjustment present and who were at the December 9, 2020 meeting voted in favor. Vote: 5/0/0. The vote is unanimous.

Correspondence: none

Public Hearing – 7:30 P.M.

Chair Saba opened the public hearing at 7:30 PM, January 13, 2021.

- 1. Application for Appeal of Administrative Decision submitted by Charles Cleary, Esq and Wadleigh, Starr & Peters, P.L.L.C. for Charles Kinney & Jeanine Kinney Living Trust, Charles Kinney Trustee related to a parcel of land at Map 17 Lot 62 in the RR2 Zone. (cont'd from December 9, 2020)**

Abutters:

Centerview Hollow Land, Katherine and Lonnie Goodwin, Mr. Charles Zilch, SEC Associates(present), Diane Kinney, Charles Kinney (present) and Jeanine Kinney, Trustee Charles & Jeanine Kinney Liv Tr, Wadleigh, Starr & Peters PLLC, Attn. Charles F. Cleary(present), Huoth Pech, Paul and Leann Moccia (present), Will Reddington (present), Diane and Barry Mackin, (present) TTE, Diane Mackin Rev Trust and Barry Mackin Rev Trust

Chair Saba read a letter from the Building Inspector, Brian Boyle, into the record. In the letter, Mr. Boyle informed the applicant that his application, dated 12/23/2020, was denied. In summary the denial states: 1) Information under “Plans and Specifications” was left blank; 2) Information under “Description and Construction” was left blank; 3) It does not comply with Atkinson Zoning Article IV, Section 530, for the RR2 zone. It does not meet lot size and setback requirements; 4) It does not comply with NH RSA 674:41, requiring frontage for building lots; and 5) the parcel does not have Planning Board approval. The 1973 deed states that the lot has not been approved for building purposes.

Chair Saba questioned if the Board could even hear the appeal as submitted. The applicant is looking for a special exception under RSA 674:41. Chair Saba stated that he has read the RSA and it is explicit under Paragraph 2 in the RSA that there must be a lot of record. The Building Inspector’s letter states that it is not an approved lot. It has not been a buildable lot since it was created at the time the subdivision was created.

Vice Chair Connors pointed out that Atkinson Zoning regulations supersede State regulations. Attorney Charles Cleary, Wadleigh Starr and Peters disagreed and believes that RSA 674:41 would control with respect to frontage and that the applicant is allowed to seek the appeal.

Vice Chair Connors pointed out that there are three key issues stated in the letter of December 29, 2020 from the Building Inspector: a nonconforming lot, less than 2 acres; a variance required for 200 feet of frontage; and a variance required for a 30 foot setback. He then asked why all three issues are not in the appeal before the Zoning Board, only the frontage issue.

Attorney Reddington explained that for the purpose of this appeal, the applicant is seeking exception from RSA 674:41, the frontage requirement, first. The applicant is aware that there may be other issues that need to be addressed.

Chair Saba stated that the problem with the Board entertaining only the exception to RSA 674:41 is that the lot is not a lot of record. It is a parcel of land that was created with the stipulation in the Deed that it is non-buildable.

Attorney Reddington stated that the Deed should not be the controlling factor. Chair Saba informed him that the lot is labeled as non-buildable in the recorded subdivision plan.

Mr. Charlie Zilch explained that the 1971 subdivision plan does not include the parcel as part of the approved lots, but does not exclude it or restrict it as non-buildable. It is shown as left over or remaining land. It was left with clear access from proposed Huckleberry Lane with a 30 foot wide easement.

Chair Saba asked why the land for the easement was not made part of the lot as opposed to an easement. Mr. Charlie Zilch explained that there is no explanation in the Planning Board 1971 minutes as to why it was provided with an easement for access or why it was excluded from the other lots. The lot was created, but it was not created as part of the subdivision. The easement is on private land, it crosses through the abutting lot.

Attorney Reddington informed the Board that the applicant is appealing Item 4 of the Administrative Decision. Vice Chair Connors asked if the Board could make a decision on only one point of an Administrative Decision. He is worried more about Item 3 of the letter which concerns Atkinson Zoning Regulation Article IV, Section 530 concerning lot size, frontage and setback.

Chair Saba is concerned that the notification to the abutters states that the applicant was advised of the administrative decision of the Planning Board and that they are seeking an exception under RSA 674:41. There are more issues with the lot.

Attorney Reddington stated that the applicant is looking for an exception under the Statute. Chair Saba stated, if the Board did allow an exception to RSA 674:41 as requested in Item 4, there is still Article IV, Section 530 as requested in Item 3 to consider. The lot does not meet minimum lot size, frontage or setback.

Mr. Charlie Zilch read Atkinson Zoning Regulation Article IV Section 400:4, and explained that the setbacks are permissible. Even if the 30 foot sideline setbacks were required, there is enough for a buildable lot. Chair Saba pointed out that as Town Counsel explained, this is not an existing lot of record, it is remaining land from a subdivision. Mr. Charles Zilch explained that there is still a building envelope to site a house, septic system and driveway. There are many other undersized lots in Atkinson.

Mr. Kinney stated that it was a lot of record before the subdivision. Chair Saba disagreed and stated the Board was informed that the land in question was left over after the subdivision was plotted. Member Sullivan clarified that the statute discusses street giving access. Chair Saba agreed that the easement could give access but the parcel is not a lot of record. The Board can only entertain what is in the appeal.

Attorney Reddington read from RSA 674:38 and stated that it is a legal lot. He stated that the parcel is on an approved subdivision plan, it is a lot of record and is a taxable lot.

Chair Saba asked Attorney Reddington if the lot appeared on a subdivision plan and was recorded in 1971 in the Registry of Deeds and Attorney Reddington said it was. He also stated that he did not know if the lot existed before 1971 as Mr. Kinney stated. He does not know when the lot came into existence, but the first time it was recorded was in 1971.

Chair Saba informed the Board that it needs to decide if they are able to use this application as the vehicle to vote on the lot. Vice Chair Connors stated that he is looking at the application in its entirety and as an appeal to an administrative decision. There is a frontage problem and a setback problem as well. There are no drawings to show that the setback issues have been addressed.

Attorney Cleary stated that it matters that the lot is shown on the 1971 subdivision plan and that there are provisions in Atkinson ordinances that allow for undersized lots and setbacks. The applicant simply wants the Board to address only RSA 674:41. The other issues can be addressed later.

Vice Chair Connors stated that the parcel was excluded from the 1971 subdivision, therefore the Board has to address the appeal in accordance with current Atkinson Zoning Board requirements.

Chair Saba stated that the Board is asked to grant an exception based on RSA 674:41. The lot was created by a subdivision, but it was not approved by the Planning Board when the subdivision was approved, it was a leftover piece of land with no access. It is not a lot of record. Now, the applicant is trying to make it a buildable lot under RSA 674:41. He does not believe that it applies. He would like to see subdivision approval showing the parcel is an existing lot of record. The parcel did not meet criteria in 1971 and does not meet it now.

Attorney Reddington reiterated that it is a lot. Chair Saba disagreed, it is a piece of land, no subdivision approval applied to the lot. There are many other landlocked parcels in Atkinson. He informed the Attorney that it must have a State approved subdivision number. Mr. Charles Zilch informed the Board that the regulations requiring State approval for all lots less than five acres came into effect several months after the lot was created. Therefore, it is exempt. However, the lot is large enough, it has high quality soils and meets setbacks so it could meet State subdivision approval.

Chair Saba asked the Board to speak. Vice Chair Connors stated that the appeal only addresses RSA 674:41 and should address all four points made by the building inspector in his letter.

Chair Saba asked for the Building Inspector's feedback. Mr. Boyle stated that items one and two would be easy to meet, all that is needed is to fill out the application. However, items three, four and five are more difficult. There was no attempt to make this lot an approved buildable lot when the subdivision was approved in 1971. He agrees that it is a piece of land left over, and there are several similar lots in Town. In order to be buildable lots, zoning regulations must be met. Other lots in Town that did not meet zoning requirements had frontage. He is not aware of another instance where a building permit was allowed with no frontage and well under a two acre lot. He agrees with Mr. Charles Zilch that if it were a lot on Huckleberry Lane without required frontage, but was an approved lot, it could be allowed.

Chair Saba stated that Town Counsel has informed the Board that this is not a lot of record as applies to RSA 674:41. It is clear from the deed that the lot has not been approved for building purposes. Without the parcel having status as a legal lot in the Town or as a Planning Board subdivision, he does not believe that the Board can entertain the application.

Attorney Reddington stated that the Statute provides an exception for lots without frontage. Chair Saba stated his biggest concern is that it is not a lot of record and does not meet current zoning. Attorney Reddington again stated that he is looking for the first step, exception from RSA 674:41. Chair Saba replied that it is not the policy of the Board to consider an appeal one step at a time, the entire denial needs to be addressed. There are five issues addressed in the denial of administrative appeal. The appeal is asking for an exception under RSA 674:41. Chair Saba does not see how 674:41 applies because it is not a lot of record.

Mr. Charlie Zilch asked if the lot were two acres and the only issue was frontage, would the Board entertain the appeal. Chair Saba replied that it would depend on how the application were written, if it were a lot of record and met all zoning it might consider the request for exception to RSA 674:41.

Mr. Charlie Zilch replied that the sideline setback should not be an issue, there is still a building envelope even with the larger setback.

Chair Saba again informed the applicant that RSA 674:41 does not apply based on his conversation with Town Counsel. If the applicant were requesting a variance, then it would have to be shown that there is access. It would have to be a lot of record with Atkinson Planning Board approval. An easement has not even been discussed.

Attorney Reddington stated that this exception needs to be sought because there is no frontage. Chair Saba replied that there are several deficiencies for it to be a buildable lot at this point.

Attorney Cleary stated that in his mind a lot that appears on an approved subdivision plan is a lot of record.

Vice Chair Connors informed the Attorney that the Board has public notice for an Application for Administrative Appeal which has five points and the applicant is asking the Board to decide on only one point, lack of frontage. For the Board to proceed to a vote, all five points must be addressed. He asked the Chair if the Board should move forward with a motion to deny the Application to Appeal because not all points in the Administrative Decision have been addressed.

Chair Saba stated that he believes that RSA 674:41 does not apply. Chair Saba read the rebuttal to the Building Inspector decision which cites Regulation 400:4. Regulation 400:4 applies to a lot of record and Chair Saba questions if it is a lot of record.

Chair Saba stated the Board should first decide if the Lot is an approved lot recognized as a buildable, legal lot in 1971. A lot of record must be buildable.

Chair Saba stated that it was not approved in 1971. When the subdivision plan was drawn up, it was not made a lot.

Chair Saba requested a vote on whether the lot was recognized as an approved, subdivision lot by the Atkinson Planning Board under subdivision control in 1971 and does the Board feel that this lot was part of that subdivision and classified as a buildable, legal lot.

Discussion: Attorney Cleary stated that it was not necessarily a buildable lot, but a lot of record. Chair Saba replied that the criteria for a lot of record is that it meets the requirements for subdivision control. Chair Saba informed the Attorney that it was not approved in 1971 and in order for it to be approved now, it would have to meet frontage requirements and current zoning requirements. Vice Chair Connors stated that the subdivision showed lots 10, 11, and 12. This parcel was not labeled as part of the subdivision. Member Sullivan stated that the parcel was never included in the Planning Board decision approving the subdivision.

Chair Saba opened the hearing to the public.

Mr. Moccia requested to speak. He lives on Huckleberry Lane. He pointed out that the lot under consideration is not on Knightland Road, it is on Huckleberry Lane and asked if it is the same lot. He has lived next to the lot for 35 or 36 years and a perk test has been done every two to three years and has failed. Chair Saba pointed out that the applicant has septic approval from the State. Mr. Charlie Zilch explained that the upland soils are Paxton soils and can support a septic system.

Mr. Barry Mackin spoke. He moved to Atkinson from Massachusetts. Since he has moved here, 200 acres behind his house have been developed. He wants to know what is the stopping point. Chair Saba responded that it is the responsibility of the Zoning Board to look at the lot and also the neighborhood. Mr. Mackin also informed the Board that there is a large tortoise that migrates across Huckleberry Lane to that lot on a yearly basis. Chair Saba responded that there are many species of turtles, but only a handful that are registered as endangered and those habitats are labeled and known. He does not believe that parcel is one. Mr. Charlie Zilch stated that the applicant would not be impacting the wetland.

Chair Saba asked if there were more questions from the public. There were none.

Chair Saba requested a vote on whether the Zoning Board of Adjustment recognizes this lot on Map 17 Lot 62, parcel 0 as an approved, subdivided lot by Atkinson Planning Board.

Roll Call Vote: Member Leondires, no; Member Connors, no; Member Wade, no; Member Sullivan, no; and Chair Saba, no. The members of the Atkinson Zoning Board of Adjustment present all voted no, Map 17 Lot 62, parcel 0 is not recognized as an

approved, subdivided lot by the Atkinson Planning Board. Vote: 0/0/5. The vote is unanimous.

Chair Saba requested a vote on whether the application requesting an exception from RSA 674:41 is applicable and valid since this is not a lot of record.

Discussion: Vice Chair Connors stated, no, the notice of hearing was for an appeal of an administrative decision. Chair Saba stated that in accordance with the Building Inspector denial letter the issue is Zoning Ordinance 400:4 regarding existing lots of record. The Board has just voted that this is not a lot of record. The applicant is requesting an exception to RSA 674:41. The applicant agreed. Chair Saba said he was informed by Town Counsel that the lot is not a lot of record because it does not meet RSA 674:41 therefore the application does not apply. Vice Chair Connors stated that the applicant needed to resolve one, if this was part of the subdivision of 1971, or option 2, get it identified as a lot now in accordance with current zoning regulations, and then come back to the Zoning Board of Adjustment. Mr. Leondires, Mr. Sullivan and Member Wade agreed.

Chair Saba requested a motion.

Vice Chair Connors made a motion to deny the Application for Appeal of Administrative Decision submitted by Charles Cleary, Esq and Wadleigh, Starr & Peters, P.L.L.C. for Charles Kinney & Jeanine Kinney Living Trust, Charles Kinney Trustee related to a parcel of land at Map 17 Lot 62 in the RR2 Zone. (cont'd from December 9, 2020) . Member Sullivan seconded the motion. Roll Call: Vice Chair Connors, yes; Member Wade, yes; Member Leondires, yes; Member Sullivan, yes; and Chair Saba, yes. Vote: 5/0/0. The vote is unanimous.

Chair Saba informed the applicant that the Board upholds the decision of the Building Inspector.

Vice Chair Connors made a motion to close the public hearing. The motion was seconded by Member Leondires. Roll Call Vote: Vice Chair Connors, yes; Member Leondires yes; Member Wade, yes; Member Sullivan, yes; and Chair Saba, yes. Vote: 5/0/0. The vote is unanimous.

Chair Saba requested to return to the minutes and page 15.

Vice Chair Connors made a motion to adjourn the January 13, 2021 meeting of the Atkinson Zoning Board of Adjustment. Member Leondires seconded the motion. Roll Call: Vice Chair Connors, yes; Member Leondires yes; Member Wade, yes; Member Sullivan, yes; and Chair Saba, yes. Vote: 5/0/0. The vote is unanimous.

Chair Saba adjourned the meeting at 8:47 pm.