

ATKINSON ZONING BOARD OF ADJUSTMENT
21 Academy Avenue
Atkinson, New Hampshire 03811
Public Hearing Meeting Town Hall
Wednesday, December 8, 2021

Members Present

Glenn Saba, Chair
Bob Connors, Vice Chair
Arthur Leondires
Kevin Wade
Scott Sullivan

Others Present

Karen Wemmelmann, Recorder
Leann Moccia
Thomas Hildreth, Esq., McLane Middleton

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

Workshop 7:00 PM

Chair Saba made a motion to recess for 10 minutes and go into closed session under Chapter 91A, Paragraph 1, Subparagraph L. Vice Chair Connors seconded the motion. All members of the Atkinson Zoning Board of Adjustment voted in favor. Vote: 5/0/0.

Public Hearing – 7:30 P.M.

Call to Order: Chair Glenn Saba called the meeting to order at 7:09 PM. Chair Saba introduced the members of the Zoning Board of Adjustment (“Board”) present. Vice Chair Connors, Member Kevin Wade, Member Leondires and Member Sullivan. Chair Saba informed the audience that there is one hearing:

Motion For Rehearing: As submitted by William P. Reddington, Esq., Wadleigh, Starr & Peters, P.L.L.C. for Charles Kinney & Jeanine Kinney Living Trust, Charles Kinney Trustee.

Abutters:

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

Chair Saba explained that prior to going live the meeting was opened and the Board made a motion to go into private session in accordance with Chapter 91A, Paragraph 1, Subparagraph L for legal matters in order to discuss with the other members of the Board what Town Counsel had informed him.

Chair Saba stated that this is a motion for rehearing and under that appeal for rehearing, he has some things to go over with the Board. Chair Saba reviewed for the Board that:

When a motion for rehearing is received, the Board must decide to either grant the rehearing or deny it. The Board has 30 days to decide.

If the Board believes that there are sufficient grounds to reconsider the original decision, the motion should be granted, if not the motion should be denied.

The person has the right to apply for a rehearing and the Board has the authority to grant it, however, the Board is not required to grant the rehearing and to use its judgement to decide if justice will be served by doing so.

New evidence is not a requirement for granting a rehearing.

The reasons for granting the rehearing should be compelling ones. The Board has no right to reopen a case based on the same set of facts unless it is convinced that an injustice would otherwise be created, but a rehearing should be seriously considered if the moving party is persuasive that the Board has made a mistake.

There is no public participation, the Board will discuss the motion, how the Board acted and how they came to a judgement.

Chair Saba requested the Board start with the grounds for rehearing which can be found on page 4 of the motion; the findings of the Housing and Appeals Board.

1. The ZBA erred when it ignored the findings of the Housing Appeals Board.

Vice Chair Connors stated that the finding of the Housing Appeals Board was that the motion should be reheard to the Board under RSA 674. The order of the Housing Board stated that the Board was wrong not to hear under RSA 674. December 9, 2020 was the first appearance before the Board for an appeal of an administrative decision. The Board found there was no decision to appeal. At the rehearing on January 13, 2021, the decision being appealed had five issues. Vice Chair Connors attempted to discuss the five issues; however, the Board only discussed the frontage for the RSA 674 hearing. The Board did not go forward with reviewing the motion at that time partially because the five issues in the administrative decision were not addressed. The motion went to the housing board because the Board did not hear it under RSA 674:41. The motion was remanded back to the Board by the Housing Board . The order did not state that the decision of the Board was wrong.

Chair Saba read from decision of the Housing Board:

“As a result of the foregoing and by a preponderance of the evidence, the Housing Appeals Board vacates the Town of Atkinson Zoning Board of Adjustment vote not to consider the applicant’s RSA 674:41 II appeal and remands the matter back to the Zoning Board of Adjustment to review the Applicant’s request under RSA 674:41 II. The Applicant’s request for findings and rulings which are consistent with this order are approved, the balance are denied.”

Chair Saba read from Page 6 of the October 10, 2021 minutes and pointed out that as Chair, he stated at that meeting:

“that the HAB stated that it is only acting on 674:41 II for a determination, and remands it back to the Board solely for review on 674:41 II. They are not making a determination on the easement and read from the order. ”

It was discussed at the meeting and Chair Saba believes that the application was heard under RSA 674:41 II. Vice Chair Connors agreed. Chair Saba polled the Board. All members agreed.

2. The Board erred when it denied the request for an Exception under RSA 674:41 II based on its interpretation of the easement.

Chair Saba requested discussion.

Vice Chair Connors stated that the easement is not the only consideration. First, this is a subdivision with many lots. This lot was the only *parcel* that did not have a house put on it. One reason is there is a deed that states that it is not approved for building. Putting the statement in the deed together with the fact that a house was never built on the lot, he concluded that the lot was never intended to be built on. In addition to it not having a conforming lot, whether it is subdivision or single family. *The setbacks were an issue when the Building Inspector looked at the lot. The setback issues were resolved by changing the building envelope at a later date.* The deed is from 1993. Vice Chair Connors read from the 1993 deed stating that the lot has not been approved for building purposes.

Chair Saba stated that the HAB stated that this is a lot so whatever that means, we have to accept that it is a lot. The Board was directed to focus on 674:41 II. *As a Board, reading 674:41 II, Paragraph 2, we determined it is not an island, it is a piece of landlocked land.* As a Board, he believes their discussions led to the fact that it would Not be to the betterment of the Town by approving it. Vice Chair Connors stated that it would set a precedent. There are many other lots in Town that do not have frontage and they could use this as a reason to subdivide.

Chair Saba read from 674:41 II, Paragraph 2, which states “that if the issuance of the permit or erection of the building would not tend to distort the official map or increase the difficulty of carrying out the master plan on which it is based, and if the erection of the building or issuance of the permit will not cause hardship to future purchasers”... In the minutes, it was brought up that Attorney Reddington stated that it would not cause harm to future purchasers of this lot. Chair Saba reiterated that it might cause harm to the abutters over whose land the easement runs and asked about the next buyer of the property. There also could be an issue for future owners of the subject lot if the easement was later proved inadequate. It falls on *this* Board to determine whether the erection of the building or issuance of the permit would cause harm to future purchasers. He believes the Board decided it is not worth the risk and that the Board discussed this in detail.

Member Wade stated that it is obvious to him that it would cause a hardship.

Chair Saba believes that the Board has the authority to say yes or no, *just as if it were a variance. Some variances are granted and some are not.*

Vice Chair Connors stated that the cumulative effect has to be considered.

Chair Saba stated that RSA 674:41 is not a commonly used vehicle and there is no case law. Chair Saba asked the Board members if they think the Board erred by denying the request for exception under 674:41 II and if they think their decision was based solely on their interpretation of the easement.

Vice Chair Connors stated that he has looked at the matter and all the issues, not just the one issue.

Chair Saba requested Member Wade speak. Member Wade stated that even under that one issue of the easement, hardship would be great for the owner of the property and the abutters. He does not believe it was the sole reason for the determination.

Vice Chair Connors stated that part of the issue is it appears that the Board has only discussed one issue which makes it appear that that issue was the only basis for its decision. He is looking at everything together.

Chair Saba stated that he believes that the Board discussed whether the hardship that the proposed easement will cause and may cause. The Board discussed whether it meets subparagraphs a, b, c, d or e in paragraph one and concluded it did not. The Board looked at paragraph 2 and did not think it met. Then, the Board looked at the whole ordinance and still could not allow the motion. Chair Saba requested that Board members speak if they have doubts about the decision.

Vice Chair Connors stated he tries to help out the applicant, but the Board is sworn to represent the Town. He is concerned that approving this application would set a precedent. There are a lot of landlocked lots that could take advantage of allowing this application and this doesn't fit in the master plan.

Chair Saba stated that the applicant's entire argument is that it does not have frontage, which is why he is referencing 674:41 II. As he reads it and consults with attorneys, he admits he still does not completely understand 674:41.

Chair Saba stated that the Board has leaned heavily towards the rights of the landowner. But, the Board has also always taken into account the welfare of the general public and as a Board it was determined that this application did not fit with the master plan.

Chair Saba requested comments. Member Leondires agreed.

3. The ZBA erred where it denied the Applicant's request finding that the "burden or harm to the public far outweighs the benefit to the applicant".

Chair Saba stated that this statement is more opinionated than factual. The objections of the abutter were only one reason the Board denied the application and the other reasons were broken down in its discussions.

Member Leondires asked if any Board members had expressed that they would be inclined to grant the request but for the objections of the abutters. Chair Saba stated he believed someone did. But that statement had *nothing to do with 674:41*, It was hypothetical and it had to do with a landowner who claims to benefit from *an* access easement and the owner of the property where the easement exists does not object, the Board member surmised that the Board may consider it differently.

Vice Chair Connors expressed his concerns about the infringement *on* the abutters and it was his feeling that a driveway could not be slapped on someone's land and take possession. *If it was being used as a dry run to get to the lot, it would be different.* That was one of many reasons for his decision. He does not believe anyone on the Board used one specific issue to decline. The Board has looked at the multiple issues since the first time the Board heard this.

Member Wade stated he may have said that if the landowner was not bothered by it, he *might consider it based on the easement, but he was concerned about the other issues, as well.*

Chair Saba asked the Board if anyone felt that Issue 3 was the sole basis of their thoughts. All Board members agreed that Issue 3 was not the sole basis of their thought process.

4. The Board erred when it mistakenly believed that it needed a unanimous decision.

Chair Saba stated that it is in the minutes, he may have said it, but the statement was taken out of context. We all understand that the only time a unanimous decision is needed is when only three members are present. Chair Saba further stated that when voting each criteria must pass by majority vote and all criteria must pass to be approved.

Vice Chair Connors stated that anytime there has been a vote, it has never been stated that the vote needs to be unanimous.

Chair Saba asked if anyone on the Board was swayed by his statement. The Board members replied that they did not remember the statement and were not swayed by it.

Member Wade stated that he believes the only time the vote must be unanimous is when only three members of the Board are present.

Chair Saba stated that the vote was unanimous, so that makes the whole point moot.

5. The Board erred and violated RSA 674:41 where it did not make specific findings with respect to each element under the statute.

Vice Chair Connors stated that the Board voted on all criteria together.

Chair Saba stated that in the discussion *before* the vote, it was agreed that they can vote on the criteria individually, or use only one motion. Chair Saba stated again the question is whether the Board needs to vote on 674:41 II Paragraph 2 or if the Board needs to vote on all aspects of 674:41. One argument of the motion states that the Board was not focused on Paragraph 2. This argument states that the Board did not vote on all criteria. He admits that he does not have a full understanding of RSA 674:41. He believes it was discussed in detail by the Board prior to the vote, and he believes that it was stated before the vote that the hardship it was causing outweighed the benefit to the applicant, which would refer to Paragraph 2.

Chair Saba stated that going through the whole RSA, under Paragraph 3, the Board all agreed that it does not fall under Paragraph 3, or Paragraph 1: a, b, c, d, or, e.

Vice Chair Connors stated the applicant is saying that the Board should have discussed Paragraph 2, voted on that, then talked about 2a and subparagraphs a and b, voted on them individually and provided reasons for its decision.

Chair Saba stated he does not believe Paragraph 2, a and b fall under this and does not agree.

Vice Chair Connors stated that the appeal is for 674:41 II which includes Paragraph 2a, subparagraphs a and b.

Chair Saba believes there were *many* discussions throughout the hearing. The Board showed that the application does not meet the criteria for RSA 674:41. In the Board's opinion, the harm to the general public far outweighed the gain to the applicant. It was discussed in detail and the Board all agreed when it voted.

Vice Chair Connors informed the Chair that Issue 5 asks if the Board erred by not discussing each element of 674:41 II.

Chair Saba agreed and reread Issue 5. Vice Chair Connors asked if the Board erred by not discussing 674:41 II-a which states that municipalities may accept any lot including island lots.

Chair Saba stated that there were *in depth* discussions throughout the hearing and believes the results would be the same.

Chair Saba *asked* how it could be broken down.

Chair Saba asked if the issue refers only to Paragraph II of the RSA. Chair Saba read 674:41 II in part. He stated that the applicant appealed *the decision of the administrative officer, and* there was a hearing. The RSA states that the Board of Adjustment may make any reasonable exception and shall have the power to authorize or issue a permit subject to conditions. Chair Saba stated that the Board could have imposed many conditions. *The Board agreed that the proposed easement would distort*

the official map or increase the difficulty of carrying out the master plan. The Town does not have lots that do not have frontage or are landlocked or are accessed by a private easement. The Board also stated in its discussions that the proposed application would cause a hardship to the general public.

Vice Chair Connors stated that the above goes back to his concern about the cumulative effect. There is no other land in this Town where the Board has allowed access to a lot with no frontage and by an easement.

Chair Saba stated that the RSA mentions that it may accept any lot including island lots... which have access only by boat which would be a hardship.

Chair Saba read further in the RSA “from the requirements of Paragraphs I and II by an affirmative vote, if approved by the Board ...; it was not approved, disapproved by the Planning Board...; it did not go to the Planning Board.” Chair Saba asked if the decision would have been different if each criteria were discussed. The Board agreed that their decision would not have changed if they had discussed each basis.

There was no more discussion on Issue 5.

6. The Board erred in that it incorrectly interpreted RSA 674:41 III and denied the applicants request based on a misunderstanding of the statute.

Chair Saba stated that in the application, the applicant is not requesting frontage, he does not have frontage, he does not want the easement to be considered as frontage, he wants it to be an island lot or a landlocked lot under 674:41 II. In the Boards discussion, it did not believe it fit the master plan and agreed that the harm to the general public far outweighed the benefit to the applicant.

Chair Saba polled the Board. The Board members agreed.

Chair Saba stated that as a Board in its entirety, the concern was clearly the harm and hardship to the general public.

Chair Saba asked if there was more discussion. There was none.

Returning to the appeal, Chair Saba asked the Board if there were more discussion on granting or denying the motion.

Vice Chair Connors requested time to review everything *to see* if he could find anything to make him reconsider his decision regarding all his concerns since the first hearing.

Chair Saba encouraged the Board *to speak up* if there is anything in the appeal to make them reconsider their decision.

Member Wade stated that he does not see anything to cause him to reconsider.

Member Sullivan, stated that he was not at the meeting, but he sees the logic of Vice Chair Connors, and does not see anything to make him vote to reconsider the decision.

Chair Saba polled Member Leondires. He stated he was rereading RSA 674:41 III.

Chair Saba stated that he does not agree with the first sentence that the sole reason was it was determined the harm to the general public outweighs the benefits to the applicant. It was a major factor, but in this Boards history it has never approved a lot with no frontage. This mechanism may be an avenue, but the town master plan does not encourage it and it is not in the town regulations. The decision was not based on that one abutter, by no means.

Member Wade stated the Board has been very lenient in the past and this goes beyond that.

Vice Chair Connors restated each criteria and disagreed that:

1. The Board erred when it ignored the findings of the Housing Appeals Board.
2. The Board erred when it denied the request for an exception under RSA 674:41, II based on its interpretation of the easement.
3. The Board erred when it denied the Applicant's request finding that the "burden or harm to the public far outweighs the benefit to the applicant".

There was a discussion and a concern, a valid concern and the Board must represent the Town.

4. The Board erred where it mistakenly believed that it needed a unanimous decision.
5. The Board erred and violated 674:41 where it did not make specific findings with respect to each element under the statute.

Vice Chair Connors stated the Board talked about everything in the RSA.

6. The Board erred in that it incorrectly interpreted RSA 674:41 III and denied the Applicant's request based on a misunderstanding of the statute.

Vice Chair Connors stated that the Board may not understand it fully, but did its best based on what was presented.

Member Leondires stated that he does not understand how it passes 674:41 III. He read from the RSA and stated he did not believe it could pass RSA 674:41 III regarding 1a, 1b, 1c and 1d. It probably meets a and b. Criteria c is a class 4 highway. It is not a private highway or a class 4 road. All the sections are tied together. It does not meet any of those criteria.

Chair Saba stated that the motion states the Board should only consider 674:41 II. Member Leondires stated that 674:41 II references 674:41 III. He questioned how we sever :II from RSA 674:41

Chair Saba stated that if the Board is unanimous that *the lot should not be approved and* is not a buildable lot under 674:41.

Vice Chair Connors stated looking at everything he does not see anything that would make him change his decision.

Chair Saba stated there is no doubt that the Board takes everything it does very seriously. The Board has never had to address RSA 674:41. The question is whether the Board feels that a waiver should be granted on what is before it, based on specifically RSA 674:41 II and RSA 674:41 in its entirety.

Chair Saba requested a motion.

Vice Chair Connors made a motion to deny the Motion For Rehearing: As submitted by William P. Reddington, Esq and Wadleigh, Starr & Peters, P.L.L.C for Charles Kinney & Jeanine Kinney Living Trust, Charles Kinney Trustee. Member Wade seconded the motion. The members of the Atkinson Zoning Board of Adjustment voted to deny the motion with Member Sullivan abstaining. Vote: 4/0/0.

Chair Saba stated that the motion is denied. The applicant has 30 days to appeal the decision of the Zoning Board of Adjustment.

Vice Chair Connors made a motion to close the public hearing. Member Leondires seconded the motion. All members of the Atkinson Zoning Board of Adjustment voted in favor. 5/0/0. Unanimous.

Member Leondires made a motion to adjourn. Member Sullivan seconded the motion. All members of the Atkinson Zoning Board of Adjustment voted in favor. Vote: 5/0/0. Unanimous.

The meeting was adjourned at 8:10 PM.

The meeting was reopened to approve minutes.

Approval of Minutes: November 10, 2021

Member Leondires made a motion to approve the minutes of the November 10, 2021 meeting of the Atkinson Zoning Board of Adjustment as amended. Vice Chair Connors seconded the motion. All members of the Atkinson Zoning Board of Adjustment present at the November 10, 2021 meeting voted in favor. Vote: 4/0/0. Unanimous.