

**TOWN OF EPSOM
ZONING BOARD OF ADJUSTMENT MEETING
Epsom Central School, 282 Black Hall Road
August 16, 2023, 7:00PM**

PRESENT

Glenn Horner, Chair
Ryan Kehoe, Vice Chair
Lisa Thorne, Member
Alan Quimby, Member
Andrew Ramsdell, Alternate Member
Prescott Towle, Alternate Member
Jason Johnson, Alternate Member

ALSO PRESENT

Betsy Bosiak, Acting Recording Secretary
Virginia Drew, Board of Selectman Representative
Ricky Harrison, Applicant
Frederick K. Anderson
Claradell Anderson
Rita Cloutier
Dotty Dodge
Bill Dodge
Miriam Cahill-Yeaton
Norm Yeaton
Ron Powers
Barry Arseneau
Beth Arseneau
Gerry Paquette
Don Paquette
Christopher Gagne, Applicant
Keir Adams-Gagne
Harold Estabrook
Harvey Avery
Barbara Avery
Kristen Tomarchio
Philip Tomarchio
Rob Topik
Carol Lambert
Irene Angelone
Meadow Wysocki
Justin Guth, Zoning Compliance Officer

CALL TO ORDER

Chair Horner called the meeting to order at 7:00 PM.

Mr. Horner noted the cases to be heard tonight.

APPROVAL OF MINUTES

Meeting of August 2, 2023 – Edits were made.

MOTION: To approve the minutes as amended. Mr. Towle motioned to approve the minutes as amended; Mr. Kehoe seconded. Motion passed, 7-0.

Mr. Horner reviewed the process for the cases tonight.

Mr. Horner opened the public hearing at 7:08 PM. Mr. Horner confirmed public notices posted at the Town Office, Post Office and published in the Concord Monitor; all abutter notices were returned except the Webbs. Mr. Horner read the public notice into the minutes.

APPEAL:

Case 2023—08-01 (Gagne – Var & SE) – Christopher Gagne has applied for a Special Exception, as required by Article III, Section G, Paragraph 1,e.vii, to construct an overhead accessory dwelling unit (ADU) in an attached 3 car garage. The applicant has also applied for a Variance to Article II, Sec. A, Paragraph 2 to allow a portion of the garage and ADU to be within the 50’ setback from a wetland. The property is located on Goboro Road within the Residential/Agricultural Zoning District and is identified on Epsom Tax Map U08 as Lot 80-4.

Mr. Horner noted that during the original hearing for Case 2023-08 it was found the garage and ADU were within the 50’ setback of the wetlands which is why the Variance was added and the -01 was added to the case number.

Mr. Horner appointed Mr. Johnson to sit in for Mr. Kitson who was not present.

Mr. Gagne noted construction was started about a year and half ago. He had met with the ZCO at that time and was told that his plans were acceptable. He noted later he learned he is within the town’s wetlands setbacks. Mr. Horner asked if he had information from DES. Mr. Gagne had spoken with someone at DES and was told as long he was not building within the wetlands it was acceptable. He noted that a certified wetlands scientist delineated the wetlands designation as shown on the plans. The building is 42.2’ from the wetlands.

Mr. Horner asked why this is not contrary to the public interest and in the spirit of the ordinance. The application noted the 3-car garage is well set back from the wetlands. Mr. Horner discussed the information on the application. Mr. Horner asked if Mr. Gagne knew if it was a wetland; Mr. Gagne noted he was aware there was drainage when it rained. When the property was surveyed it was determined wetlands were on the property. In dry years it is just grass.

It was noted the application expressed that the neighbors would not be aware of the relationship between the wetlands and the garage. Mr. Horner discussed that if the Variance is not granted the garage may have to be removed.

Mr. Horner reviewed the information on the application for the Special Exception. The ADU was reviewed as being within a residential area. It is attached to the house and above the garage. It was believed there was little impact. The former ZCO had issued a building permit. Mr. Gagne noted that he will be having a septic system designed for a 6-bedroom house for future installation if needed and there is an adequate well.

Mr. Horner asked when the current septic system was built, 2006. Mr. Gagne noted when he purchased the house there were no concerns with the septic. Mr. Horner noted that it would have been good to bring a new plan. Mr. Quimby clarified he should have an approved system to obtain permits to construct the house.

Mr. Horner asked if he had a current building permit. Mr. Gagne noted it is at the town and they are waiting for the approvals of the Special Exception and Variance before it is granted.

Discussion ensued regarding the existing system and if it was approved. Mr. Guth noted that Mr. Gagne had a previous building permit that expired and now we are here to correct items. Mr. Guth noted that if there is not an approved system then he would have to have a new system designed and constructed. Mr. Guth noted that the septic system does not have anything to do zoning, but with DES.

Mr. Horner asked if the ZBA should have a condition regarding an unapproved system. Mr. Guth did not believe it would be necessary.

Mr. Kehoe asked that the size of the ADU. Mr. Gagne noted there was space outside of the ADU that is not counted as part of the ADU. Ms. Thorne asked if he would be living in the main house. Mr. Gagne noted they would be.

Mr. Horner opened the hearing for public input asking if there were abutters for. No one spoke in favor of the application.

Mr. Horner asked if there were abutters opposed, no one spoke in opposition of the application.

Mr. Guth noted that Mr. Gagne had received incorrect information from the previous ZCO and if this was not approved it could create a financial hardship.

Mr. Horner asked if any members of the Board wanted to deny, no one wanted to deny the application.

Mr. Kehoe wanted a condition that a septic system would be approved by NHDES with an approved designed system be provided to the ZCO prior to the reissuing of the building permit.

Mr. Horner noted a condition that the existing system be approved by NHDES and if required a new system be installed.

Mr. Horner noted that Ms. Thorne wanted to be sure that all conditions of the ADU regulations were complied with.

Mr. Horner noted there shall be no expansion on the garage/ADU within the wetland buffer as shown on NH Land Consultants Plot Plan dated 8/11/23.

Mr. Horner asked for a motion to close the public hearing. **Mr. Kehoe motioned to close the public hearing; Mr. Quimby seconded the motion. The motion passed, 5-0.**

The Variance Checklist was completed by the Board.

The Special Exception checklist was completed by the Board.

Mr. Horner noted there was a new RSA regarding the finding of fact and reviewed those facts with the Board.

Mr. Quimby motioned to approve the Variance and Special Exception with the following conditions

- 1. There shall be no expansion (e.g., porches, decks or other structures) on the portion of the garage/ADU building within the wetland buffer as shown on NH Land Consultants Plot Plan dated 8/11/23 and submitted in evidence.**
- 2. A copy of the NHDES approval of the design and installation of the existing septic system shall be verified by the Zoning Compliance Officer prior to reissuing the Building Permit for the garage/ADU.**
- 3. A new septic system design intended to accommodate the additional loading of the ADU shall be approved through the NHDES and the approval verified by the Zoning Compliance Officer prior to issuing an occupancy permit for the ADU.**
- 4. Following construction of the ADU, the existing septic system may continue to service the residential dwelling and the ADU. Should the existing system fail or otherwise need to be repaired, it shall be replaced by the newly designed and approved septic system.**
- 5. All ADU requirements contained in the Epsom Zoning Ordinances, including owner occupancy, shall be observed and adhered to by the property owner.**

Mr. Kehoe seconded the motion. The motion passed, 5-0.

Mr. Horner noted the Variance and Special Exception were approved, but there was a 30-day appeal period.

There was a recess from 7:57 PM to 8:03 PM.

Mr. Horner noted there would be no testimony for the next two cases.

Case 2023-05 (Norton – SE & Var.) – Attorney Allen, on behalf of John and Maria Norton, has requested the Board of Adjustment reconsider its June 21st decision denying a variance allowing the use of a seasonal dwelling as a short-term rental on a lot with no public road frontage. The property is located on Lake View Road within the Residential/Agricultural Zone and is identified by Epsom Tax Map U-19 as Lot 21.

Mr. Horner discussed that there was no evidence provided to reverse the Board's decision. He noted he had spoken with both the Town's attorney and the applicant's attorney (Attorney Kirsten Allen) about the motion. Mr. Horner noted that Mr. Johnson would be sitting on case 2023-05.

Mr. Johnson noted that the property should have been grandfathered as it was rented prior to the ordinance being in place. Mr. Johnson discussed tax statements were submitted in support that it was rented prior to the ordinance being in place. He noted that was not made clear to him and if he had known that he would have voted differently.

Ms. Thorne noted she wondered about the tax evidence as well. Mr. Horner noted they would get to that. He noted that could be submitted as evidence with an administrative appeal. Mr. Horner noted that what they are voting on holding a rehearing. Mr. Horner noted that there is no evidence to grant a Variance or a Special Exception. He noted they did not want to grant a rehearing for an application that should not have come before the board. Mr. Johnson clarified that they would hear a case for an administrative appeal. Mr. Horner noted that the applicant did not have an attorney and was given incorrect information by the town.

Regarding the rehearing the applicant was not present when the case was heard. Mr. Horner noted that they could grant a rehearing for further consideration. He noted they would put the request on hold.

Mr. Horner suggested the Board preserve the applicant's right to rehear the Board's Variance denial by suspending the decision on the motion until the administrative appeal has been heard and decided. In the event the administrative appeal is denied, the applicant will then have 30 days to submit a new motion for rehearing on the original variance request or proceed to appeal the Board's decision on the administrative appeal beyond the ZBA.

Mr. Johnson's issue is that the rental was in place prior to the ordinance and the applicant should not have to come before the Board for a Variance or Special Exception. It was discussed that this is why he should come for an administrative appeal.

Mr. Horner reiterated that if the applicant is denied he can within 30 days resubmit the motion for a hearing.

Mr. Horner requested a motion to suspend the rehearing of the Board's Case 2023-05 (Norton-Var) Variance denial decision and recommend that a new application for an administrative appeal be submitted in support of pre-existing short term rental use. In the event the

administrative appeal is denied, the applicant will then be given the opportunity, within 30 days of the denial, to resubmit the motion for rehearing of the Case 2023-05 Variance denial.

Mr. Kehoe motioned the above. The motion was seconded by Mr. Quimby. The motion passed, 5-0-0.

Case 2023-07 (Harrison – Var.) – Attorney Miller, on behalf of Ricky Harrison, has requested the Board of Adjustment reconsider its July 5th, 2023 decision denying a variance to establish a paving business in the Residential/Light Commercial Zone. Construction businesses are not permitted in the Residential/Light Commercial Zone. The property is located on Dover Road within the Residential/Light Commercial Zoning District and is identified on Epsom Tax Map U5 as Lot 83.

Mr. Horner noted Mr. Towle would be sitting on this case for Mr. Kitson. He noted Mr. Randall and Mr. Johnson could comment if they desired.

Mr. Kehoe discussed his process for when a case comes to the Board. He noted that he reviews the application, reviews the ordinance, etc. and takes notes to prepare for a case. He notes that he listens to the evidence at the hearing and may edit his notes, etc.

Mr. Johnson discussed it was presented by the applicant that there was discussion among Board members prior to the case being heard. He noted that there has not been any discussion, etc. between Board members prior to the hearing. Mr. Horner asked Mr. Quimby and Mr. Randall if they had seen this occurring. Both, as long-term members of the Board, had never seen this occurring.

Mr. Horner noted that there are new rules from the state and reviewed them and RSA 673:3, I. Mr. Horner noted the decision shall include specific written findings of fact supporting the decision or disapproval. Mr. Horner noted if they do not do their due diligence and write things up a denial can be reversed. Mr. Horner noted there is a lot of evidence within the motion and they have to determine if it warrants a rehearing.

Mr. Horner noted items from the ZBA handbook as to the degree to which a local land use board should make detailed findings of fact in support of an approval may vary based on the level of controversy associated with the application. In general, the board should be clear with identifying how the application meets their regulations and checklist requirements for the findings of fact portion of the approval. Findings of fact should not replace conditions of approval. For denials, a local land use board should consider what is preventing it from saying yes. These things should be anchored in the standards of the regulations and describe how the application does not meet the standards of the regulations, but may also include the exercise of independent judgement, experience, and knowledge of the area by the board. The findings of fact should be complete, so that a reviewing court knows all of the reasons, and the applicant has instructions if they want to submit a second try. It is not only for the benefit of the court but also the applicant. It was noted the board should always enlist town counsel as an aid in the issuance of the findings of fact. It was discussed Mr. Horner does not always contact the attorney for every case.

Mr. Horner noted that Attorney Muller, representing the appellant, begins his request with stating the ZBA was not impartial and potentially violated RSA 91-A, the Right to Know Law.

Attorney Muller argues to the impartiality standards, as defined by law, as a basis for his argument, beginning with RSA 676:7. Mr. Horner noted the hearing was established correctly.

A Supreme Court decision involving Winslow v Town of Holderness Planning Board was noted. This appeal was whether the decision of a planning board is rendered invalid by the participation of a board member whose earlier remarks, before he became a board member, indicated that he had prejudged the case. The Superior Court ruled that the remarks in question were sufficient evidence of prejudgment to disqualify the board member, and his participation rendered the board's decision voidable under the rule of Rollins v. Connor. Mr. Horner noted the prejudgment ruling is being used as a reason, if proven, as to why the Board should rehear the case.

Another issue brought to the Board was the New Hampshire Constitution, the Judiciary: Tenure of Office. Mr. Horner noted this discussed prejudgment of a case.

Another item regarded RDS 673:14 that no member of a board shall participate if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens.

Mr. Horner noted these items are from the new law and rules. Findings of fact should be clear so the court knows what the board determined as findings of fact.

Mr. Horner reviewed the information from Atty Muller for a rehearing.

Mr. Horner reiterated that the board members should have notes, etc. when they are hearing a case. Mr. Horner noted the items from Atty. Muller for a rehearing. Mr. Horner noted there were claims of prejudgment. Mr. Horner noted a Board member should be called out if they are biased based on RSA 673:14.

Attorney Muller concluded that the Chairman of the Board had prejudged the case prior to the hearing. Mr. Horner noted he is not working with anyone who has a relationship with the applicant or abutters and relied on testimony presented at the hearing. It was also concluded in the motion that the Chairman had discussions with an abutter. Mr. Horner noted he has not had any discussions with Ms. Heck. She had attended the meeting and spoke in regards the application which is how one of the conditions was developed.

Mr. Johnson asked Mr. Horner to explain how he did another case vs. this case. Mr. Kehoe noted that there was no prewritten testimony with this case. He noted the items discussed were brought up during the hearing.

Mr. Horner noted personal notes are exempted by RSA 91-A-5. He noted he uses notes and no one sees his notes. If they were taken without his knowledge that is a violation of the RSA law

Mr. Horner denied that the decision was prejudged. He had presented proposed denial and approvals for discussion in detail.

Mr. Horner asked if anyone wanted to discuss the bias issue. Mr. Johnson discussed it seems like a gray area where there is a difference between notes and a prewritten decision. Mr. Kehoe noted they took testimony and the decision was based on the testimony. Mr. Kehoe said if they did not take testimony and one member wanted to make a decision there are four other members of the Board to convince. Mr. Johnson thought it was a public perception, asking how this could be stopped. Mr. Kehoe noted that it might be the best if they did not read from their notes.

Mr. Horner noted that deliberations can be deferred for 30 days after closing the public hearing if necessary to consider all the evidence and come back for a meeting. Mr. Horner noted regarding denials or disapprovals, you need to have your ducks in a row if you want it to hold up in court. To address the appearance of bias and if you feel you may have given that appearance then you should bow out.

Mr. Horner discussed testimony from Ms. Heck at the July 5, 2023 hearing indicating she considered her property values as being diminished.

Mr. Horner discussed the merits of the variance that was sought by the applicant as directed by the ZCO. The Board looked at the purpose of the Light Commercial Zone with Mr. Horner noting the defined purpose of for that zone.

Mr. Horner noted that the Board concluded the paving business is inconsistent with the purpose and therefore the spirit of the ordinance within the zone. Mr. Horner discussed the businesses within the area. The granting of this variance would harm the health and safety of the town due to its proximity to a town well. A discussion ensued as to how the ZCO would know if the trucks were being washed, etc. on the property to remove asphalt.

Mr. Johnson discussed the proximity of the well to the property and the DES regulations. Mr. Horner noted only evidence in the motion should be discussed. Mr. Johnson noted that evidence found can be considered. Mr. Horner noted if he wanted to present the evidence, he could recuse himself and sit in the audience. Discussion ensued.

Mr. Horner noted that the Board has to follow the Zoning Ordinances and that is what the Board should be using. Mr. Johnson noted that he is bringing up state law. Mr. Horner noted that by bringing new evidence an abutter could call him out as bias and ask that he recuse himself.

Mr. Randall noted what Mr. Johnson is bringing up has nothing to do with the motion for a rehearing. Mr. Johnson indicated that he is stating something that could be presented to the court. Mr. Horner noted the Board has to stick with the motion and only evidence in it and the prior public hearing will be presented to the court.

The Malachy Glenn case, identified in the motion and used to support it, had used outdated criteria no longer applicable today. Mr. Horner noted that in Malachy variances were divided into two categories, Use and Area. The only thing the previous variance criteria affected was

hardship. In Malachy Glenn, the case was an area variance. The case discussed in the motion would have been a use variance at that time.

Mr. Horner discussed arguments by the abutters regarding the paving business. He noted there was a potential hotel in the area along with antiques and other businesses in a historic area.

The motion notes there is also a concrete business in the light commercial zone but it is at the other end of the Light Commercial Zone and grandfathered. This appeared to be a setup an argument of precedent. Legal standards for people being treated the same in obtaining variance approvals can be established by arguing precedent.

The purchase of the property was based on a discussion with the former ZCO. The Board had no evidence of that discussion and should not be focused on this argument as it is not a ZBA concern.

The motion argues business use of the property would be in the rear which may be in the Residential Agricultural Zone which is the most restrictive zone. This seems to add additional justification for denial. The motion also noted the area would be screened. So how would the ZCO be able to see the area? The ZCO would then have to obtain permission from the owner to trespass on the property which could take time. The concerns with asphalt on the property and use of cleaning chemicals to remove it as expressed by an abutter was noted.

Mr. Horner noted the approval of a previous case in 2012 (another paving business). Mr. Horner noted within months approval conditions were being violated. Mr. Horner noted it turned into a long term mess. He noted the abutter hired an attorney to assist the town. The case went to Supreme Court and the town prevailed. But at what cost?

This concludes the discussion on hardship. The applicant purchased the property, did not do his research and did not apply to the Board for the needed approvals before the purchase.

Mr. Towle asked the next step. Mr. Horner indicated to either deny or accept the motion for rehearing.

Mr. Quimby felt the Board did not make a mistake and did their due diligence. Ms. Thorne feels that new evidence would have to be presented; she did not see new evidence.

Mr. Kehoe does not see any predetermined bias and he did not see any procedural mistakes. He did not see any hardship. Mr. Towle noted the concerns regarding the town well.

Mr. Horner noted there were things that could create a new case. Mr. Horner noted a zoning related item: if a motion for a rehearing does not address all 5 criteria and that they did not capture all the criteria. Mr. Horner noted they voted on 5 criteria unanimously. Mr. Horner noted the primary concerns on the merits were contradicting the purpose of the zone and concern with the town well.

Finally he addressed the bias claim directly: I did not prejudge this case. I wrote notes about two possible decisions the Board might reach to either grant or to deny the variance application

which is what I often do in this type of case. I did not talk to anybody about this case prior to the hearing and my draft notes about a decision did not anticipate the testimony of any abutter.

Mr. Kehoe motioned to deny the motion for a rehearing, Mr. Quimby seconded the motion. Motion passed, 5-0-0.

The Board took a break at 9:33 PM, returning 9:37 PM.

Mr. Horner noted the Board is out of the rehearing process and could take comments from the public.

Mr. Horner recused himself with Mr. Kehoe assuming control of the meeting.

Mr. Topik verified lawyer comments are not public, public testimony can also be written testimony. The homework and driving by a property can be considered. Once a vote is taken on a motion, it will consider everything.

Mr. Kehoe noted that they have the applicant's evidence and also abutters evidence are taken into consideration. Mr. Topik asked during a rehearing if a member has an opinion, that is a gray area. Mr. Topik noted there is no testimony, you just thank people for their input. Mr. Kehoe noted how the Board uses testimony for a decision.

Mr. Kehoe noted the attorney requested two changes to the minutes of the July 5, 2023 minutes. The minutes of July 5, 2023 do not accurately reflect some comments. The changes were made at the August 2, 2023 meeting. Mr. Kehoe noted we have received this and the minutes were approved. The comments by Ms. Riel are erroneous. Mr. Kehoe noted the minutes were voted on and approved by the Board. The Town Attorney agreed.

Mr. Quimby motioned to amend the minutes; Mr. Randall seconded the motion. The motion failed.

Mr. Horner returned to the Board.

Mr. Horner noted the Board has 2 new ADU cases which Mr. Kehoe will be reviewing these. There will also be an application for a special exception for a development on Route 28.

Mr. Randall asked if there was a date for this. Mr. Horner thought September 20.

Mrs. Drew noted that the ZBA meeting information was not on the Town Website.

ADJOURN

Mr. Towle motioned to adjourn; Mr. Quimby seconded the motion. The motion passed.

Chair Horner adjourned the meeting at 9:59 PM.

Respectfully Submitted,

Betsy Bosiak

Betsy Bosiak, Acting Recording Secretary

APPROVED