

WESTHAMPTON ZONING BOARD OF APPEALS  
MINUTES FOR HEARING OF NOVEMBER 28, 2017  
ON VARIANCE REQUEST, 109 NORTHWEST ROAD

The meeting was called to order at 7:00 PM. Members present: J. Kelsey, S. Morrigan (Acting Chair), W. Parks (Acting Clerk), S. St. Marie, and W. Tracy. Members absent: L. Aloisi. Others present: J. Powers, M. Powers, R. Morrigan, R. Kellogg, J. Renault, V. Perrone, J. Huston, Janelle Soucia, A. Kellogg, E. Rickey, M. Hathaway, C. Labato, R. Huntley, N. Sadusky, J. Shaw, B. Page, T. Page, D. Blakesley, G. Curtis, R. Clapp, N. Picard, J. Picard, M. Montague, G. Shafer, W. Clement, R. Van Driesche, S. Marks, J. Zimmerman, J. Tracy, S. Johnson, B. Jablonski, S. Noba, C. Moat, A. Avakion, D. Meehan, R. Baer, R. Schultz, B. Randolph, M. Brennan, M. Robbins, K. Robbins, T. Alexander, S. Holt, J. Meehan, R. Baldoquin, C. Hondrup, J. Brodeur, S. Gagne, P. Silvernail, R. Benoit, D. Benoit, H. Nolan, P. Miller, M. Prince, A. Pichette, P. Cotton, J. R... (illegible), S. Harry, B. Richardson, and C. Provost.

Ms. Morrigan read the posted notice of the hearing. A variance is requested for frontage setback.

The plan for the testimony was announced. All evidence in favor of the variance will be heard first. Then, evidence against granting the variance will be heard, and then Westhampton residents in general will be heard. Ms. Morrigan stated that the meeting was being recorded for the purpose of minutes, and Ms. Kellogg notified the Board that she was also recording the meeting.

Ms. Kellogg spoke first and stated she was seeking a variance because of 4 feet in the front setback and issues with her foundation. She said she was sure that we all had read the application. She provided quotes in the case of having to move the foundation and mentioned encountering ledge.

Ms. Morrigan then stated that the ZBA would take comments from persons in attendance as to how this case meets the standards for a variance.

Testimony was given by Mr. Shaw that the bylaws were written with an intent and that the numbers in the bylaws were not absolutes. He called the present case a "3 foot oops." He stated that previous ZBAs had allowed similar oopses. Further testimony was given that Ms. Kellogg was improving the value of the real estate.

Mr. Blakesley, Highway Superintendent, next stated that he supports the application 100%. He described the application by Ms. Kellogg for a new septic system. Ms. Morrigan stated that per legal counsel, the septic tank setbacks were off the table. He stated that the foundation is 4 feet, 2 inches short of the required setback. He felt that it was rare for a surveyor to survey the road when surveying property. He states that he has used his best judgment as to where the layout of the road was. He believes that the former building inspector made his best guess as to the location of the layout of the road. In his opinion, the ZBA should grant the variance.

General positive comments included that Ms. Kellogg was improving the lot. The school nurse testified that she was concerned about Ms. Kellogg's daughter's health.

Mr. St. Marie stated that we were here to enforce the town bylaws. A number of people testified that the intent, rather than the literal words, of the bylaws, should be followed.

The next person to testify was a person who identified herself as "Janelle Soucia, the lender." She stated that the bank would never have granted the loan without an approved lot and an approved septic system. She said she had never before had a permit pulled like this, and that the bank had contacted its counsel.

A number of audience members stated that Ms. Kellogg had done all she was told to do.

Mr. St. Marie described the process by which the building permit was challenged and then was found invalid. Mr. Parks mentioned that Ms. Kellogg was not supposed to have been issued a building permit. There was testimony that the town should apologize for the error.

The ZBA was urged to grant the variance based on the mistake of the building inspector. Compassion was urged.

Mr. Clements, a member of the Planning Board, called the hearing a travesty. He stated that the ZBA was immorally persecuting Amber.

Ms. Morrigan said we were here to listen to the audience. She urged respect for the audience and the volunteer members of the ZBA.

Members of the community described their desire to welcome Ms. Kellogg to town.

Ms. Soucia asked about the appeal outside of the appeal time frame, stating that it never should have come forward. Ms. Morrigan responded that the ZBA met on June 13 and considered the request of the appellant and made a decision that the appellant did not have notice of the granting of the building permit. The ZBA accepted the appeal that night.

Mr. Kelsey stated to the audience that we are not the enemy. He said that the ZBA is here because people have appealed. He labeled the whole process as insane. But, he stated, it is the rules, whether we agree with them or not. He stated that the ZBA had consulted with Town Counsel and followed their guidance all along. He repeated that we are following the rules. It is the system, what Westhampton decided they wanted. He noted that we are getting destroyed by a member of the Planning Board. He concluded that the ZBA is here because someone is appealing.

Mr. St. Marie urged constructive testimony and not attacking anyone else in the room.

Mr. Holt stated that the situation is very complicated, that things have changed for both sides. He stated that he was here to support the process, the complicated system. He urged following the bylaws section on hardship.

Mr. Pichette spoke in favor of the application. He expressed appreciation for the work of the ZBA and urged compassion. He mentioned that mistakes were made by both the Town and Ms. Kellogg.

Ms. Curtis, who identified herself as a former member of both the ZBA and the Planning Board, spoke against the variance application. She stated that both the Town and Ms. Kellogg and Mr. Barbeau did not follow the laws. She pointed out that the other side is that a variance is not a local bylaw, but rather that is a law that is governed by state law. There are state requirements that people have to meet. Ms. Curtis said that she had attended every meeting since Ms. Kellogg purchased the land. She stated that the only board that followed the law was the Board of Health. The Building Inspector issued a building permit. She pointed out that modular structures are governed by state code. She listed the two requirements for modular homes, which are: 1) that the permit must be taken out by a licensed contractor and 2)

to place a modular structure, you must have a site plan. She stated that there was no site plan before the foundation was poured. Ms. Curtis noted that because this is new construction, Ms. Kellogg went to the Planning Board. Ms. Curtis related that she had done research on the Camelot Homes website on New Era homes, from whom Amber bought her home. That research revealed that one of the first requirements is to have a surveyor clearly mark the boundaries of the land. Ms. Curtis noted that Ms. Kellogg and Mr. Barbeaul put in a foundation without a site plan. Ms. Curtis further testified that the Town is owning up to previous errors of the previous Building Inspector. Furthermore, noted Ms. Curtis, Ms. Kellogg bought additional land, and now it is a legal lot. Ms. Curtis further stated that while she was waiting for the decision on the appeal, the ZBA told her that you proceed at your own peril. Ms. Kellogg was informed that there would be a hearing in July. In the interim, the foundation was installed and did not meet the setback requirements. Ms. Curtis pointed out that the ZBA is being asked to take all the emotional aspects of this situation into account. Ms. Curtis said that it is the ZBA's job to enforce the town laws, based on the state laws. She pointed out that state law says that when hardship is self-inflicted, no variance should issue. She urged the ZBA to follow the literal and technical requirements of the law. She said "the people here are not here for zoning reasons." Mr. Tracy asked Ms. Curtis what she was saying. Ms. Curtis said, "I have no skin in this, but in my mind, what I have at stake is that I have seen too many accommodations and exceptions made in this town for uses that are not based on facts." She urged that the law be followed. She noted that the law had not been followed by either the Town or Ms. Kellogg. However, she said, two wrongs do not make a right. She confirmed that she opposed the variance.

Mr. Rickey stated that he would be the contractor. He said that yes, he did assist and give his opinion but that he was not involved in the installation of the foundation. He stated that the Town had directed Ms. Kellogg to install the foundation. On questioning from the chair, he retracted that statement.

A number of audience members urged that the ZBA focus on what is happening now, not past history. Several people urged following the intent of the law.

Mr. St. Marie asked about the timing of the installation of the foundation. Ms. Morrigan stated that the meeting was June 13. She stated that on that day, the ZBA accepted the appeal. Ms. Morrigan further stated that Ms. Kellogg was present and asked, "What do I do now?" Ms. Morrigan related that the ZBA told her "If you take action at this point, you proceed at your own risk."

The audience acknowledged how hard the ZBA's job is and thanked us for our work.

Ms. Baldoquin asked where Mr. Aloisi was. Ms. Morrigan stated that Mr. Aloisi is not here, that that announcement had already been made, and that she was filling in for him as chair for the hearing.

Ms. M. Powers urged the ZBA to vote in accord with the law. There was discussion as to whether 109 Northwest Road was a building lot. Mr. St. Marie said that it doesn't matter now because it is now a conforming building lot.

At 8:35 PM, W. Tracy moved to close public input and J. Kelsey seconded the motion. The vote was unanimous in favor of closing public input.

The ZBA then began deliberations. Mr. Tracy stated that the questions before us fall under Zoning Bylaws Section 6.1.1, with the three questions. The ZBA then evaluated section a. Article 6.11, Variances. Subsection a. was then read: "Such a variance shall be granted only if all of the following conditions have been met: Circumstances exist that relate to the soil

conditions, shape or topography of the land or structures which especially affect such land or structures but do not generally affect the zoning district in which the land or structures are located.” (Emphasis in original.)

Mr. Tracy argued that Ms. Kellogg’s foundation doesn’t affect the zoning district with a road that is already oversized. Mr. Parks said that the actual intrusion into the setback was 7.8 feet, including the stairs that had been added recently to the home.

In response to a question from the chair, Mr. St. Marie stated that he did not have a copy of the application. Ms. Morrigan asked Mr. St. Marie if he wished to look at the application. Mr. St. Marie then took the application to read. Mr. Tracy stated that the well was close by. Ms. Morrigan asked how close the well was, saying that there is no measurement on the site plan from the well house to the foundation. She noted that Ms. Kellogg did not have to blast to put in the current foundation. Mr. Kelsey said the well could be 20, 30, or 40 feet from the foundation.

Ms. Morrigan asked whether any of the rest of the property had evidence of ledge. Mr. Parks noted the ledge being removed in pictures submitted with the variance application.

Ms. Morrigan then read from Ms. Kellogg’s application to the ZBA, where Ms. Kellogg stated that the siting of the foundation involved Mr. Miller saying “he did not believe that we were within the 50 foot front setback.” Further, Ms. Kellogg said that Mr. Miller said that “he believed the telephone pole was the measurement of the front setback of the property line.” However, Ms. Kellogg further noted that “he stated if it was not, we could be in violation.” Ms. Morrigan said that the applicant herself is saying in her application for a variance that Mr. Miller “thought,” and “believed” that Ms. Kellogg’s proposed location for the foundation was in the proper place, but that if it was not, “she could be in violation.” So, said Ms. Morrigan, that is him warning her.

Mr. Parks then cited from materials submitted to the Select Board. He said Ms. Kellogg submitted a letter from Mr. Miller that never got to the Board members. In that letter Mr. Miller stated that the home will meet all of the setbacks of the current zoning. Ms. Morrigan gave the letter to Mr. Tracy for review.

Mr. Tracy argued that most roads in town have 50 foot layouts, again mentioning the 4-foot incursion into the front setback. Ms. Morrigan noted the home with its stairs would be 7.8 feet into the setback. Mr. Kelsey mentioned that it didn’t matter to him whether it was 7.8 feet or 10 feet. Mr. Parks pointed out that Ms. Kellogg did not know where her property line was and that that is the issue, that there was no site plan.

It was argued that the survey showed that the previous structure was more into the setback than Ms. Kellogg’s. Mr. Parks showed a document from the Building Inspector’s file that showed that the previous structure was 61 feet in. Mr. St. Marie asked whether there was a date or a signature. Mr. Tracy said that the document did not show anything. It was noted that Ms. Kellogg’s survey showed that the location of the structure was “approximate.” Ms. Morrigan cited that the location of the previous structure was based on Field Assessors 2014 records and a Google Earth picture from 2011, and that that was a long time ago.

It was noted by a ZBA member that this is a conforming lot that needs to meet the current setbacks and that it doesn’t really matter where the previous structure was. Ms. Morrigan stated that she disagreed with the statement that Ms. Kellogg’s application for a variance meet the requirements of section a. This would assume that the location of their current foundation is the only place it could be located on the entire property. She again read subsection a. Just

because we have pictures of what they did and a single place where they encountered ledge does not mean that they couldn't locate the structure anywhere else on the property.

Instability of the well was mentioned. Ms. Morrigan noted that it is not clear where the well is, and because they didn't blast before, there was no reason to believe they are going to blast. Ms. Morrigan said that we don't know the distance from the current foundation to the well, and that she was concerned about the quality of the evidence that has been given. Mr. Kelsey found that the well house was too close to the foundation. Mr. Kelsey expressed his opinion that the distance is in the picture - that it could be 20, 30 or 40 feet, but that it was right there, almost on top of it. Ms. Morrigan noted that Mr. Henshaw's letter about damage to the well was predicated on damage if there is blasting within 20 feet of the well, and that we don't have that number. Mr. Tracy asked: "What is more detrimental - risking damaging the well or giving them 4 feet?" Several members said that it is not detrimental to the neighborhood.

Ms. Morrigan asked what about all the rest of the people in town who follow the rules? Mr. St. Marie stated that cases are decided on a case-by-case basis. Mr. Kelsey stated that we do not want our town to be following the letter of the law. Mr. Kelsey stated that if we were following the letter of the law, Ms. Kellogg is in trouble.

Discussing the hardship, Mr. St. Marie found that it was not self-inflicted.

Mr. Tracy found the most important factor was section c, that this was not going to hurt anybody.

Ms. Morrigan then read from research: "Substantial hardship must be related to the land itself and not personal to the landowner." She summarized that cases "do not allow for hardships of the owner's creation, innocent or otherwise, even if the landowner created under guise of otherwise invalid building permit issued." Ms. Morrigan expressed her opinion that Ms. Kellogg's hardship was self-inflicted. The ZBA had told her at a meeting that if she were to proceed, she would be proceeding at her own risk. The foundation was poured two weeks later. In addition, Ms. Morrigan stated that she understood that Ms. Kellogg had been given instructions not to have the house delivered onto the property by the new Building Inspector, Mr. Quinlan, and she had it delivered anyway. Mr. St. Marie noted that the bylaws say hardship, financial or other. Ms. Morrigan reported that her research showed that it was not the financial situation of the landowner, but rather geographical. Mr. Tracy said "I am talking about subsection b, that there was no testimony of the nature of the mistakes of the applicant." It was noted that Ms. Kellogg was granted a building permit and then, under notice of an appeal, proceeded at her own risk, not the town's risk. Mr. Miller's own words as related by Ms. Kellogg in her application were again reviewed by Ms. Morrigan: "think," "believe," "I [Mr. Miller] could be wrong; you could be in the setback and in violation." Ms. Morrigan noted that there seemed to be a misinterpretation of the public about the town telling her to do this. She noted that it took the ZBA a very long time to see a site plan, that there could have been one a long time ago. Ms. Morrigan noted that the ZBA had offered to meet with Ms. Kellogg in August and talk. She related that Ms. Kellogg came to a ZBA meeting specifically scheduled to discuss her situation and said words to the effect of we bought a bunch of land and solved it all and we don't need your help.

Mr. Kelsey said that we should all agree that a situation like this will ever happen again. Ms. Morrigan disagreed, stating that there were two such situations in May. Mr. Tracy said that the ZBA had spent a lot of legal funds and agreed with the appeal that (Ed. note: quoting from the ZBA's decision dated August 9, 2017) "the Building Inspector, in relying on his interpretation of Chapter 40A, Section 6, Paragraph 4 and the single lot exemption, was in error in issuing a building permit to Amber Kellogg and Michael Barbeau for property located at 109 Northwest Road." He noted that nowhere did it say it was not a legal building lot. He again noted the

survey, and Ms. Morrigan asked about the words "approximate location plus or minus." Mr. Tracy says we were scolded for not insisting that we have a land surveyor, and that this is what we got. How can we not use it? He said that Ms. Kellogg has done a lot of what we asked. What is the harm?"

Mr. Kelsey stated that he doesn't see harm. He argued that the vote of the ZBA should represent what the audience thinks. Mr. Kelsey said that they turned out to say they are OK with the 7 feet, and that we are supposed to speak for them. Mr. Tracy asked "Is it detrimental to the neighborhood?" Ms. Morrigan said, "What about the next person who comes around to us?" Mr. Tracy said variances do not set a precedent.

Mr. St. Marie said that there are circumstances. He asked, "Can the house be moved?" Ms. Morrigan said, "I don't know. That could have been presented. There is a lot more property there. There could been checks for ledge findings on other parts of the property." A ZBA member said, 4.5 7.8 call it 10. It was asked "does it hurt anybody?" In response, Ms. Morrigan said "Why do those feet bother us with other people? We made a person a year or two ago put his house on exact same place as the previous foundation. We held him up to make him do those pins. We would have said no to 3 inches more." Ms. Morrigan said that it was not fair for the ZBA to require that certain people meet strict requirements and not require it of others. Ms. Morrigan said we could have worked with Ms. Kellogg if she had had a site plan. Ms. Morrigan again mentioned the current Building Inspector telling Ms. Kellogg not to get the house delivered. She said that Ms. Kellogg had dared the ZBA when she put in her foundation after being on notice that there was an appeal. Mr. Tracy said, "We are supposed to represent and hear the info. We did. No one here is objecting." Ms. Morrigan said, "That's not true, Bill; there are several." Ms. Morrigan said that the ZBA should consider their position and enforce the law. It is a conforming lot. The hardship is self-inflicted.

W. Tracy moved, and J. Kelsey seconded the motion, that this application for a variance meets all of the requirements necessary according to our Westhampton Zoning Bylaws for a variance and moved that the variance be granted. There was no further discussion. Votes for: J. Kelsey, S. St. Marie, and W. Tracy. Vote against: S. Morrigan and W. Parks. The motion failed by a vote of 3 to 2.

Mr. Kelsey moved, and Mr. Parks seconded the motion, to adjourn the hearing. The vote was unanimous in favor, and the meeting adjourned at 9:15 PM.

Respectfully submitted,

Shirley P. Morrigan  
Clerk and Acting Chair

DOCUMENTS AND EXHIBITS  
USED BY THE ZBA 11/28/17

Application for Variance

Photographs

Document dated October 4, 2017 containing:

- List of abutters,
- House plans,
- Picture of stairs with handwritten notes,
- Quitclaim Deed from Kristen and Peter Huntley
- Professional Services Agreement with Holmberg and Howe, Inc.
- K & T Concrete Services Proposal
- Elite Concrete Proposal
- Letter from Charles R. Henshaw
- Occupancy Affidavit and Financial Status

Notice of Public Hearing

Letter dated 11/28/17 from K. Heidinger

Hand drawn plan

Draft complaint dated 10/16/17 from A. Kellogg and M. Barbeau