

**GREENLAND ZONING BOARD
PUBLIC HEARING**

TUESDAY, June 16, 2009

Members Present: Mr. Chris Halligan, Chair
Ms. Liz Cummings, Vice Chair
Mr. Don Arsenault
Mr. Sean Conner
Ms. Stephanie Glennon

Staff: Mr. Robert Cushman, Building Inspector
Ms. Amy Leonard, Secretary

Chairman Halligan opened the public hearing of the Greenland Zoning Board of Adjustment at 7:00 P.M. and a roll call was taken. He announced the procedures of the Zoning Board of Adjustment and stated that a quorum was present and they would proceed with the meeting. Mr. Halligan noted the meeting was being recorded and the minutes would be available to the public when completed.

Public Hearing

1. Request for a Special Exception, 3 Great Bay Drive East, Owner/Applicant: Thomas & Janice Griffith, (Map R13, Lot 19). Applicant is requesting a special exception from Article XVIII, Section 18.5.1, Subsection A of the zoning ordinance: to dig a trench for utilities in the wetlands conservation district.

Mr. Thomas Griffith, owner/applicant, approached the Board to discuss his request for a special exception to dig an approximate 110-foot trench for underground utilities within the wetlands conservation district. Mr. Griffith gave the Board a brief background of why this project is needed. He stated in the summer of 2007, he had notified Verizon of a leaning transition pole at the end of his driveway. Verizon determined the pole to be unsatisfactory and replaced it at the street. Later, Mr. Griffith inquired about underground utilities and was told the property owner is responsible for digging the trench; once the utilities are underground, Verizon will remove the pole. He stated he was granted a wetlands permit from D.E.S. to replace their septic system, and under that same permit, D.E.S. also granted them allowance to bury the utility line. Mr. Griffith noted when his contractor went to the Building Department for a permit to dig the trench, Mr. Cushman denied it and told him he would need to go before the Zoning Board of Adjustment for a special exception.

Ms. Cummings asked Mr. Cushman if he considered the pole to be a structure. Mr. Cushman replied yes and noted Section 18.5.1 is the standard section he uses when the wetlands buffer is being disturbed. Ms. Cummings asked Mr. Griffith if the land would be returned to its current state and Mr. Griffith replied yes.

Chair Halligan opened the hearing for public comments. Jon Wendell, 15 Great Bay Drive East, commented in favor of the project and noted he

did not have any issues with it. Tom Brackett, 22 Brackett's Point Road, stated he too did not have any issues with the project and is in favor of it. Hearing no other comments, the hearing was closed and the following motion was made:

Motion 1: Lizbeth Cummings moved to grant the Special Exception request to dig a trench for underground utilities at 3 Great Bay Drive East, as presented and outlined in the application. Don Arsenault seconded the motion.

Ms. Cummings proceeded to go over the criteria needed to be satisfied in order to grant the special exception, along with the applicant's reasoning's, which included: 1. No hazard to the public or adjacent property on account of potential fire, explosion or release of toxic materials; there will be no hazard to the public or adjacent properties, 2. No detriment to property values or change in the essential characteristics of a residential neighborhood on account of the location or scale of buildings and other structures, parking area, access ways, odor, smoke, gas, dust, or other pollutant, noise, glare, heat, vibration, or unsightly outdoor storage of equipment, vehicles or other materials; by burying the utility line the area should be more appealing and reduces the current safety hazard created by a leaning pole, 3. No creation of a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity; there will be no creation of traffic safety hazard or congestion; 4. No excessive demand on municipal services, including, but not limited to, water, waste disposal, police and fire protection, and schools; there will be no increase in demand for municipal services, 5. No significant increase of storm water runoff onto adjacent property or streets; trench will be filled in and returned to its original contour. Ms. Cummings also reviewed the additional special exception criteria and reasoning's needed within the wetland conservation district or buffer. She felt all the reasoning's were sufficient and in order. The rest of the Board agreed and a vote was taken on the motion.

There was a vote of 5 for and 0 against. The motion carried and the special exception request was granted.

NOTE: Mr. Halligan stated the Board would hear agenda item 4 next.

2. Appeal from an Administrative Decision, 6 Drake Drive, Owner/Applicant: Kona Realty Trust, (Map R12, Lot 6). Applicant is seeking an appeal from the Building Inspector's determination that several variances are required before issuance of a driveway permit is granted: the applicant is exercising their requirement to appeal the Building Inspector's decision within 30 days. A continuation will be requested while the applicant seeks to obtain the said driveway permit through the Greenland Planning Board under a conditional use permit.

Larry Morse from New Hampshire Soil Consultants, representing the applicant, approached the Board and introduced the owner/applicant, Peter Goodman. Mr. Morse stated the reason for this appeal is based on the fact that he believes a conditional use permit can be obtained through the Planning Board, rather than the Building Inspector's determination that variances are needed for the driveway permit. He stated the applicant is preserving his rights and asking the Board to "stay" or continue this appeal until the Planning Board can review the

conditional use permit application. Ms. Glennon noted the Planning Board cannot overrule the Building Inspector's determination, only this Board can, and questioned how the applicant can proceed with the Planning Board, without a decision from the Zoning Board. Mr. Morse explained that the applicant submitted a driveway permit application to Mr. Cushman and he has 30 days to act on it. There was some confusion as to which board the applicant should go before and due to the 30-day appeal process, he felt the applicant should ask for this appeal to be continued and still go before the Planning Board. Ms. Glennon asked if there is a pending Planning Board application in place. Mr. Morse responded they are waiting to get D.E.S. approval for a wetlands permit before filing a Planning Board application. Mr. Arsenault stated he didn't feel there was any issue with continuing the appeal as requested. Ms. Cummings asked how long the appeal would need to be continued for. Mr. Morse responded three months would be appropriate. Mr. Conner asked if in three months, would it still be an administrative appeal or would they file variance requests. Mr. Morse responded if the applicant were approved by the Planning Board for a conditional use permit, they would withdraw the appeal. He stated if the Planning Board finds there is a use issue, they would then submit an application for a use variance. Ms. Glennon stated the plan states the project is for a driveway expansion and asked Mr. Cushman why that expansion of an existing structure, doesn't fall under Article 18.12.1 and require a Special Exception on top of the variances needed. Mr. Cushman stated that since there is an existing, adequate driveway, he felt the variances he listed would be more appropriate. After the discussion, the Board agreed to continue the application for the appeal on a month-to-month basis.

Chair Halligan opened the hearing for public comments. Jon Wendell, resident, asked if the use was listed on the driveway permit application. The Board reviewed the application and responded no. William Lowery, 3 Drake Drive, stated he felt this would be opening up the door for commercial activity in the residential zone and was not in favor of it. Hearing no other comments, the hearing was closed and the following motion was made:

Motion 2: Lizbeth Cummings moved to extend this administrative appeal request until their next meeting on July 21, 2009. Don Arsenault seconded the motion. There was a vote of 4 for and 1 against (S. Glennon). MOTION CARRIED.

3. Appeal from an Administrative Decision, 22 Brackett's Point Road, Owner/Applicant: Thomas & Allison Brackett, (Map R14, Lot 14).

Applicant is seeking an appeal from an administrative decision regarding Article XIV, Section 14.3, of the zoning ordinance: applicant does not consider Units 1, 1A & 2 abandoned.

Mr. Dave Engel approached the Board and stated he was representing the applicants, Thomas and Allison Brackett. Mr. Brackett was also present. Mr. Engel submitted various documents and photos for the Board to review (attachment 1) and proceeded to review them. He directed the Board to review the letter from the Building Inspector, to Mr. Brackett, dated March 10, 2009, stating why he would not issue the building permits (the letter references Article XIV, Section 14.3 and Article IV, Section 4.1.3). Mr. Engel asked the Board to review page 2 of the attachments, highlighted section 3.4.1, which describes the

residential purpose. Also included in the documents for evidence, was a copy of Section 3.6 Table of Uses, A. 1, Single-family dwelling and the Town zoning map. Mr. Engel stated there is no doubt the Brackett property is within the residential zone. He then directed the Board to review page 5 of the attachments, Article XIV, Section 14.3, which defined abandonment. He stated per Section 14.3, a residential use in the residential zone is not a non-conforming use; also, there is nowhere in the Greenland zoning ordinances which talks about abandonment of a conforming use. He stated Mr. Cushman's denial of the building permits for units 1, 1A and 2 under the abandonment ordinance was not correct and illegal. Mr. Engel then directed the Board to page 6 of the attachments, Article IV, Section 4.1.3 and stated there is no lot with more than one residential structure on it, on the property. He asked the Board to review the photos showing ongoing construction on these units. Based on all the documentation, Mr. Engel requested that the Board overturn the Building Inspector's decision not to grant building permits for these units under the abandonment ordinance.

Mr. Arsenault stated all the renovations go back to a contract between the Town and Mr. Brackett in 1987, for a time period of 5 years, in which 22 units would be converted from seasonal to year round residential units. After the 5 years were up, Mr. Brackett asked for a one-year extension to finish them and the Selectmen granted it. Mr. Arsenault asked why Mr. Brackett is now asking for permits after approximately 16 years had gone by. Mr. Engel stated there has been a continuation of the 1987 contract, by use, and that was that the Town would plow the roads to these units, which has continued to be done to date. He stated that while the contract may have had a cut-off date, the Town and Mr. Brackett have been abiding by those regulations in that agreement. He stated there is no way Mr. Brackett could have fixed up all those units in that time frame. Another part of the contract was all the seasonal units would be converted to year-round residences and the footprints of these units could not be changed or increased. Mr. Brackett eliminated 9 of the original 22 units agreed upon. Mr. Arsenault noted if Mr. Brackett thought the contract did not have an expiration date, then why had he asked for an extension after the first 5 years. Mr. Engel stated there is no legal reason to not issue building permits and reiterated the fact that residential use is not a non-conforming use. Ms. Glennon stated she did not agree with Mr. Engel's argument regarding Section 4.1.3; Mr. Brackett's own home, plus all the units are on one property, Map R14, Lot 14. Mr. Engel stated every unit is on it's own lot. Ms. Glennon asked if Mr. Engel agrees, starting in 1993, that units 1, 1A and 2 were not used for residential purposes in any 12-month period of time. Mr. Engel stated they were always used for summer cottages. He further stated Mr. Brackett has the right to not have them occupied if he chooses to. Ms. Cummings asked how many residential houses are on Mr. Brackett's one lot. Mr. Brackett responded there are 26 units on his one lot of record. Mr. Arsenault asked if building permits were requested and granted after 1993. Mr. Brackett responded yes and recited, from memory, a list of permits for various units. Mr. Arsenault asked Mr. Cushman when the photos were taken that had been included in the Board's packets. Mr. Cushman stated the photos had been taken in February or March of 2009. Ms. Cummings asked when the photos submitted by Mr. Engel were taken. Mr. Engel responded approximately 60 days ago. Ms. Cummings asked if building permits were obtained to do the work that was shown in those photos. Mr. Brackett stated no, he did not feel permits were needed

for construction under \$1500.00. Ms. Glennon again asked how long these 3 units (1, 1A and 2) have been unoccupied. The direct question was not answered.

Chair Halligan opened the hearing for public comments. Paul Sanderson and Jon Wendell, Selectmen assisting the Building Inspector, spoke against the application and showed a power-point presentation. They submitted a binder of various documentation and photos (attachment 2). Mr. Sanderson pointed out the history of the property and factual information and agreed Mr. Brackett is running a quality operation on his property. He indicated the Selectmen have been reviewing this property for years and they are relieved Mr. Brackett is finally before a land use board, which is the first time ever. He stated seasonal units are allowed in Greenland and pointed out an abutting property, John Weeks, whose cabins are all seasonal. In 1987, a portion of the property was deeded to Mr. Brackett from his parents, which is a subdivision that never came before the Planning Board. The Selectmen at that time considered the subdivision a violation, which prompted the original 1987 contract. Mr. Sanderson noted there have been three Building Inspectors since that time, with no complete conversions during Mr. Cushman's time here. Mr. Sanderson stated the problem is 6 units: 1, 1A, 2, 6, 7 and 8 were not converted to year round use, have been unoccupied and they now cannot be converted. He noted Mr. Brackett does not have to tear those units down; he can use them for a seasonal or accessory use. Mr. Sanderson stated the non-conformity is not the residential use, but rather the number of units on one lot of record and pointed out the Brackett's own acknowledgment of the non-conforming uses on page one, item 3, of the 1987 contract signed by Tom and Allison Brackett and two Selectmen. He noted the abandonment ordinance has been in effect since 1958 and the contract since 1987, and by its own terms, should have been terminated in 1993. He indicated Mr. Brackett is a trained attorney and served on two land use boards; he knows and understands the Town's ordinances and property law. Mr. Sanderson responded to Ms. Glennon's question regarding how long units 1, 1A and 2 have been unoccupied. He stated to the best of the Selectmen's knowledge and based on the annual census, submitted by Mr. Brackett himself, there has been no occupancy in those units since 2005. Mr. Sanderson stated the conversion is the issue, not the fact that they exist. Mr. Engel stated the only thing before them is the denial of the building permits and the basis of that denial, not the information shown on the power point presentation and that of the original agreement. He again stated residential use is not a non-conforming use. He stated in 1999, the Town's own legal counsel sent a letter (attachment 3) stating the contract was legal and binding and proceeded to submit the letter for review. Deborah Beck, abutter, asked if the Town still plows down there and Mr. Brackett responded yes. Hearing no further comments, the hearing was closed and the following motion was made:

Motion 3: Stephanie Glennon moved to deny the administrative appeal that is to uphold the decision of the Building Inspector to deny building permits for units 1, 1A and 2. Lizbeth Cummings seconded the motion.

Ms. Glennon stated she does not think the ordinance is ambiguous on the issue that was presented to the Building Inspector. She referred to RSA 674:33 II, and stated they have seen a basis for the Building

Inspector to determine that this request was not a permissible use for him to issue the building permits. She stated they have the Table of Uses, 3.6.1 and regulation 3.5.3 that imposes certain obligations on the Building Inspector; one being that all buildings or structures hereafter erected, reconstructed, altered, enlarged, or moved, or all future uses of premises in the Town of Greenland shall be in conformity with the use regulations of this Ordinance. Any building, structure, or land shall not be used for any manner other than is permitted in the district in which it is located. Ms. Glennon read Regulation 3.5.4, which states a permit for the construction, alteration, enlargement or moving or use of a building or structure shall not be issued by the Building Inspector unless the use complies with this Ordinance and/or has been granted a variance or special exception by the Board of Adjustment. She stated the residential use is not the non-conformity; the non-conformity is when an applicant comes before them and says he has a grandfathered use, that by definition then is a non-conforming use once that ordinance comes into being. Ms. Glennon noted they have the automatic abandonment provision, identical to that which the State's highest court has upheld as not a "taking", in 14.3. She proceeded to read Section 14.3, which states: a non-conforming use which has become non-operative, vacant, or is not used for such use for the period of one year shall be construed to have been abandoned and the premises may thereafter be used only for those uses for which the premises are zoned. She did not feel the Building Inspector erred in any way. She stated this is not a taking of property, because the grandfathered use of seasonal cottages is still available. She felt there is no basis to expand the non-conformity, especially in the way that is so antithetical to the essential goal of low-density residential development. Ms. Cummings read under the Table of Uses, regarding other uses that can be applied to these units, with Special Exceptions. She noted a building permit is required for anything that is altered inside and out of a structure, even the changing of a sink. She felt the Building Inspector would have been wrong to issue permits for year-round, permanent residences given the units were abandoned. Mr. Halligan agreed with both and added the use does not comply with the ordinances. Ms. Cummings also added that the applicant, nor his attorney, had shown any proof that units 1, 1A and 2 had indeed been occupied for over one year. After the discussion on the motion, the following vote was taken:

There was a vote of 5 for and 0 against, to deny the administrative appeal for units 1, 1A and 2. MOTION CARRIED.

4. Appeal from an Administrative Decision, 22 Brackett's Point Road, Owner: Thomas & Allison Brackett, (Map R14, Lot 14), Applicant: Town of Greenland. Applicant is seeking an appeal from an administrative decision regarding Article XIV, Section 14.3, of the zoning ordinance, specifically the Building Inspector's decision on the issuance of building permits for Brackett units 6, 7 and 8: the Board of Selectmen seek to reverse the issuance of local building permits and approval of proposed new septic designs for units 6, 7 & 8, as those units have not been occupied since at least 2005.

Paul Sanderson and Jon Wendell, Selectmen representing the Town, again approached the Board to discuss their appeal of an administrative decision for Tom Brackett's units 6, 7 and 8. Mr. Sanderson stated the factual presentation from the last appeal is applicable here and they

incorporate that into this presentation. He noted the difference here is the Building Inspector did, in fact, grant building permits for units 6, 7 and 8. They believe the law and facts are indistinguishable from units 1, 1A and 2, and feel the Building Inspector made a mistake when he issued building permits for units 6, 7 and 8. He continued with the earlier power point presentation, this time focusing on those particular units and construction before and after photos. Mr. Sanderson noted the Selectmen concede that these units have not been converted to year-round residential use, therefore, that use has been abandoned. The photos in the presentation showed the appearance that unit 8 was renovated larger than the original footprint. After the presentation, Mr. Sanderson asked that the Board reverse the Building Inspector's issuance of building permits for units 6, 7 and 8.

Chair Halligan opened the hearing for public comments. Mr. Arsenault asked what the permits were obtained for. Mr. Cushman responded the permits were to repair and renovate those units. Mr. Brackett had originally been granted permits for this work in 2007 and in May of 2009, he was granted an extension to finish the work. Mr. Brackett stated in 1991, units 6, 7 and 8 were ready for year round occupancy, but trees had fallen on two of those unit's roofs and they needed to be replaced. He noted he has not been idle on renovating these units. Ms. Glennon asked about the occupancy use of these units. Mr. Brackett responded they use them randomly for seasonal use; they are not vacant. Ms. Glennon asked if they were used for a single family dwelling for any 12-month period of time and Mr. Brackett responded no, only recreationally; he never collected rent for any of these particular units. Ms. Cummings asked if Mr. Brackett continued to work on unit 8 after the Selectmen submitted this appeal application on May 6, 2009. Mr. Brackett responded yes, he continued to work on it. He proceeded to explain the time frame of various events regarding the construction and building permits of these units. Mr. Engel submitted various documents and photos for the Board to review (attachment 4) and referred to Section 14.1, Existing Use, which states any building or use of premises or part thereof which does not conform to the requirements of this zoning ordinance at the time of its adoption may continue in such use (1952-). Mr. Engel stated he has not seen any distinction whether to use structure or a pre-existing use on a permanent basis or a seasonal basis; they're all structures and all residences. He does not think they can legally change the use, therefore, the Selectmen's request to revoke the building permits for units 6, 7 and 8 should be denied. Mr. Engel stated the same arguments noted for abandonment during the last appeal, he would like to reiterate for this hearing. Mr. Conner asked if State permits would overrule the Town's decision. Mr. Sanderson responded no. Mr. Sanderson noted the grandfathered use on these units is for seasonal use. Hearing no other comments, the hearing was closed and the following motion was made:

Motion 4: Stephanie Glennon moved to grant the administrative appeal, that is to revoke, under the statute, the Building Inspector's decision to issue building permits for units 6, 7 and 8 and reverse the issuance of local building permits and approval of proposed new septic designs for said units. Lizbeth Cummings seconded the motion.

Ms. Glennon referred to Section 3.5.1, which states the Table of Uses, Section 3.6, specifies the uses that are permitted by right, are permitted by special exception, or are prohibited. Permitted uses are

designated in the Table with a P; uses which require the granting of a special exception by the Board of Adjustment are designated with an S; and prohibited uses are designated with an X. Any use that is not specifically permitted is prohibited. She also referred to Section 3.5.2, which states all uses illustrated in Section 3.6 shall be subject to the limitations delineated in other Sections of this Ordinance. In cases of conflict, the more restrictive interpretation shall apply. Ms. Glennon then referred to Section 3.6 A (1) that states residential use is permitted and read Section 3.6 B (1) that states a temporary residential use can be overnight and day camps, cottage colonies, vacation resorts, hostels and similar recreational facilities. She noted, fundamentally, there is an enormous difference between accessory dwelling use and converting the units to year-round residential use. Ms. Cummings stated she was concerned with the fact that Mr. Brackett continued to work on unit 8 after the appeal had been filed per RSA 676:6. She felt these units should go back to the use it originally was, which was seasonal, but not year-round use. She stated she has to go with the Selectmen and uphold the ordinances. Ms. Cummings noted Mr. Brackett cannot use those units for a year-round residence, as that use has not been used for over one year. Mr. Arsenault stated in 1991, these units had been ready for year-round use, according to Mr. Brackett and he feels Mr. Cushman was right to issue the building permits. He doesn't believe these units had been abandoned. Mr. Conner agreed with Mr. Arsenault and added there was more evidence presented in this appeal that work had continued over the years on these units. Ms. Glennon stated the use definitely matters and is applicable, there has been no occupancy in these units for over one year. The Board reviewed the building permit applications that had been granted. After the discussion, the following vote was taken on the motion:

There was a vote of 3 for and 2 against (D. Arsenault & S. Conner) the motion to grant the administrative appeal and revoke building permits to renovate units 6, 7 and 8 into year-round residences. MOTION CARRIED.

5. Any business that may legally come before the Board but does not call for public hearing, including: review of previous meeting minutes, consideration of their approval, consideration of timely-filed motions for rehearing, and consideration of further motions.

1). The Board reviewed amendments made to the Instructions for Appeals to the Greenland Zoning Board of Adjustment (attachment 5), which had been suggested at their last meeting. The words "applicant and representative" were added to all areas in the instructions that address abutter notices. After the review, the following motion was made:

Motion 5: Lizbeth Cummings moved to accept the amendments made to the Instructions for Appeals to the Greenland Zoning Board of Adjustment, as presented. Stephanie Glennon seconded the motion. All were in favor, with a vote of 5 for and 0 against. MOTION CARRIED.

2). The Board reviewed the minutes of May 19, 2009. After the review, the following motion was made:

Motion 6: Lizbeth Cummings moved to accept the minutes of May 19, 2009, as submitted and Stephanie Glennon seconded the motion. All were in favor, with a vote of 5 for and 0 against. MOTION CARRIED.

Being no further business, the meeting was adjourned at 9:30 P.M.

Motion 7: Chris Halligan moved to adjourn the meeting at 9:30 P.M. and Lizbeth Cummings seconded the motion. All were in favor, with a vote of 5 for and 0 against. MOTION CARRIED.

Recorded, transcribed and typed by:

Amy Leonard
Secretary, Zoning Board of Adjustment

Attachments:

1. Documents re: Brackett units 1, 1A & 2
2. Factual binder, re: Brackett units 1, 1a, 2, 6, 7 & 8
3. Mr. Loughlin letter, re: Brackett driveway, dated 10-12-99
4. Documents re: Brackett units 6, 7 & 8
5. Changes made to the Instructions for Appeals to the Greenland Zoning Board of Adjustment
6. Agenda, dated 6-16-09

Approved by the Greenland Zoning Board on July 21, 2009.